SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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EIDO T. SHIMANO ROSHI and
YASUKO A. SHIMANO,

Plaintiffs,

- against -

THE ZEN STUDIES SOCIETY, INC.,

Defendant.

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REPLY AFFIRMATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Index No. 650025/2013

LAWRENCE D. GERZOG, an attorney admitted to the Bar of the State of New York, mindful of the penalties for perjury, affirms as follows:

1. I am the attorney for Plaintiffs Eido T. Shimano Roshi and Yasuko A. Shimano ("Plaintiffs") in this action. This Reply Affirmation is made in support of Plaintiffs' Motion for Partial Summary Judgment.

2. The Affirmation of Jonathan J. Marcus, Esq., counsel for defendant Zen Studies Society, Inc. ("Defendant"), signed October 3, 2014 and submitted to this Court as Defendant's Affirmation in Opposition to Plaintiffs' Motion for Partial Summary Judgment, by its own terms, demonstrates that Plaintiffs' Motion for Partial Summary Judgment should be granted. Defendant has not demonstrated the existence of any issue of fact requiring a trial with regard to Plaintiffs' First Cause of Action, or any of Defendants' Affirmative Defenses or Counterclaims. For this reason, and for the reasons set forth in Plaintiffs' moving papers, this Court should grant Plaintiffs partial summary judgment as requested in their motion.

THERE ARE NO TRIABLE ISSUES OF MATERIAL FACT WITH RESPECT TO PLAINTIFFS' FIRST CAUSE OF ACTION, DEFENDANT'S AFFIRMATIVE DEFENSES OR ANY OF DEFENDANT'S COUNTERCLAIMS

3. Defendant seems to believe that conclusory allegations not supported by evidence are enough to defeat summary judgment. They are not. Plaintiffs have met their burden of providing this Court with admissible evidence that establishes a prima facie basis for their First Cause of Action. Defendant has offered nothing to demonstrate the existence of any triable issue of material fact with respect to Plaintiffs' First Cause of Action, any of Defendant's Affirmative Defenses or any of Defendant's Counterclaims. The First Cause of Action is ripe for summary judgment and summary judgment should be granted. The timing of the motion vis-a-vis discovery is irrelevant because Plaintiffs can demonstrate, as they have here, that no factual disputes necessary to the resolution of the case exist. In any event, all the information that might be necessary for Defendant to substantiate its Affirmative Defenses or Counterclaims is already in the possession of Defendant, and not in the possession of Plaintiffs.[1]

4. As stated in Plaintiffs' moving papers, Defendant is pursuing an outrageous strategy of trying to "starve" Plaintiffs into submission by denying them, the 82 year old founding

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[1]In what is no doubt a typographical error, but may also be a Freudian slip, Mr. Marcus states in his affirmation at paragraph 2, "[s]ince a significant portion of any evidence regarding the Plaintiffs self-dealing, breaches of fiduciary duty and sexual misconduct remains in the hands and heads **of Defendants**. . . " Whether intentionally or not, Mr. Marcus is right that any "evidence" of Plaintiffs "misconduct" is in the hands of Defendant. As demonstrated herein, however, that is of no moment, as there are no material factual disputes with respect to Plaintiffs' First Cause of Action. In addition, Defendant claims that discovery is necessary to flesh out the claims on Plaintiffs' Second Cause of Action, involving certain pieces of religious and artistic significance, despite the fact that Plaintiffs are **not seeking summary judgment** on this claim.

former Abbott of Defendant, and the ailing 79 year old former Executive Director of the Defendant's New York Zendo, or temple, their modest payments as agreed to years ago by Defendant and paid by Defendant for more than a year after Plaintiffs' retirement.. It is time for this Court to stop Defendant's cruel and unlawful mistreatment of the people who are almost single handedly responsible for the success of Defendant, and for Defendant to honor their legal obligations.

DEFENDANT'S CLAIMS THAT PLAINTIFFS' "MISCONDUCT"
VOIDS THE DCA AGREEMENTS, OR THAT THEY ARE VOID
FOR SELF DEALING ARE COMPLETELY WITHOUT MERIT,
AS ARE THEIR CLAIMS THAT PLAINTIFFS GAVE "FAITHLESS SERVICE" TO ZSS

4. Defendant claims that the DCA agreements at issue in Plaintiffs' First Cause of Action are void due to Plaintiffs "misconduct" or because of Plaintiffs' self-dealing, and that Plaintiffs' are guilty of being faithless servants. Each of these claims is totally without merit.

