



T2Tech Ridge, Inc. v APM Partners LLC

2018 NY Slip Op 32492(U) (2018) | Cited 0 times | New York Supreme Court | September 28, 2018

SUPREME COURT OF STATE OF YORK COUNTY OF YORK:

INC., CORPORATION, Plaintiff, INDEX NO. MOTION 12/08/2017 MOTION SEQ. NO. 001 APM PARTNERS APM PIZZA PARTNERS PIZZAMETRY, ENTERPRISES, PUZANT KHATCHADOURIAN, JOHN KAVAZANJIAN, ZAVEN ORDER

following e-filed listed NYSCEF 001) 10, DISMISS MASLEY, CPLR plaintiff's complaint involved retail locations, eventual liquidation Plaintiff Inc. (plaintiff), alleges 2017 complaint APM Partners (APM) Pizzametry, allegedly APM Pizzametry liquidated 2016. Pizzametry, itself, previously 2011. Pizzametry individual Puzant relevant co-CEO shareholder. Individual Clyde 001 FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37 AM INDEX NO. 655761/2017 NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 10/02/2018

1 of 14 THE NEW NEW COMMERCIAL PART 48

-----X T2TECH RIDGE, as successor in interest to T2

- v - 655761/2017 DATE

LLC D/B/A/ LLC as successor in interest to LLC and K & G ' LLC, CLYDE KEATON, DADEKIAN, DECISION AND Defendants. -----X The documents, by document number (Motion 4, 5, 6, 7, 8, 9, 11, 13, 15, 16, 19 were read on this motion to/for J.: Defendants move, pursuant to 3211 (a) (1) and (7), to dismiss in its entirety. This action arises out of various transactions surrounding a business with automated vending machines that produce pizza products (Machine) in and the of that business. T2Tech Ridge the successor in interest to T2 Corporation (T2), in its September 8, that defendant LLC is the successor in interest to LLC (Pizzametry), the assets of which were transferred to when was in December had acquired the assets and interests of K & G Enterprises, LLC (K&G) in August was founded by defendant Khatchadourian, who, at times, was Pizzametry's and majority defendants John Kavazanjian, Keaton, and 655761/2017 Motion No. Page 1of14 [* 1] Zaven shareholders

Individual Plaintiff Individual all In 2010, Order million exclusive sold placed Order i"J Order



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(collectively, plaintiff, plaintiff's exclusive

would plaintiff: already built, partial plaintiff could would plaintiff balance partial balance million
Plaintiff alleges additional following In 001 FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37
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2 of 14 Dadekian were minority in Pizzametry (together with Khatchadourian, Defendants). asserts that the Defendants are current members of APM. June T2 entered a Basic Agreement (Order Agreement) with K&G by which T2 invested \$1.5 in K&G and acquired a 13% membership interest in K&G and the right to manufacture the first 5,000 Machines and/or in North America (see Agreement, 1). The Agreement was amended in writing three times: on August 26, 2010 (First Amendment), on October 4, 2010 (Second Amendment), and-following Pizzametry's acquisition of K&G-on December 31, 2013 (Third Amendment) Agreements). The Third Amendment was entered by as successor to T2, and Pizzametry, as successor to K&G. The Third Amendment modified right to manufacture the Machines from the first 5,000 to the first 3,000 units and provided for certain payments that Pizzametry make to \$244,240.65 for five Machines and \$30,000 as payment for parts purchased in advance. Additionally, the Third Amendment provided that Pizzametry terminate the Agreements before it purchased 3,000 Machines, but it then compensate \$1,000 for each Machine not purchased up to 3,000 units. A of \$160,330 for excess inventory remained after the \$30,000 payment was satisfied, and payment of that was conditioned upon Pizzametry reaching \$1 in funding. that it received no further orders from Pizzametry and manufactured no Machines the Third Amendment. December 655761/2017 Motion No. Page 2of14 [* 2] 2016, Pizzametry "was liquidated [plaintiff]," plaintiff

out" Pizzametry, effectively (complaint [compl.] 'IJ'IJ Pizzametry Plaintiff alleges 2016, Individual APM "proceed sell supplies

following plaintiff Pizzametry liquidated, million value-including plaintiff's "zero" 'IJ Plaintiff liquidation Upon belief, plaintiff all, Pizzametry Individual Plaintiff formal liquidation 2016. Plaintiff alleges Pizzametry's APM,

