Perez v Tedesco
2014 NY Slip Op 31831(U)
July 7, 2014
Supreme Court, Suffolk County
Docket Number: 63193/2013
Judge: Thomas F. Whelan
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SHORT FORM ORD ER

INDEX No. 63193-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/22/14
SUBMIT DATE: 6/6/14
Mot. Seq. # 001 - Mot D
Preliminary Conf: 8/22/14
CDISP: No

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ALBERT PEREZ, individually and derivatively on behalf of TOTAL COMPUTER SOFTWARE, LLC

Plaintiffs

-against-

VINCENT TEDESCO, TOTAL COMPUTER SYSTEMS, LTD d/b/a TOTAL COMPUTER GROUP, TOTAL COMPUTER GROUP, LLC, TOTAL COMPUTERS, LTD. and JOHN DOE CORPORATION,

Defendants.

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Upon the following papers numbered 1 to 6 read on this motion by the defendants to CPLR 7102 ____ Order To Show Cause/Notice of Motion and supporting papers: 1 - 3 ; Notice of Cross Motion and supporting papers ____; Answering papers 4-5 ; Reply papers 6 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the defendants for dismissal of certain of the causes of action advanced in the plaintiff's amended complaint is considered under CPLR 3211(a) and is granted to the extent set forth below; and it is further

ORDERED that a preliminary conference shall be held in this action on Friday, **August 22, 2014**, at 9:30 a.m. in Part 45 at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

This action was commenced by plaintiff Perez to recover, derivatively on behalf of Total Computer Software, LLC, and individually on his own behalf, damages allegedly incurred by them due to the breaches of contract and other duties imposed by law upon the individual defendant, Vincent Tedesco, and the corporate defendants which he owns, manages, directs and/or controls. The

plaintiff, Total Computer Software, LLC [hereinafter "Software"] was formed by plaintiff Perez and defendant Tedesco in 2003 and is owned by them and defendant Total Computer Systems, LTD d/b/a/ Total Computer Group [hereinafter "TCG"] in the following percentages: Perez - 42%; Tedesco - 38%; TCG - 20%. The amended complaint contains eight derivative causes of action on behalf of plaintiff Software and nine causes of action on behalf of plaintiff Perez, in his individual capacity. Defendant Tedesco is charged with misappropriating, wasting and converting millions of dollars in funds and other assets of Software and distributing them to himself and his co-defendant corporations and their employees.

The plaintiff, Software, ceased operations in June of 2012 upon its sale to a non-party corporation known as Tiburon, to which sale, the three members of Software agreed. The purchase price of $13,000,000.00 was payable as follows; $4,000,000.00 at closing; four million over three years at various installments beginning in June of 2013 and the remaining $5,000,000.00 in the form of an "earn-out". Following Tiburon's payment of the $500,000.00 installment due in June of 2013, plaintiff Perez demanded and received certain limited accountings of the distribution of the proceeds of such installment and of the one made in August of 2013. Precipitating such demand was Perez's concern of non-receipt of his fair share of such payments, and his complaints about not being paid compensation he previously deferred and the pay back of loans he made to Software. This action was commenced after discussions between the parties broke down without a resolution of plaintiff Perez's claims in this regard.

By the instant motion, which is comprised of the affirmation of defense counsel with the pleadings attached and a memorandum of law, the defendants seek dismissal of the first eight causes of action, all of which are advanced as derivative claims on behalf of Software and the dismissal of all but three of the plaintiff Perez's individual claims. The grounds advanced are legal insufficiency pursuant to CPLR 3211(a)(7) and a lack of capacity or standing pursuant to CPLR 3211(a)(3). The plaintiffs oppose by submission of an affidavit of plaintiff Perez to which there are attached evidentiary submissions and a memorandum of law by counsel. The defendants reply by way of a memorandum of law. For the reasons stated below, the motion is granted to the extent ser forth below.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Leon v Martinez***, 84 NY2d 83, 87–88, 614 NYS2d 972 [1994]; ***Minovici v Belkin BV***, 109 AD3d 520, 971 NYS2d 10 [2d Dept 2013]; ***Rabos v R & R Bagels & Bakery, Inc.***, 100 AD3d 849, 851, 955 NYS2d 109 [2d Dept 2012]). In making this determination, the court may consider any factual submissions offered in opposition to a motion to dismiss a pleading in order to remedy pleading defects (*see* ***Quinones v Schaap***, 91 AD3d 739, 740, 937 NYS2d 262; ***Daub v Future Tech Enter., Inc.***, 65 AD3d 1004,885 NYS2d 115 [2d Dept 2009]). Nevertheless, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (***Minovici v Belkin BV***, 109 AD3d 520, *supra*, *quoting* ***Parola, Gross & Marino, P.C. v Susskind***, 43 AD3d 1020, 1021–1022, 843 NYS2d 104 [2d Dept 2007]; *see* ***Daub v Future Tech Enter., Inc.***,

65 AD3d 1004, *supra*). Here, the defendants submitted no evidentiary materials while the plaintiff included some in their opposing papers. These submissions shall thus be considered only to remedy any pleading defects.

