LOUIS CASTELLANOS, DOMINICK CACCAVELLA,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: MORRIS COUNTY
Plaintiffs,	:	
	:	CIVIL ACTION
vs.	:	DOCKET NO.: MRS-L-3111-13
LEON R. WATTS, JR., LEMON BAY RESORTS, L.L.C., MICHAEL WALSH, VITO LOCHIATTO, JOHN DOES 1-5, MARY DOES 1-5, and DOE CORPORATION 1-5,	:	
Defendants.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Plaintiffs, Louis Castellanos ("Castellanos") and Dominick Caccavella ("Cacavella")("the Plaintiffs), submit this Memorandum in Opposition of the Defendants to Dismiss the Plaintiffs' Amended Complaint. For the reasons that follow, the Defendants' Motion should be denied.

Statement of Relevant Facts

A. DeZao Certification

The undersigned's office received the Court's Order on October 20, 2014 (DeZao Certification, ¶3). At that time, the undersigned was in the midst of preparing for an overwhelmingly big federal trial (commencing November 5, 2014), which monopolized both his time and that of other attorneys in the office (and specifically the attorney primarily responsible for legal research and drafting work)(*Id*. at ¶4).

Hence, the Order was first brought to the undersigned's attention and the aforementioned research/drafting attorney on October 24, 2014, six (6) days before the amended pleading was due (*Id*. at ¶5).

At that time, nothing was known about the content of the Court's decision on the record, nor was the record in the undersigned's possession (*Id*. at ¶6).

The Order was the first that the undersigned heard of the Court's decision (*Id*. at ¶7). The *per diem* attorney who handled the argument left the undersigned's employ within days after, and did not provide any details as to what had been decided (*Id*.). Hence, the Order came as a surprise, leaving the office less than six (6) days to redraft the Complaint based upon the written Order alone (*Id*.).

Though inquiry was immediately made (starting on October 24, 2014) as to achieving authorized business status for Heartstone in New Jersey, it became obvious that there was very simply not enough time to do so before October 30, 2014 (nor, did it appear from the Order, that Heartstone's claims would be dismissed with prejudice)(*Id*. at ¶8).

Furthermore, the undersigned's analysis of this case led him to believe that the causes of action really belonged to the Plaintiffs individually because the damage sustained was to them uniquely rather than to the corporation or all of its shareholders (*Id*. at ¶9). Hence, the Complaint was redrafted to assert individual causes of action on the part of the Plaintiffs (*Id*. at ¶10).

The Amended Complaint was timely filed on October 30, 2014 (*Id*. at ¶11).

In the meantime, the undersigned's office determined that it was essential to determine why the Court dismissed Denise Walsh from the action (*Id*. at ¶12). When it

was realized that the attorney formerly working at the office had handled the oral argument, the office immediately ordered the transcript of it (*Id*.).

The transcript was not received until on or about October 29, 2014, one (1) day after the Amended Complaint was filed based upon the terms of the Order (*Id*. at ¶13).

Upon review, it was determined that the Complaint could be further amended in light of some of the comments the Court made on the record of which the undersigned had been unaware when the Amended Complaint was sent for filing on October 28, 2014 (*Id*. at ¶14). Hence, a second Amended Complaint was filed on or about November 3, 2014 (*Id*.).

The Defendants incorrectly argue that the Plaintiffs' Amended Complaint was only and untimely followed on November 3, 2014 (*Id*. at ¶15).

While the Plaintiffs are currently undertaking efforts to achieve authority for the Corporation to do business in the State of New Jersey, the undersigned does not believe that the claims alleged in the Amended Complaint belong to it or that they allege injuries to the Corporation (*Id*. at ¶16).

Additionally, the undersigned must make note of the Defendants' charge that the Plaintiffs' Amended Complaint should be dismissed because it merely drops Heartstone as a Plaintiff (*Id*. at ¶17). Before filing the Amended Complaint, the undersigned verified with his clients that the facts alleged were true and accurate (*Id*.). They verified that they were (*Id*.).

As there were no facts to add or change, the Complaint was amended so as to eliminate Heartstone as a Plaintiff and clarify the injury to the individual Plaintiffs (*Id*. at

¶18). The Defendants suggest that the Plaintiffs' failure to add or change facts that were not there should doom their action (*Id*.). This argument should fail (*Id*.).

B. Oral Argument Transcript

In its oral decision, the Court held:

THE COURT:

> What I'm going to do is afford the – the plaintiff an opportunity to re-plead the individual claims of fraud because, frankly, there may be a cause of action lurking in this complaint. And to understand exactly what it is, it seems as though the plaintiffs are alleging that they were defrauded by – by Lochiatto into parting with their interest through Heartstone in this property without being compensated or without consideration.
>
> **********
>
> To the extent that there are any other individual fraud claims – and I think there are specific allegations of fraud made in counts 24, 29, 42, 49, 50, 51, 58, 84, 85, 115, and 16, and 122, and 123. I think there may be specified claims of fraud there, but it's difficult at this stage of the – the way this pleading is set up to understand exactly how it worked because of various relationships, the relationships among the two individual defendants and Lochiatto which appears to be one in which the plaintiffs assert that they were defrauded in some fashion by Lochiatto.
>
> If one liberally ferrets through this complaint, that would seem to be the theory; either fraud in the inducement, fraudulent statements made to get the individual plaintiffs as members of Heartstone to – to sell the – to sell the property to Lemon Bay. There may be claims as well here as I review the complaint pertaining to Lochiatto and Michael Walsh.

(Tr., 30: 5 – 12).

The Court's Order stated, *inter alia*:

> 7. All remaining claims of plaintiffs are dismissed without prejudice in order to provide plaintiffs the opportunity to file an amended complaint within 20 days of today, by 10/30/14. If plaintiffs do not file an amended complaint by that date, the complaint is dismissed with prejudice without need to file another order.

(Defendants' Exhibit E, p. 2).