Plaintiff Individual themselves liquidating Pizzametry intellectual APM, "squeeze[d plaintiff] out," devalued 'IJ Plaintiff's complaint following claims:

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3 of 14 without proper notice to was "squeezed of its membership interest in and the Agreements,were terminated 26-27). Liquidation of that it was notified, by correspondence from Kavazanjian received on December 1, that the Defendants formed to in a new direction," Machines and to customers, and expand manufacturing and engineering of the Machines with new strategic



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partnerships. The day, was advised that had been its \$2.1 debts transferred to secured creditors, and its equity 13% interest-was (id. 29-31). asserts it was not provided advance notice of, or an opportunity to vote on, or an opportunity to become a secured creditor. information and asserts that or much of, the secured debts of were owed to the Defendants. received notice of the on December 5, that assets were transferred to which partnered with a new entity to manufacture the Machines and raised significant funds to begin mass production of Machines. asserts that the Defendants benefitted by and transferring its assets and property to and those acts its interest and investment, and interfered with its rights under the Agreements (id. 44). raises the

Motion No. Page 3of14 [* 3] Pizzametry APM

111146-53

111154-58

Pizzametry APM Pizzametry 1111

111164-67

APM 111168-75

APM 111176-81

York Pizzametry APM 111182-85

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4 of 14 (1) breach of contract against and for failure to pay for 2,995 Machines under the termination provision (id. [seeking award of unspecified damages]); (2) tortious interference with contractual relations against the Individual Defendants for interfering with the Agreements (id. [seeking award of unspecified damages]); (3) breach of implied covenant of good faith and fair dealing against and for rendering unable to perform its obligations under the Agreements (id. 59-63 [seeking award of unspecified damages]); (4) promissory estoppel against all defendants for inducing plaintiff to invest and expend resources (id. [seeking award of unspecified damages and/or restitution]); (5) breach of fiduciary duty against the Individual Defendants for securitization of Pizzametry's debts, self-dealing, and fraudulently transferring Pizzametry's assets to at plaintiff's expense (id. [seeking award of damages for lost value of investment and membership interest]); (6) aiding and abetting breach of fiduciary duty against (id. [seeking award of unspecified damages]); (7) fraudulent transfer under New Debtor and Creditor Law§ 276 against the Individual Defendants for the liquidation of and transfer of its assets to (id. [seeking award of unspecified damages]);



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Motion No. Page 4 of 14 [* 4] all plaintiffs lost contractual devaluation il'IJ

civil all obligations plaintiff, plaintiff Pizzametry, unlawful plans il'IJ

Additionally, plaintiff APM [plaintiff] lost value Pizzametry Agreement[s]"; "all all related value Pizzametry APM"; related value Pizzametry, APM, the Individual rights"

CPLR complaint

"On CPLR pleading liberal alleged complaint plaintiff[] possible favorable inference" NY2d legal conclusions "factual claims incredible flatly evidence" "accorded favorable 655761/2017 001 FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37 AM INDEX NO. 655761/2017 NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 10/02/2018

5 of 14 (8) unjust enrichment against defendants for benefits and of its membership interest and investment (id. 86-93 [seeking award of unspecified damages]); (9) conspiracy against defendants for conspiring to avoid Pizzametry's to deprive of its membership interest in and committing various acts in furtherance of those (id. 94-98 [seeking award of unspecified damages]; see id. at 18-19). asks the court for an order: rescinding the "transaction by which Pizzametry's assets and operations were transferred to and the of its investment in and the imposing a constructive trust on rights and gains of Defendants to the in and associated with and/or and accountings to the of and Defendants' "interests and in those entities (id. at 18-19). Defendants now move, pursuant to 3211 (a) (1) and (7), for an order dismissing the in its entirety. Discussion a motion to dismiss pursuant to 3211, the is to be afforded a construction. [The court] accept[s] the facts as in the as true, [and] accord[s] the benefit of every (Leon v Martinez, 84 83, 87-88 [1994] [citation omitted]). However, bare and which are either inherently or contradicted by documentary are not their most Motion No. Page 5 of 14 [* 5] intendment"