5. First, nothing in the DCA agreements provides that misconduct by the Plaintiffs would void the DCA agreements. Thus no trial is necessary to determine whether either of the Plaintiffs engaged in the "misconduct" alleged by Defendant. Second, although the alleged "misconduct" was known to the ZSS before the Plaintiffs retired from ZSS, ZSS complied with the DCA agreements for more than a year, making the payments due thereunder, before unilaterally and without any legal authority suspending such payments. Defendant's Counterclaims for "faithless service" are merely their Affirmative Defenses turned around as baseless Causes of Action.

6. The "faithless servant claims" are the same "misconduct" claims made as Affirmative Defenses, only re-cast as Counterclaims. The alleged "misconduct" cannot be proven, is

not misconduct as a matter of law, and are simply straw men erected by Defendant to legitimize its outrageous and unlawful behavior.

7. Defendant's claims of self-dealing are likewise without merit and fall as a matter of law. There is no dispute that the DCA agreements were drafted by Defendants' attorney; that they were unanimously approved by Defendant's Board of Directors, that they were duly signed by the proper parties, and that Defendant began performance immediately after Plaintiffs' retirement and continued that performance for more than a year. The admitted fact that the Plaintiffs, as Board members, voted in favor of the DCA agreements, offers no comfort to Defendant, as a matter of law, and as a matter of simple arithmetic, since the Board that approved the DCA agreements approved them unanimously and was made up of a total of 7 members.

DEFENDANT'S CLAIM THAT DISCOVERY
IS REQUIRED IS ALSO WITHOUT MERIT

8. As demonstrated, the conduct alleged by Defendant to have been engaged in by each of the Plaintiffs is not, as a matter of law, "misconduct," and further "misconduct is not an excuse under the DCA agreements to void the agreements or allow ZSS to stop payments under them. Discovery would only be required if a triable issue of fact about what the Plaintiffs did or did not do was material to the First Cause of Action. Since the conduct alleged to be misconduct is not misconduct as a matter of law, and sine even misconduct would not allow ZSS to stop payments under the DCA agreements, no discovery is required.

9. Similarly, as noted, the Defendant's claim that the Plaintiffs were "faithless servants" is merely a restatement of their "misconduct" Affirmative Defenses as Causes of Action.

Since the actions claimed to have been taken by Plaintiffs do not give rise to claims that they were faithless servants, and since those alleged actions were known to the ZSS Board for years, while the ZSS Board acknowledged the validity of the DCA agreements and made payments thereunder for more than a year, ZSS' Affirmative Defenses and Counterclaims are without merit as a matter of law, requiring no trial and no discovery .

DEFENDANT' CLAIMS THAT PLAINTIFFS HAVE CAUSED DELAY AND HAVE REUSED TO NEGOTIATE IN GOOD FAITH ARE BOTH FALSE AND IRRELEVANT

10. Defendant's statement that it stopped making the payments that were required under the DCA agreements both legally and morally because of some alleged failure of Plaintiffs to negotiate in good faith is as ludicrous as it is offensive. Plaintiffs entered into fair, modest, and legal binding agreements with Defendant. Defendant began making the legally required payments, and made them for more than a year. There was nothing to negotiate. Defendant's desire to renege on its binding agreements does not give rise to a duty to negotiate on behalf of Plaintiffs. Moreover, and most tellingly, Defendant did not seek judicial intervention to invalidate the DCA agreements, but simply, unilaterally and unlawfully ceased making the payments they were legally and morally obligated to make.

11. When Plaintiffs were forced to bring suit, Defendant ceaselessly attempted to get Plaintiffs to agree to arbitrate the dispute. When Plaintiffs finally did agree, under enormous pressure from Defendant, to non-binding mediation, based on a promise that Defendant would negotiate in good faith based on the result of the mediation, Plaintiffs were met after the mediation was concluded with a Defendant which continued to stonewall and maintain its legally and morally untenable position.

CONCLUSION

12. Defendant has engaged in shocking, unforgivable and totally immoral fashion by refusing to make the payments it promised to make, and indeed started making, to Plaintiffs, two of the people most responsible for making Defendant the influential and wealthy institution it has become.

13. This Court should grant Plaintiffs partial summary judgment in connection with their First Cause of Action, and grant them summary judgment dismissing Defendant's Affirmative Defenses and First through Fourth Counterclaims, and ordering an immediate trial on the issue of damages.

Dated: New York, New York
October 22, 2014

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