C. Defendants' Statement of Facts

The Defendants erroneously focus on the basic nucleus of facts that explain in detail the background of this case, while ignoring the amendments made to the causes of action. Indeed, their "comparison" chart of the same paragraphs in the Original and Amended Complaint suggests that basic, necessary facts should have been removed or "altered" in order to meet with the Court's directives. Below is a summary of why the Defendants' fixation on these points is erroneous:

Paragraph 1:	"Castellanos is an individual residing in Bergen County, New Jersey."
Paragraph 2:	"Caccavella is an individual residing in Middlesex County, New Jersey."
Paragraph 3:	"Vito Lochiatto is an individual residing in Middlesex County, New Jersey."
Paragraph 5/4[1]:	"Watts is, upon information and belief, an individual residing in Somerset County, New Jersey."
Paragraph 6/5:	"Lemon Bay is, upon information and belief, a limited liability company domiciled in the State of New Jersey and owned and operated by Watts."
Paragraph 7/6:	"Michael is, upon information and belief, an individual residing in Morris County, New Jersey, and was, at all relevant times, married to Denise."
Paragraph 9/7:	"The Doe Defendants are persons or entities whose names are unknown to the Plaintiffs who might have culpability with respect to the allegations herein."

It is impossible to conceive of the point the Defendants attempt to make by citing the above paragraphs of "examples" of the Plaintiff's Original and Amended Complaint being identical. Since they surely do not suggest that these allegations would need to be

[1] First number denotes Paragraph in Original Complaint; second number denotes Paragraph in Amended Complaint.

changed in the Amended pleading, the Defendants hence simply cite to these paragraphs to "thicken up" their argument.

With respect to the remaining paragraphs, the Defendants apparently contend that the Plaintiffs should have "reinvented the wheel," and alleged "new" or "different" facts in this action in order to reframe their Complaint on their behalf instead of derivatively for the Corporation.[2] But they misstate the record and misleadingly claim that the "Plaintiffs failed to re-plead their claims" (Defendants' Motion, p. 4). Had the Plaintiffs chose to, *e.g.*, eliminate significant portions of the facts alleged, it is quite imaginable that the Defendants' Motion would be one complaining that, *e.g.*, there were insufficient facts to sustain the causes of action. In point of fact, the Defendants have not pointed to *any* allegations in those that they "chart" that reflect injury to the Corporation or to all shareholders thereof rather than to the Plaintiffs individually. Hence, while they suggest that the Plaintiffs flouted the Court's Order by either missing a deadline or failing to amend the pleading, the Defendants' Motion is a predictable but misguided attempt to dismiss an individual claim as "derivative" simply because they can.

Argument

I. The Defendants' Motion Ignores Black-Letter Law in New Jersey Holding That Members of Closely-Held Corporations May Assert Individual Actions That Concern Injury Inuring the Individual.

[2] In this regard, see DeZao Certification, ¶¶17-18.

Law

It is well established that a lawsuit to redress an injury done to a corporation which harms all shareholders alike may only be brought by the corporation. *Strasenburgh v. Straubmuller*, 146 N.J. 527, 548-49 (1996). To determine whether a complaint states a derivative or individual cause of action, courts examine the wrongs alleged in the complaint. *Id*. at 551. An individual action is one that alleges "special" injuries to a particular shareholder which were not suffered by the shareholders as a group. *Id*. at 550. A derivative action may only be maintained if the plaintiff represents interests of similarly-situated shareholders or members. *Id*.

If the breach of fiduciary duty cases a "special injury," shareholders may sue directly. *Id*. at 552. For example, claims against directors for the selective dissemination of information to one group of shareholders over another are not derivative in nature because the unfair dealing unequally affects shareholders that were deprived of the information. *Id*.

In *Kahn v. Rusckowski*, 2010 WL 2696856 (App. Div.)(DeZao Cert., Exhibit B), the court was "satisfied that" the plaintiff alleged a "special injury" that was not "suffered by" all of the corporation's shareholders. *Id*. at 5. There, the

> defendants' alleged wrongful conduct caused injury only to the minority shareholders, who were allegedly deprived of the opportunity to decide whether to keep or sell their shares at a price forty-six percent higher than the stock market price, and, for that reason, this is not a derivative action.

Id.

In light of their status as fiduciaries, our law demands of directors utmost fidelity in dealing with a corporation and its stockholders. *Casey v. Brennan*, 344 N.J. Super. 83, 108 (App. Div. 2001), *aff'd*, 173 N.J. 177 (2002). They must act fairly and cannot use

their powers for their own personal advantage and to the detriment of the minority shareholders. *Id*.

> In the case of a closely held corporation . . . the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions; (ii) materially prejudice the interests of the creditors of the corporation; or (iii) interfere with a fair distribution of the recovery among all interested persons.

Brown v. Brown, 323 N.J. Super. 30, 36, 731 A.2d 1212, 1216 (App. Div. 1999)[citation omitted].

The Appellate court

> recognizes that as to closely-held corporations, the normal policy reasons for requiring a plaintiff to employ the form of the derivative action may not be present or will be less weighty, even though the action alleges in substance a corporate injury.

Id. at 37, 1216. Indeed, "the concept of a corporate injury that is distinct from any injury to the shareholders approaches the fictional in the case of a firm with only a handful of shareholders." *Id*.

> . . . . The usual policy reasons requiring an action that principally alleges an injury to the corporation to be treated as a derivative action are not always applicable to the closely held corporation.

Id. [internal quotations and citations omitted].

The *Brown* court adopted the following policy:

> Although §7.01(d) does not follow the fullest potential reach of Donahue to the extent of converting all intracorporate disputes that would be normally characterized as derivative actions into direct actions whenever the case involves a closely held corporation, it gives the court discretion to treat the action as direct if the policy considerations enumerated in Comment d are satisfied. In general, when a direct action is brought on behalf of the entire class of injured shareholders and the corporation's insolvency is not in question, there is less reason to insist that the action be brought derivatively. The court should then have the equitable power to treat the action as direct if the corporation is closely

> held, thereby avoiding procedural hurdles that were not designed to apply in such a case.

Id.

In *Brown*, while "express[ing] no opinion on the ultimate permit of plaintiff's claims[,]" the court saw

> merit . . . in plaintiff's contention that it would be inequitable to allow Terri Brown and Brown and Guarino to avoid answering for their conduct by invoking rules of standing that have been developed to meet concerns not present here. As a matter of equity we conclude that Eleanore should be permitted to proceed by way of a direct action. *See, e.g., Kirk v. First Natl. Bank of Columbus*, 439 F.Supp. 1141, 1148-49 (M.D. Ga. 1977)(former shareholders in a defunct corporation who did not have standing to bring a derivative action, and who had received reduced price for their shares because of former president's misappropriation of funds, were permitted to bring a direct action).