Dismissal is "conclusively establishes claims law"

Plaintiff's claims claim tt:iat claims all earlier Specifically, obligated plaintiff plaintiff entitled million Relatedly, claim Individual inadequately plead claim Plaintiff "artificially improperly" liquidated

threshold effectively plaintiff entitled Plaintiff obligation

plaintiff would entitled

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6 of 14 (Summit Solomon & Feldesman v Lacher, 212 AD2d 487, 487 [1st Dept 1995]). under subsection (a) (1) warranted where the. documentary evidence a defense to the asserted as a matter of (Leon v Martinez, 84 NY2d 83, 88 (1994)). 1. contract (first and third causes of action) and tortious interference with contract (second cause of action) Defendants contend the contract must be dismissed because the Third Amendment supersedes agreements, and documentary evidence demonstrates that there was no breach. they argue that: (a) the termination provision that Pizzametry to compensate for certain unpurchased Machines was obviated by the Third Amendment; and (b) is not to the excess inventory payment of \$160,330 because the condition precedent-Pizzametry obtaining \$1 of funding-was not satisfied. defendants contend that the tortious interference against the Defendants must be dismissed as because there was no breach of the Agreements on which that is based. responds that defendants and and transferred Pizzametry's assets to APM to circumvent and frustrate the funding- condition; therefore, the condition is excused and is to payment of \$160,330. further responds that the Third Amendment did not vacate Pizzametry's to pay for unpurchased Machines upon termination; rather, the Third Amendment increased the number of units for which, upon termination, be to payment.

655761/2017 Motion No. Page 6of14 [* 6] In reply, implied

dealing claim plead plaintiff allege threshold attributable Pizzametry APM. Preliminarily, whole Order eliminate obligation 3,000

would eliminate While "the Amendment)," "supersedes all agreements," plainly unambiguously earlier including obligations clearly "[c]hang[ing]" Order "add[ing]" plainly obligation 2,000 3,000 "prevention doctrine" applies plaintiff's implied claim 2012] "prevention" "hindrance" precludes relying 655761/2017 001 FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37 AM INDEX NO. 655761/2017 NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 10/02/2018

7 of 14 defendants argue that the breach of covenant of good faith and fair is insufficiently inasmuch as does not that the funding was not satisfied, or that it was not reached due to any act or omission to or the Third Agreement, read as a with the Agreement and First and Second Amendments, does not Pizzametry's to pay for up to unpurchased Machines upon termination. The Third Amendment amends the past agreements by increasing the number of units for which compensation become due upon termination; it does not the termination duty. section 9 (a) of the Third Amendment states that it is entire understanding of the parties with respect to the subject matter [in the Third and prior ... written the Third Amendment and incorporates and modifies specific portions of the agreements, those concerning Pizzametry's upon termination. Section 5 of the Third Amendment refers to section 3 of the Agreement and to section 5 (A) of th.e First Amendment; section 5 of the Third Amendment increases Pizzametry's to pay for unpurchased Machines upon termination from up to to units. The court does not address whether the to breach of covenant and good faith (see e.g. Thor Properties, LLC v Chetrit Group LLC, 91 AD3d 476, 477 [1st Dept [discussing the or doctrine, which a party that caused or consented to non performance of a condition precedent from on the