Id. at 39, 1217.

Application

The Defendants' Motion is devoid of any of the above case law. Instead, it "dumbs down" the legal question by suggesting, wrongly, that "Heartstone is barred from bringing suit" (Defendant's Motion, p. 10). In fact, as the Defendants should know, it is improper to dismiss with prejudice for failing to obtain a certificate of authority. *Basement Store Franchise Corp. v. Natoli*, 2014 WL 4328218, 2 (App. Div.)(DeZao Cert., Exhibit C). Hence, as a matter of propriety, the Defendant makes use of hyperbole when it claims that Heartstone is "barred" from bringing this suit.

Ignoring that, the Defendants erroneously focus on the fact that the Plaintiffs' Complaint should be dismissed because it "simply dropped Heartstone from the caption of this action, and filed an Amended Complaint alleging the exact same claims they previously alleged on behalf of Heartstone in he original Complaint" (Defendants'

Motion, p. 10). The trouble with the Defendants' argument is that it erroneously presumes that the Plaintiffs' originally-asserted causes of action are "defective" because they belong to the company. However, as demonstrated by an examination thereof by way of application of the law set forth above, the claims very obviously allege claims individually possessed by the Plaintiffs and not all shareholders of the company.

The Defendants' further arguments belie the sanctity of their requested relief:

> The Court has already held as much with respect to the original Complaint (which is virtually identical to the Amended Complaint), holding that the Individual Plaintiffs may not bring claims to recover for damages arising out of the sale of the Property, which could only be maintained by Heartstone. See Duff Cert., Exh. D at T29: 2-13 ("[E]ven if there were derivative claims, they could not stand because . . . there's no certificate of authority, and effectively the individual members would be stepping into the shoes of the . . . entity . . . . [T]here would be no validity to any such claims because of the failure to secure a certificate of authority") . . . .

(Defendants' Motion, p. 12).

First, the Defendants either misunderstand or miscite the very transcript language that they cite, claiming that the Court "held" "that the [ ] Plaintiffs may not bring claims to recover for damages arising out of the sale of the Property, which could only be maintained by Heartstone" (*Id.*). However, the following, cited language speaks to general "derivate claims," not to "damages arising out of the sale of the Property" (*Id.*).

It is respectfully submitted that the Court's discussion of "dismissal with prejudice" was intended only to apply to the Plaintiff's individual claims for two reasons: First, because the Court's Order only specifies the 20-days and dismissal with prejudice in regard to the individual claims and not the derivative claims. As a result, when the Defendants served the Order, the Plaintiffs' Counsel was only on notice of the former.

Second, the law cited previously indicates that a corporation's complaint should never be dismissed "with prejudice" for failure to have a certificate of authority.

Secondly, the Plaintiffs' Complaint very simply does not sound in "diminution in value of their shareholdings resulting from wrongs allegedly done to their corporation[ ]" (Defendants' Motion, p. 12). Instead, the Amended Complaint sounds in Fraud because the Plaintiffs were led to believe that the Property was being sold for their benefit; that they would each get a unit on the Property; that no monies would be received from the sale; and that the Plaintiffs relied on these false statements to their detriment; in Breach of Fiduciary Duty because the Plaintiffs placed trust and confidence in Lochiatto, who breached a fiduciary duty by inducing the Plaintiffs to enter into a contract that was contrary to their interests so that he could benefit without their knowledge; in Breach of the Covenant of Good Faith and Fair Dealing where Lochiatto's objections were to prevent the Plaintiffs from receiving their reasonably expected benefits under the sale and purchase agreement; in Equitable Fraud for Lochiatto misrepresenting material facts to the Plaintiffs in claiming that the Property was being sold for their benefit and that they would each get a unit on it; in Specific Performance, in that the units the Plaintiffs were promised were unique; in Unjust Enrichment, in that Watts and Lemon Bay received a benefit by virtue of, *inter alia*, the Plaintiffs' investment of time and money into the property; in Unjust Enrichment in that Lochiatto received a benefit by virtue of, *inter alia*, the Plaintiffs' investment of time and money into the Property; in Unjust Enrichment by Michael for receiving a benefit under the agreement; in Consumer Fraud for the Defendants engaging in knowing efforts to lure the Plaintiffs into giving up their rights to the Property without due compensation; and in Rescission, seeking to undue the

agreement. Not one of these causes of action sounds in damages inuring Heartstone or its shareholders in general. To the contrary, the Amended Complaint alleges very specific damages to the Plaintiffs as a result of the actions of the Defendants that deprived them of their benefits arising from and owing to the Property and the money, time, and work that they invested into the Property without proper compensation. Not one of these counts – nor the allegations of the Complaint – allege that the Plaintiffs are suing for "injuring arising from the diminution in value of their shareholdings resulting from wrongs allegedly done to their corporation" (Defendants' Motion, p. 12). Indeed, none of these allegations even alleges that a wrong was done to the Corporation.[3]

It is legally infirm for the Defendants to claim that the Plaintiffs "have simply done what the Court held they could not [do] on the original motion" to allegedly "avoid compliance with N.J.S.A. 42:2C-65" (Defendants' Motion, p. 13). It is telling that the Defendants do not cite to one example of even a cause of action (much less an allegation) in the Amended Complaint that alleges a wrong to the Corporation and not the individual Plaintiffs. The Defendants' argument that the "Plaintiffs should not be permitted to circumvent the Court's Order . . . by simply dropping Heartstone as a plaintiff" and filing an amended pleading "asserting the exact same claims" (*Id.*) ignores the plethora of case law above of which they were evidently unaware. To be sure, if the Plaintiffs instead amended the pleading in Heartstone's name, the Defendants would be filing the same Motion, but in that instance arguing that none of the claims involved wrongs committed against the Corporation. The Defendants even argue that the Rescission claim is an

[3] To the extent that the Defendants prey upon the Plaintiffs' Amended Complaint for echoing the sum and substance of the original Complaint, at worst it can be said that the original Complaint was most clearly targeted at wrongs inflicted upon the Plaintiffs individually and not wrongs done the Corporation. As such, redrafting the Complaint so as to allege the same wrongs without the Corporation as a Plaintiff was the most logical and legally sound effort to make.

attempt to "vindicate rights of Heartstone" (*Id.*); however, in no way do they specify how the allegations that the Plaintiffs would not have entered into the Agreement if they had been properly informed are really attempts to claim that *Heartstone* would not have entered into it.