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non-occurrence of the Motion No. Page 7 of 14 [* 7] Plaintiff sufficiently

allege obligating Pizzametry APM Plaintiff conclusorily alleges "Pizzametry value," value APM [plaintiff] obligations Pizzametry [plaintiff]," including "\$160,330 (compl. 'I) Plaintiff also belief, time" liquidation, APM funds " 'I) allegations nearly liquidation Pizzametry, failed obligation claim implied dealing conditional \$160,330

dismissal plaintiff's contractual relations claim plaintiff's

Plaintiff's claims fraudulent claim claim, claim, fraudulent claim shareholder's Specifically, plaintiff Pizzametry's fraudulent liquidation value plaintiff's 655761/2017 001 FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37 AM INDEX NO. 655761/2017 NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 10/02/2018

8 of 14 condition to prevent recovery in some circumstances)). does not either that the funding condition was satisfied, the payment, or that and/or caused or consented to the non-occurrence of that condition. that was a business with and that was transferred to to "squeeze out and to attempt to extinguish the owed to payment of [for] excess inventory" 43). states, upon information and that a "short after partnered with a new manufacturer and obtained "significant [financing] (id. 41). There are no pertaining to funding efforts during the three years between execution of the Third Amendment and of or that any defendant had, but to perform, an connected to satisfying the condition. For those reasons, the for breach of the covenant of good faith and fair based on the non-payment of the payment is dismissed. The prong of defendants' motion that seeks of tortious interference with is denied insofar as first cause of action for breach of contract survives this motion. 2. breach of fiduciary duty (fifth and sixth causes of action) and transfer (seventh cause of action) Defendants contend that the breach of fiduciary duty aiding and abetting breach of fiduciary duty and transfer are barred as they are not asserted in a derivative action. they argue that the conduct alleges-mismanagement or diversion of assets by of the company by its officers and directors, causing the of Motion No. Page 8 of 14 [* 8] Plaintiff APM

Individual

Individual all alleged

allegation allege allegedly "[A] alleged

2014)]. "may 40, Inc., "where

NY2d 108, 2012)], "a alleged

individually)" 001 FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37 AM INDEX NO.



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9 of 14 equity investment and membership interest to be lost or diluted-state harms to Pizzametry, not plaintiff directly. responds that the conduct alleged-fraudulent transfer of assets to committed by the Defendants-states an individual claim in that plaintiff is the only shareholder that was harmed by the improper acts while the other shareholders, the Defendants, benefitted from the conduct. Defendants reply that these claims must be dismissed as derivative because there is no that any defendant breached a duty owed to plaintiff independent of the duties owed to Pizzametry, and plaintiff does not an injury it sustained separate from any injuries sustained by Pizzametry. stockholder has no individual cause of action against a person or entity that has injured the corporation," even if the wrongful acts diminished the value of the shares of the corporation or where a shareholder incurred personal liability (Serino v Lipper, 123 AD3d 34, 39 [1st Dept A shareholder not obtain a recovery that otherwise duplicates or belongs to the corporation" (id. at citing Herbert H. Post & Co. v Sidney Bitterman, 219 AD2d 214, 225 [1st Dept 1996]), except under the narrow exception applicable the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation" (Serino, 123 AD3d at 39, citing Abrams v Donati, 66 951 [1985]). As explained by the First Department in Yudell v Gilbert (99 AD3d 114 [1st Dept court should consider (1) who suffered the harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, (id. [internal 655761/2017 Motion No. Page 9of14 [* 9] claims fail law

alleged individual allegations complaining shareholder's claims claims Plaintiff's Individual APM Plaintiff alleges 2016, Pizzametry's " well

lieu foreclosure All Pizzametry has value [plaintiff]'s obligations including APM clean slate" (compl. fl fl Plaintiff "of plan liquidate" Pizzametry plan Pizzametry "should debt" flfl Plaintiff "has so-called flfl Upon "all" Pizzametry's Individual fl Specifically, plaintiff alleges Individual plaintiff Pizzametry "to exclusion of," self-dealing 655761/2017 001 10of14 FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37 AM INDEX NO. 655761/2017 NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 10/02/2018