It should be noted that the Defendants' attack on the Plaintiffs' Amended Complaint is committed in isolation, ignoring – where it wishes – allegations that clarify that the Plaintiffs were individually harmed by the Agreement. For example, they claim that "[a]ll of the causes of action alleged are premised on the theory that the [ ] Plaintiffs were harmed by the sale of the Property . . . ," (Defendants' Motion, p. 11). But the Defendants ignore – because they must – the allegation that the Plaintiffs invested money, time, and/or labor in the Property that was never compensated for.

The Defendants shallowly cast aspersions upon the Plaintiffs' Amended Complaint, alleging that it is "meritless" (Defendants' Motion, p. 14) – a hefty claim in light of the case law cited above that they either ignored by neglect or design. Likewise, their argument that Heartsone was the owner of the property and hence suffered the loss (*Id.*) is borne of ignorance of the Plaintiffs' claims that they invested money, time, and/or labor into the Property that went unrecompensed.

At core, the Defendants' argument ignores cases such as, *e.g., Judson v. Peoples Bank & Trust Co.,* 25 N.J. 17, 134 A.2d 761 (N.J. 1957), where the plaintiffs "charged that they were induced by fraud to sell their shares of stock in Tuttle Bros., Inc. of Westfield, a New Jersey corporation, and sought to recover" "the actual value of the shares." *Id.* at 763.

The *Judson* case is instructive. There, "the representations made to the Judsons were flagrantly fraudulent cannot be disputed." *Id*. at 25, 765. One of the defendants "transmitted a false picture of imminent doom, and while representing that the structure would fall unless fresh working capital were obtained, he schemed in fact to eliminate their holdings with the funds of the company itself." *Id*. The plaintiffs "parted with their shares at the option price of $15, for a total of $35,550. The holders of preferred accepted $48,850 for shares having a par value of $88,350 and unpaid dividends of $84,003.18." *Id*. There, one of the defendants "did not purport to be an arms-length party to a purchase, but rather pretended to be a friend of the Judsons, bent upon advancing their interests." *Id*. at 26, 765. *And see, Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 188 A.2d 24 (1963)(action by former stockholder against remaining stockholders for fraud resulting in former stockholder's alleged receipt of inadequate price upon sale adequate to survive summary judgment).

Research in all jurisdictions for cases factually analogous to this one underscore that the Plaintiffs have alleged individual injury. In *GICC Capital Corp. v. Technology Finance Group, Inc.*, 30 F.3d 289 (2d Cir. 1994), for example, the appellate court reversed the dismissal of the plaintiff's amended complaint. There, the plaintiff accepted a promissory note from the defendants as part of an unrelated settlement. During negotiation of the note, the defendants did not disclose that, at the same time, they were stripping the corporation of assets. Their failure to disclose the stripped-down status of the corporation induced the plaintiff to accept the note in settlement. Thus, because of the defendants' misrepresentations, the plaintiff accepted an over-valued asset in

exchange for the settlement of their claims. The injury was direct because the plaintiff was immediately injured in the process of negotiating a settlement with the defendants.

In *Kirschner v. Bennett*, 2011 WL 1875449 (S.D.N.Y.)(DeZao Cert., D), the court dismissed all claims brought by investor plaintiffs with prejudice for lack of standing because the replicated claims brought by the corporation. There, the plaintiffs accepted an over-valued asset and were "immediately injured." *Id*. at 5. Wrote the Court:

> . . . . This is not a case in which the FX Customers received a fair exchange and then a fraud occurred . . . . This is a case in which the FX Customers were defrauded at the very time they gave Refco value. And . . . the [plaintiffs] gave value at a time when an undisclosed fraud "undermine[d] the possibility of repayment."

Id.

There, "at the time transaction, there was ***no loss*** to the corporation at the time of the challenged transaction, the only loss was to the plaintiff – and therefore it cannot be said that the plaintiff was suing derivatively for a loss suffered by the corporation." *Id*. [**emphasis added**].

In *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), the officers of the defendant corporation fraudulently concealed the availability of a major asset, leading the plaintiff creditor to agree to a reorganization plan when it relinquished all but 17.5 percent of its allowed claim against the debtor corporation. This injury was direct because "it was not dependent upon actual injury the debtor corporation may have suffered as a result of the concealment, but instead arose solely from the misrepresentation by the defendant officers . . . about the status of the [ ] assets." *Id*. at 238.

In *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F.Supp.2d 249 (D. Conn. 2012), the court noted that fraudulent inducement claims "are direct because they allege a harm suffered by plaintiff independent of the partnership and a duty to plaintiff that is not merely derivative of [the defendant's] fiduciary duties to the partnership." *Id*. at 263. "The injury [ ] in such a claim not only the loss of the shares, but the fact that those shares were lost as a result of the inducement." *Id*.

In this case, likewise, the Plaintiffs have alleged direct claims because they are ones in which "the duty breached was owed to the stockholder and that [they] . . . can prevail without showing an injury to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. Super. 2004).

Indeed, in *Gieselmann v. Stegman*, 443 S.W.2d 127 (Mo. Sup. 1969), not "every allegation of wrongdoing in the original petition is a Simon-pure charge of individual injury. Some of the language is appropriate to a derivative action for the corporation." *Id*. at 131. "The gravamen of the pleading, however, is injury to plaintiffs as individuals." *Id*.

> . . . . Most of the grievances and the principal complaints to wrongs rebounding to the detriment and direct injury of plaintiffs as individuals. Most of grievances and the principal complaints relate to wrongs redounding to the detriment and direct injury of plaintiffs as individuals. Actions based upon torts where the injury is done directly to an individual shareholder, director or officer as such, depriving him of his rights, for instance, wrongfully expelling him . . . , are actions which may be brought by shareholders as individuals, . . . , and are not required to be brought as derivative actions.

Id.

a. To the Extent That the Complaint Alleges Wrongs Occurring After They Transferred Ownership of Their Shares of the Corporation, The Plaintiffs Would Have No Standing to Maintain a Derivative Action.

Law

N.J.S.A. 14A:3-6(1) of the New Jersey Business Corporation Act deals with actions by shareholders and expressly provides that:

> No action shall be brought in this State by a shareholder in the right of a domestic or foreign corporation unless the plaintiff was a holder of shares . . . at the time of the transaction of which he complains, or his shares . . . devolved upon him by operation of law from a person who was a holder at such time.

See, also, Rule 4:32-5 (stating that, in a derivative action, the complaint must allege that she was a shareholder at the time of the transaction she complains about).

Application

Here, there is no dispute that neither one of the Plaintiffs any longer own shares in Heartstone. In particular, the original and Amended Complaints both allege that it was after the Plaintiffs transferred ownership in the Company that (they subsequently learned) Heartstone was actually purchased for $500,000. As that action necessarily occurred when the Plaintiffs were no longer shareholders, they would have no standing to pursue a derivative action on behalf of the Corporation. The conveyance of the $500,000 is intimately linked to the Plaintiffs' causes of action. Furthermore, the failure to pay the Plaintiffs their promised monies for work, time, and money invested in the Property occurred *after* they had transferred their shares; and any unjust enrichment or the like on the Defendants' behalf would have occurred upon receipt of the $500,000. Furthermore, the Defendants' failure to abide by the terms of the promises they made did not occur until after the Plaintiffs transferred their shares in the Company. As a result, they were not shareholders at the time of significant, complained-of events underlying the Complaint and Amended Complaint.

Specifically, the allegations of the Plaintiffs' Amended Complaint alleges:

> 31. The Plaintiffs learned that the Property was closed on, and that they were waiting on the economy to change so that units thereon could be constructed.
>
> 33. During the course of litigation, Castellanos received copies of discovery documents pertaining to the lawsuit. At the tie, copies of the sale agreement between Lemon Bay and Heartstone was obtained and it was discovered that Lochiatto had acted as the Seller on behalf of the company; and that the purchase price for the Property was an additional $500,000.
>
> 34. On or about January 28, 2010, a Discharge of Lis Pendens was filed against Heartstone.
>
> 35. After the Property was sold, the Plaintiffs were told that no further work was needed on the Property.
>
> 37. The Plaintiffs never received any monies for the sale of the Property, nor the promised unit thereon.

These allegations make clear that, at the time of at least some of the alleged, the Plaintiffs were no longer shareholders because the conveyance had already occurred. As a result, they would have no standing to bring a derivative action on behalf of Heartstone.

b. The Plaintiffs Could Not Maintain Both a Derivative and Individual Claim Where the Individual Claim Would Be "In Competition" With the Derivative Claim, and Rescission Undermines Their Standing to Sue Derivatively.

It has been said that, where individual and derivative claims are in competition for the same pool of money, derivative action is inappropriate. *See, Eshelman v. Orthoclear Holdings, Inc.*, 2009 WL 506864, 9 (N.D. Cal.)(DeZao Cert., Exhibit F). Furthermore, a request for rescission would eliminate a plaintiff's standing as a shareholder to pursue a derivative claim. *Id*.

Here, the Plaintiffs' individual claims "compete" with any potential derivative claims because the relief sought would come from the same pool of money. But, more

importantly, the request for rescission would undermine any standing they had to bring the action on behalf of the Corporation. As a result, even assuming, *arguendo*, that the claims pled belong to the Corporation – which they do not – the Plaintiffs' individual claims would disqualify them as corporate representatives for purposes of a derivative action.

II. The Defendants' Motion Regarding the Consumer Fraud Act is Premised Upon Their Legal Errors Above.

The Defendants repeat and compound their legal error – that the Plaintiffs' Amended Complaint sounds in a derivative action[4] – that somehow the Plaintiffs were not individually harmed by the allegedly fraudulent actions of the Defendants.[5]

Ignoring this, the Defendants argue only that, on substance, the Consumer Fraud Act should not apply to Lemon Bay; they make no mention of Watts individually, Lochiatto,[6] or Michael (Defendants' Motion, p. 16). Instead, it parenthetically mentions that none of the other Defendants should be liable either. However, this parenthetical reference fails because the Defendants' own Exhibit C lists "Lemon Bay" as purchaser and not any of the other Defendants (Defendants' Exhibit C, p. 10). As such, the Defendants' argument as to any Party other than Lemon Bay is based on an ignorance of the facts on record. As such, the Defendants' request that the Consumer Fraud Act claims – even against non-purchaser Defendants – should be rejected.

III. The Plaintiffs' Claims Based On an Agreement to Get a "Big Unit" Are Not Barred By the Court Order, Parole Evidence Rule, or Statute of Frauds.

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[4] The Defendants' figurative marriage to the argument that the Amended Complaint is really derivative suggests that they did not separately analyze the allegations and claims therein, nor separately research the law distinguishing derivative and individual claims.

[5] The Defendants tellingly fail to explain how or where the Amended Complaint alleges any harm to the Corporation as a result of the Defendants' alleged actions.

[6] Lochiatto, who relies upon the Motion of the remaining Defendants, fails to make any argument of his own as to the inapplicability of the Consumer Fraud Act to himself, and should hence be construed as having waived the argument.

First, the Defendants grossly overstate their position by claiming that the Plaintiffs' claims based on a promise for a "big unit" on the Property are "barred" by the Court's Order (Defendants' Motion, p. 17). However, this claim is impeached by the Defendants' own recitation of the Court's finding: The complaint, "as it is pleaded, does not . . . establish causes of action because of the . . . conflicting allegations between Castellanos, Caccavella and Lochiatto and their agreement [and] how the two big units fit into all that . . . ." (*Id.*). This statement by the Court is a far cry from "barring" the Plaintiffs' allegation that they were promised a unit on the Property in order to induce them to sign the Agreement.