10 of 14 quotation marks and citation omitted]). Direct as a matter of where the harm is anything other than harm to the shareholder alone; if the confuse the derivative and individual rights, even if some of the are direct in nature, the cannot stand (id. at 115). breach of fiduciary duty and fraudulent transfer claims against the Defendants and aiding and abetting breach of fiduciary duty claim against are derivative, not direct, causes of action and must be dismissed. that it was notified, by correspondence from Kavazanjan in December that "[d]ebts were in excess of equity and the assets of the company have been transferred to the secured creditors (\$2.1 M in secured debt) in of ... equity in a of zero, including equity, and no contractual were assumed by the creditors, the [Agreements]. ... is a new LLC and it starts with a 31; see id. 29). was not advised the to or presented with an opportunity to vote on that or whether be taking on secured (id. 32-34). adds that it no idea when the secured debt



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was accrued" and had no opportunity to become a secured creditor (id. 35-36). information and belief, plaintiff asserts that or a "significant portion" of secured debts were owed to the Defendants (id. 37). that the Defendants breached their fiduciary duties to by: securitizing their investments in the and without notice to, plaintiff; and fraudulently transferring Motion No. Page [* 10] APM plaintiff; "allowing Pizzametry

Individual exclusion of," plaintiff 111170- APM "knowingly alleged holding Individual "self-dealing 1179). result, plaintiff alleges Pizzametry worthless; Pizzametry diluted valueless; "only real asset"-intellectual APM; "was liquidation," complete loss value (id.111142-44, id.111176-81). Plaintiff's Individual self-dealing exclusion plaintiff, resulted dilution total loss plaintiff's Pizzametry claim only alleges intellectual fraudulently APM also claim: individual shareholder, would claim prevails. Plaintiff's reliance Servs. misplaced. In ruling trial claim, dismissal sufficiently pleaded individual plaintiff, shareholder holding alleged all 001 FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37 AM INDEX NO. 655761/2017 NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 10/02/2018

11 of 14 Pizzametry's assets to without advising and to favor [the Defendants] to the and without notice to, (id. 74). participated" in those breaches by accepting and the assets transferred by the Defendants' transaction" (id. As a it sustained the following injuries: its investment in was rendered its minority interest in in was and rendered Pizzametry's property rights for the Machines-was transferred to it was deprived of its rights under the Agreements; and it deprived of the opportunity to meaningfully protect its interests prior to causing of of its investment and membership interest 68-75; see a/so allegations that the Defendants engaged in transactions for their own benefit, to the of which in the or of membership interest and investment in states a derivative that harmed the company. That it Pizzametry's property assets were transferred to states a derivative the injury is to the company, not any and the company receive the benefit of recovery if the on Scott v Pro Mgt. Group, LLC (124 AD3d 454 [1st Dept 2015]) is Scott, the First Department affirmed the of the court finding that an unjust enrichment at the stage, an cause of action on the basis that the a minority of the defendant companies and those companies' trademarks, that other 655761/2017 Motion No. Page 11of14 [* 11] royalties,

plaintiff's exclusion contemplate claims fraudulent claims individual, claims shareholders example, claimant alleges individually plaintiff would

Plaintiff's estoppel claim claim estoppel claims

claims precluded. Plaintiff claims estoppel all only Pizzametry APM; Plaintiff Pizzametry APM Pizzametry APM. Plaintiff's claim allegations Inc. Is. Co., Additionally, estoppel claim, plaintiff's claim

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12 of 14 owners of those companies received revenues, fees, and other consideration for using the trademarks, to (id. at 454). Scott does not of breach of fiduciary duty or transfer and does not persuade this court that these are rather than direct. Breach of fiduciary duty raised by minority may be direct in nature when, for a that she was deprived of her share of profits as, in that situation, the receive the benefit of the recovery, not the company (see e.g. Gjuraj v Uplift El. Corp., 110 AD3d 540, 540 [1st Dept 2013]). 3. promissory (fourth cause of action) and unjust enrichment (eighth cause of action) Defendants contend that the promissory and unjust enrichment must be dismissed as they arise out of the same subject matter as the Agreements, and, thus, recovery for those is responds that its for promissory and unjust enrichment are against defendants, not and therefore, they are not barred by the Agreements as to the Individual Defendants. also responds that the Agreements do not preclude the quasi-contract claims against and because the Agreements were improperly terminated by and/or promissory estoppel is dismissed as it is premised on the same factual and subject matter as those composing the contract claims, which are governed by the Agreements (Clark-Fitzpatrick, v Long R.R. 70 NY2d 382, 388 [1987]). the promissory claim is duplicative of the breach of contract as are the portions of unjust enrichment that