It should also be noted that the moving Defendants' claim that they have "standing" to make an argument supporting dismissal of a claim addressed solely against a Party whom their Counsel does not represent (Defendants' Motion, p. 17, n. 7) is a straw man. Indeed, the cases they cite address the "standing" of a plaintiff to bring a claim, not "standing" of a co-defendant to make a motion to dismiss a claim against a defendant separately represented by counsel. However, *Triffin v. Somerset Valley Bank*, 343 N.J. Super. 73 (App. Div. 2001)(Defendants' Motion, p. 17, n. 7), actually impeaches the Defendants' position because the Appellate Division specifically cited to R. 4:26-1, "which provides that every action may be prosecuted in the name of the real party in interest . . . . ." 343 N.J. Super. at 80, 777 A.2d at 997. Indeed, the court ruled that there "is no distinction between a party in interest and standing in New Jersey." *Id.* Under such language, it is undisputed that the "real party in interest" in the claim against Lochiatto is Lochiatto. Beyond that, *Strulowitz v. Provident Life and Cas. Ins. Co.*, 357 N.J. Super. 454, 815 A.2d 993 (App. Div. 2003)(Defendants' Motion, p. 17, n. 7), does

not address whether a party who is separately represented by counsel has the right to make a substantive motion on behalf of a co-party who is also represented by his own counsel. This issue is not addressed by the "standing" case law the moving Defendants' reply upon.

The Defendants' argument that the Plaintiffs' Amended Complaint was not timely filed (Defendants' Motion, p. 17) is without merit. As set forth in the accompanying Certification of James C. DeZao, the Plaintiffs' Amended Complaint was timely filed on October 28, 2014 (DeZao Cert., ¶11).

In the meantime, the undersigned's office determined that it was essential to determine why the Court dismissed Denise Walsh from the action (*Id*. at ¶12). When it was realized that the attorney formerly working at the office had handled the oral argument, the undersigned immediately ordered the transcript of oral argument (*Id*.).

The transcript was not received until on or about October 29, 2014, one (1) day after the Amended Complaint was filed based upon the terms of the Order (*Id*. at ¶13).

Upon review, it was determined that the Complaint could be further amended in light of some of the comments the Court made on the record of which the undersigned had been unaware when the Amended Complaint was sent for filing on October 28, 2014 (*Id*. at ¶14). Hence, a second Amended Complaint was filed on or about November 3, 2014 (*Id*.).

The Defendants incorrectly argue that the Plaintiffs' Amended Complaint was only and untimely followed on November 3, 2014 (*Id*. at ¶15).

As a result of the above, the Defendants' contention that "dismissal with prejudice on this basis alone [is im]proper" (Defendants' Motion, p. 17).

The Defendants' reasserted argument regarding the Parole Evidence rule (Defendants' Motion, p. 18) is unavailing. The Defendants cite to *Filmlife, Inc. v. Mal "Z" Ena, Inc.,* 251 N.J. Super. 570, 598 A.2d 1234 (App. Div. 1991), which specified that "[e]xtrinsic evidence to prove fraud is admitted because it is not offered to alter or vary express terms of a contract, but rather, to avoid the contract or 'to prosecute a separate predicted upon the fraud.'" *Id*. at 573-74.

Here, the Defendants firstly ignore the Plaintiffs' contention (accepted for true for purposes of this Motion) that they were never presented with a copy of the Agreement (Amended Complaint, ¶25). In light of that fact alone, the Defendants' contention that the contents of that Agreement should act as a bar to alleged oral representations – the only representations the Plaintiffs were presented with – is hallow.

Furthermore, the Agreement as it exists does not contain an Integration clause (*see*, Defendants' Exhibit C). For that reason alone, the parole evidence rule does not apply. *Filmlife, supra*, 251 N.J. Super. at 573, 598 A.2d at 1235 (the "parole evidence rule operates to prohibit the introduction of oral promises to alter or vary an integrated written instrument . . . .")[emphasis added]. Indeed, the limitation to the fraud-exception to the parol evidence rule as cited by the Defendants applies specifically to "the integrated writing . . . ." *Id*. at 574, 1236.

Nor does the allegation that the Defendants promised the Plaintiffs one unit on the Property "vary the contract's terms" (Defendants' Motion, p. 18) that the Plaintiffs were transferring the Property because the Defendants could have elected to convey to them such unit at a later time.

As pointed out in the Plaintiffs' Opposition to their first Motion, in *Schlossman's, Inc. v. Niewinski*, 12 N.J. Super. 500, 79 A.2d 870 (App. Div. 1951), the Appellate Division commented on the admissibility of parole evidence in fraud cases:

> The testimony was not offered here as an addition to the written contract but to avoid the contract in toto on the ground of fraud. The distinction between such representations as add to the contract and such as void the contract, because of their fraudulent character, is firmly established. The admission of parole evidence for the purpose of avoiding a written contract on the ground of fraud is not confined to such testimony as goes to the execution of the contract, for example, to show that a party was lured into making a contract other than that intended, as by the substitution of one contract for another by trickery, or by misreading a contract to an illiterate person. The rule admitting parole evidence extends also to proof of fraudulent misrepresentations as to the subject matter of the contract . . . . Nor, since fraud in the inducement is charged, is the testimony made inadmissible because the contract in suit includes a provision, 'This is our entire agreement, and cannot be changed orally.' . . .

12 N.J. Super. at 506, 79 A.2d at 873.

The Defendants' reliance on the Statute of Frauds fails due to the doctrine of partial performance. "The statute of frauds cannot be invoked to work an injustice." *Bayne v. Johnson*, 403 N.J. Super. 125, 144, 957 A.2d 707, 719 (App. Div. 2008). In *Crowe v. De Gioia*, 203 N.J. Super. 22, 495 A.2d 889 (App. Div. 1985), the defendant challenged an order requiring him to transfer his house to the plaintiff. The defendant asserted that any agreement as to the conveyance of the property was in violation of the State of Frauds. There, because the plaintiff "fully performed her end of the agreement prior to [the defendant]'s assertion of the Statute of Frauds," "the contract w[oul]d be specifically enforced if to do otherwise would work an inequity on the party who has performed." *Id.* at 33-34, 896. *And see, Bayne, supra*, 403 N.J. Super. at 144 (where it "would be a clear injustice to deprive [the plaintiff] of her contribution to the down

payment and proportionate increase in equity of the condominium and also constitute an unjust enrichment to [the defendants]").

As a final note, the Defendants' footnoted-argument that Heartstone should be "joined as an indispensable party" (Defendants' Motion, p. 19, n. 4) is a poor substitute for a proper cross-motion should the Defendants believe such relief appropriate. Indeed, they appear to make this point passively and not seriously "because the claim for specific performance . . . is unequivocally barred by the Statute of Frauds" (ignoring, of course, the aforementioned, well-settled case law) "joinder of Heartstone would be futile" (*Id.*). Though the State of Frauds cannot be utilized to work an injustice upon the Plaintiffs, who fully performed and unjustly enriched them, the Defendants' failure to cross-move is at their peril.

IV. The Defendants Have Made No Argument That the Plaintiffs' Individual Claims (Save Two That They Attack Specifically) Fail to State a Claim Upon Which Relief May Be Granted; And All of Those Claims Are Well-Pled.

Law

In review a complaint dismissed under Rule 4:6-2(e), the court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. *Rieder v. Dept. of Transp.*, 221 N.J. Super. 547, 522, 535 A.2d 512 (App. Div. 1987). However, a reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, ..." *Di Cristofaro v. Laurel Grove Mem. Pk.*, 43 N.J. super. 244, 252, 128 A.2d 281 (App. Div. 1957). For purposes of analysis, the plaintiffs are entitled to every reasonable inference of fact. *Independent Dairy Workers Union v. Milk Drivers Local 680*, 23 N.J. 85, 89, 127 A.2d 869 (1956).

Application

The liberal motion to dismiss standard applies even after courts have granted leave to file an amended pleading. In *DeBenedetto v. Denny's, Inc.,* 421 N.J. Super. 312, 23 A.3d 496 (N.J. Super. L. 2010), the court dismissed the first amended complaint without prejudice to permit filing of an amended pleading. The defendant moved to dismiss the second amended complaint for, again, failure to state a claim.

In analyzing the Motion, the court reviewed the same, applicable standard of review for motions to dismiss for failure to state a claim upon which relief can be granted, despite the fact that it was analyzing the plaintiff's third amended complaint. *Id*. at 317, 498. *Accord, Abrahamsen v. Laurel Gardens Ltd. Partnership*, 276 N.J. Super. 199, 203, 647 A.2d 869 (N.J. Super. L. 1993)(applying same standard to motion to dismiss second amended complaint); *Marinelli v. Mitts & Merrill*, 303 N.J. Super. 61, 64, 696 A.2d 55, 56 (App. Div. 1997)(objection to filing of amended complaint on ground that it fails to state cause of action should be determined by same standard applicable to motion to dismiss for failure to state a claim); *Donato v. Moldow*, 374 N.J. Super. 475, 483 (App. Div. 2005).

The Plaintiffs' Amended Complaint alleges (a) fraud; (b) breach of fiduciary duty; (c) breach of covenant of good faith and fair dealing; (d) equitable fraud; (e) breach of contract; (f) specific performance; (g) unjust enrichment; (h) consumer fraud; (i) rescission; and (j) quantum meruit. The only two claims that the Defendants specifically brief are (f)(specific performance) and (h)(consumer fraud). Tacitly, they have therefore conceded that the remaining claims – examined below – are adequately pled if they belong to the Plaintiffs.

With regard to fraud, the five elements to the cause of action are (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997).

Here, the Plaintiffs Amended Complaint for fraud against Lochiatto[7] alleges that he intentionally misrepresented material facts to the Plaintiffs in that he claimed the Property was being sold for the Plaintiffs' benefit; that they would each get a unit on the Property; that they could and would continue to work as usual on the Property and get paid for doing so in the future as well as for work already performed; and that no monies would be received from the sale. He intended that they rely on these false statements, which the Plaintiffs did to their detriment (Count I).

The Fraud against Watts and Lemon Bay alleges that Watts created and misused Lemon Bay in order to commit a fraud upon the Plaintiffs; that he met them in a parking lot and insisted that the agreement they were signing was accurate and he was not purchasing the Property for any divisible sum of money. The representations were material and false, intended for the Plaintiffs to rely on them, which they did to their detriment (Count II).

The Fraud claim against Michael alleges that he met the Plaintiffs in a parking lot and insisted that they sign the agreement; that Michael was working with Watta and knew

[7] The Defendants not only fail to specifically attack the fraud claims in the Amended Complaint, but fail to do so on behalf of Lochiatto, whose counsel did not brief any arguments for purposes of the Motion. As such, the Defendants have not challenged the adequacy of the Plaintiffs' fraud claims in their Motion. Instead, their Motion relies on attacking these causes of action (aside from the Consumer Fraud and Specific Performance claims, which the Defendants specifically briefed) solely by virtue of the claim that they belong to the Corporation. If the Court determines that such argument fails, then the Defendants have left untouched any argument that the counts outside of Consumer Fraud and Specific Performance are not adequately pled.

the plan was to get the Plaintiffs to sign over their interest in the Property to him so that Watts could turn a profit; that he falsely represented that there would be no value given for the Property; and that he made such false statements with the intention that the Plaintiffs rely on them, which they did to their detriment.

A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. *WIT Holding Corp. v. Klein*, 724 N.Y.S.2d 66, 68 (App. Div. 2001). Here, none of the Defendants specifically attack the Plaintiffs' claim for Breach of Fiduciary Duty against Lochiatto, which alleges that Lochiatto owed the Plaintiffs a fiduciary duty by virtue ofhis business relationship with them; that the Plaintiffs placed trust and confidence in him, who was in a superior or dominant position; that Lochiatto was under a duty to act for or give advice for the benefit of the Plaintiffs regarding the Property; and that he breached that duty by inducing them to enter into a contract that was contrary to their interests so that he could benefit without their knowledge. As a result, the Plaintiffs were injured (Count IV). There has been no argument whatever that these allegations fail to state a cause of action for breach of a fiduciary duty.

New Jersey courts have long recognized that there is an implied covenant of good faith and fair dealing in every contract. *Onderdonk v. Presbyterian Homes of N.J.*, 85 N.J. 171, 182, 425 A.2d 1057 (1981). Here, again, none of the Defendants argues that the Plaintiffs have not adequately pled a Breach of Covenant of Good Faith and Fair Dealing Claim against Lochiatto. Count V alleges that he breached that covenant under the terms of the partnership he had with the Plaintiffs; that his objectives were to prevent the Plaintiffs from receiving their benefits under the purchase and sale agreement; that his

actions included arranging with Watts to receive proceeds from the sale that were not revealed to the Plaintiffs; and that he did so in willful disregard of the Plaintiffs' rights. There has been no contention that this claim is not adequately pled.