Motion No. Page 12of14 [* 12] alleged Pizzametry APM

301, 303 2008)).

wholly alleges APM Pizzametry Pizzametry APM; ml

APM 111187, 111168-85). Plaintiff's .

York State. Plaintiff

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13 of 14 reiterate the breach of the Agreements by and/or (see Celle v Barclays Bank P.L. C., 48 AD3d [1st Dept However, the remaining portions of plaintiff's unjust enrichment claim are supported by factual allegations concerning matters separate from those governed or contemplated by the Agreements. For example, plaintiff that the Individual Defendants and/or improperly: froze plaintiff out of by becoming securitized creditors; liquidated to control and transfer its assets to and enlarged their proprietary interests at the expense and to the exclusion of plaintiff (see compl. 86-93). Accordingly, plaintiff's unjust enrichment claim is adequately plead as to the allegedly wrongful conduct by which the Individual Defendants and were unjustly enriched, resulting in injuries to plaintiff separate from those related to the Agreements (see id. 89-92; see also e.g. id. 4. civil conspiracy claim (ninth cause of action) Defendants contend that the ninth cause of action must be



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dismissed as an independent tort for civil conspiracy is not recognized in New responds that its civil conspiracy claim is not independent and may be sustained because plaintiff adequately pleads an underlying tort, such as tortious interference with contract, and, coupled with allegations that defendants entered an agreement to commit the tort and took overt actions in furtherance of that agreement, states a viable claim for civil conspiracy. Defendants reply that the claim is defective, even if coupled with the underlying tort claim, in that plaintiff does not plead any facts establishing that an agreement was reached between any of the defendants to tortiously interfere with the Agreements. 655761/2017 Motion No. 13of14 [* 13] Plaintiff's civil claim inadequately pleaded. Plaintiff

only conclusory Individual APM "conspired" Pizzametry's obligations plaintiff ml tortiously

civil claim additional later Accordingly, ORDERED APM Partners APM Pizza Partners Pizzametry, Puzant Clyde

ORDERED plaintiff's

ORDERED shall complaint 20

ORDERED Part 60 Street, preliminary 1° 2-? 'i!

9/28/2018

APPLICATION: IF APPROPRIATE: CASE DISPOSED DENIED ORDER INCLUDES TRANSFER/REASSIGN ONE:

65576112017 001 NON-FINAL DISPOSITION IN PART SUBMIT ORDER FIDUCIARY APPOINTMENT FILED: NEW YORK COUNTY CLERK 10/02/2018 09:37 AM INDEX NO. 655761/2017 NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 10/02/2018

14 of 14 conspiracy is dismissed as asserts allegations that the Defendants and to avoid to under the Agreements (e.g. id. 94-98); those allegations do not demonstrate that an agreement to interfere with the Agreements was, in fact, reached, when such an agreement was made, or which defendants were conspirators. Thus, the conspiracy is dismissed without prejudice to be renewed if facts are discovered. it is that the motion of defendants LLC D/B/A/ LLC, as successor in interest to LLC and K & G Enterprises, LLC, Khatchadourian, John Kavazanjian, Keaton, and Zaven Dadekian is granted in part; and it is further that third, fourth, fifth, sixth, seventh, and ninth causes of action are dismissed; and it is further that defendants serve an answer to the within days of this decision; and it is further that the parties are to appear in 48, Centre Room 242 for a conference on /

DATE



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CHECK GRANTED D SETTLE CHECK

Motion No. GRANTED D REFERENCE

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