An equitable fraud claim differs from common law fraud in that the knowledge of the falsity and intention to obtain an undue advantage are not essential. *Jewish Ctr. Of Sussex Cnty. v. Whale*, 86 N.J. 619, 625 (1981). Here, again, there has been no argument by any Defendant that the Equitable Fraud claim against Lochiatto fails. The claim largely states the same allegations as in the Fraud count against Lochiatto, but indicates that he either knew or should have known that the statements he made to the Plaintiffs were false. Count VI is adequately pled.

No Defendant argues that the Plaintiffs' Breach of Contract claim against Lochiatto fails. Even divorcing from the allegations the "one large lot" promise that the Defendants challenge, none has addressed the promises that the Plaintiffs (not Heartstone) would be paid for the work and money they invested into the Property. Nor has any of the Defendants claimed that any of the allegations in Count VII fail to state a claim for Breach of Contract. *See, Murphy v. Implicito*, 392 N.J. Super. 245, 265, 920 A.2d 678, 689 (App. Div. 2007)(setting forth elements of breach of contract).

There has been no argument that the Unjust Enrichment claim (Count 9) is inadequately pled. It alleges that Watts/Lemon Bay received a benefit under the agreement entered into with the Plaintiffs; and further benefit by virtue of the Plaintiffs' investment of time/money/work into the Property; and that retention of such benefits without payment to the Plaintiffs would be unjust. Count 9 is adequately pled. *See, VRG*

Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994)(setting forth elements of unjust enrichment).

The Unjust Enrichment claim against Lochiatto (Count 10) is also adequately pled. It alleges that Lochiatto received a benefit under the agreement with Watts/Lemony Bay that included money belonging to the Plaintiffs; and that he further benefited from the time/investment/money the Plaintiffs put into the Property; and that retention of the benefits without payment would be unjust.

The Unjust Enrichment claim against Michael (Count 11) also alleges that Michael received a benefit under the Agreement between the Plaintiffs and Watts that included benefits rightfully owing the Plaintiffs; and that retention of the benefit without payment would be unjust.

Count 14 alleges Rescission, which none of the Defendants address in their Motion. It adequately alleges that the Plaintiffs would not have entered into the Agreement absent fraud; that the Defendants gained an unfair advantage by virtue of a fraudulent misrepresentation; that monetary damages alone will not satisfy the injury the Plaintiffs sustained; and that restoring the Plaintiffs to the *status quo ante* would remedy the wrong they suffered. This claim is adequately pled. *See, United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 483 A.2d 821 (App. Div. 1984)(setting forth elements of rescission).

Finally, none of the Defendants contend that Count 16, Quantum Meruit as to Lochiatto, is inadequately pled. Specifically, it alleges that the Plaintiffs conferred a benefit upon him by virtue of their investment into and work on the Property; that the Plaintiffs are entitled to recovery to compensate them; that it would be inequitable to

permit Lochiatto to retain the benefit conferred without payment; that the Plaintiffs tendered services that were accepted by Lochiatto, who was aware that the Plaintiffs expected to be paid. This Count is properly pled. *See, Kas Oriental Rugs, Inc. v. Ellman*, 394 N.J. Super. 278, 286, 926 A.2d 387 (App. Div.)(setting forth elements of quantum meruit).

As the Consumer Fraud and Specific Performance claims were specifically addressed by the Defendants' Motion, the Plaintiffs need not restate why they believe that both actions are proper.

In sum, the Plaintiffs' Amended Complaint adequately alleges causes of action against the Defendants as formulated to, at minimum, state a claim upon which relief may be granted.

V. In The Event The Court Deems The Plaintiffs' Amended Complaint Inadequate, They Respectfully Request Leave to Amend It to Bring It in Specific Conformance With the Court's Request.

Finally, in the event that the Court deems the Plaintiffs' Complaint deficient, it is respectfully requested that they be granted leave to file yet another Amended Complaint in accord with the Court's request.[8] *See, e.g., Marinelli v. Mitts & Merrill,* 303 N.J. Super. 61, 696 A.2d 55 (App. Div. 1997)(trial court abused its discretion in denying plaintiffs' motion for leave to file third amended complaint though case had been initiated three years earlier); *Mears v. Sandoz Pharmaceuticals, Inc.,* 300 N.J. Super. 622, 693 A.2d 558 (App. Div. 1997)(granting leave to file third and fourth amended complaints).

[8] Because the undersigned is unsure of how to further amend the Complaint (*see*, DeZao Cert,, ¶¶17-18), no proposed amended pleading can be offered at this time.

In *Ayala v. New Jersey Dept. of Law and Public Safety, Div. of State Police*, 2011 WL 5041395 (App. Div.)(DeZao Cert., Exhibit E), the defendants filed a motion to dismiss the plaintiffs' third amended complaint. The court granted the defendants' motion and allowed the plaintiffs to file a more definitive fourth amended complaint. The plaintiffs filed a fourth amended complaint, in response to which the defendants filed another motion to dismiss. That motion was granted, but the court dismissed the plaintiffs' fourth amended complaint without prejudice for failure to state a claim upon which relief could be granted. The court declined to allow the fifth amended complaint because it reflected that the plaintiffs were unable to plead a cause of action.

In *Sykes v. Meyler*, 453 F.Supp.2d 936 (E.D. Va. 2006), the court granted the defendants 12(b)(6) motion and gave the plaintiff shareholders leave to amend, explaining the difference between a direct and derivative action. The plaintiffs' amended complaint alleged a direct action, but the court again cautioned about the difference between a direct and derivative action and granted the defendants' 12(b)(6) motion. The court gave the plaintiffs one last opportunity to either assert a derivative claim or allege individual injury. There, in granting the motion with prejudice, the court noted that the plaintiffs could not bring the claims individually where they accused the board of failing to prevent absconding with software, to raise additional capital from keeping the corporation from going out of business, and failing to manage in a businesslike manner. *Id*. at 941.

Conclusion

For the reasons set forth above, the Defendants' Motion to Dismiss should be denied.