By statutory mandate, a shareholder may not institute a derivative action unless the complaint "set[s] forth with particularity," the shareholder's efforts to secure the initiation of that action by the board of directors, or sets forth sufficient and particular reasons for not making such efforts (*see* Business Corporation Law § 626[c]). This pre-suit demand is also required in a derivative action commenced by a member of a limited liability company (*see* ***Najjar Group, LLC v West 56th Hotel LLC***, 110 AD3d 638, 974 NYS2d 58 [1st Dept 2013]; ***Segal v Cooper***, 49 AD3d 467, 468, 856 NYS2d 12 [1st Dept 2008]). Compliance with the demand requirement may be excused as futile under the following circumstances: (1) when the complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction, which may be based on self-interest in the transaction or a loss of independence because a director with no direct interest in the transaction is controlled by a self-interested director; (2) when the complaint alleges with particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances; and (3) when the complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors (*see* ***Bansbach v Zinn***, 1 NY3d 1, 9, 769 NYS2d 175 [2003]; ***Marx v Akers***, 88 NY2d at 194, 644 NYS2d 121 [1996]).

"To adequately plead self-interest, the complaint must set forth facts alleging that the directors 'receive[d] a direct financial benefit from the transaction which is different from the benefit to shareholders generally'" (***Walsh v Wwebnet, Inc.***, 116 AD3d 845, 984 NYS2d 100 [2d Dept 2014], *quoting* ***Marx v Akers***, 88 NY2d at 202, *supra*; ***Yudell v Gilbert***, 99 AD3d 108, 949 NYS2d 380 [1st Dept 2012]). Particularity is likewise required when the plaintiff relies upon either of the other two futility exceptions to the demand requirement (*see* ***Walsh v Wwebnet, Inc.***, 116 AD3d 845, *supra*). While the recovery in a derivative suit inures to the benefit of the corporation and if successful, will enrich the very wrongdoers who occasioned the losses sued upon to the extent they are shareholders or members of the company, that fact alone is insufficient to excuse compliance with the demand requirement (*see* ***Glenn v Hoteltron Sys., Inc.***, 74 NY2d 386, 547 NYS2d 816 [1986]).

Here, the amended complaint contains the following allegations as to futility: "It would be futile to make any demand on Tedesco or Software for the derivative claims set forth herein because Tedesco has utilized and abused Software for years, using it as his own personal bank. Further it is futile to demand that the Defendants sue themselves for their own wrongdoing. In light of the foregoing, Plaintiff is excused from making a demand for action upon Software prior to commencing this action". In addition to these allegations, the amended complaint contains allegations of instances of Tedesco's engagement in wrongful acts of self-dealing, conversion, misappropriation of corporate assets and opportunities and other defalcations including breaches of fiduciary duties which allegedly benefitted him, defendant TCG, the third and sole corporate owner of Software, and the other named defendants. While the amended complaint alleges in conclusory fashion that Tedesco dominated and controlled, TCG, and that assets belonging to Software were improperly used to pay expenses of TCG,

including sums owing to its employees, and to pay the other defendants prior to Software's sale to Tuburon, the amended complaint contains specific allegations that TCG received nearly all of the $500,000.00 first installment of the purchase price paid by Tuburon in June of 2013 and later shared with the other defendants in a portions of the second installment paid by Tuboron in August of 2013.

Upon its reading of the amended complaint as a whole, and after crediting the allegations as true, the court finds that the plaintiff adequately advanced facts necessary to satisfy the criteria for avoiding the pre-action demand that is a condition precedent to the prosecution of derivative claims on behalf of the plaintiff, Software (*see* ***Hu v Ziming Shen***, 57 AD3d 616, 870 NYS2d 373 [2d Dept 2008]). The defendants' demands for dismissal of all eight of the derivative causes of action pursuant to CPLR 3211(a)(3) due to an insufficient pleading of demand futility is thus rejected.

The defendants next contend that the amended complaint should be dismissed in its entirety with respect to the non-member defendants, Total Computers, Group, LLC and Total Computer Group, LTD [hereinafter "non-member defendants"] due to the absence of any allegations of wrongful or otherwise actionable conduct on their part. With this contention the court agrees, except with respect to the claims of unjust enrichment which are set forth derivatively, as the Sixth cause of action, and individually, on behalf of plaintiff Perez, as the Thirteenth cause of action. Viable claims for unjust enrichment do not require allegations of wrongdoing on the part of a defendant who was allegedly unjustly enriched. Instead, such claims merely require evidence that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 182, 919 NYS2d 465 [2011]; ***Mobarak v Mowad***, 117 AD3d 998, 986 NYS2d 539 [2d Dept 2014]). Discernable from a liberal reading of the amended complaint at issue here are allegations that these two last named corporate defendants did enjoy benefits improperly bestowed upon them by actions undertaken by the defendant member/owners of Software, namely Tedesco and TCG. However, with respect to the remaining claims against these defendants, the court agrees with the defendants that the absence of allegations of wrongdoing, threatened harm to the plaintiff and the absence of viable demands for recovery of damages from the the non-member defendants warrant a dismissal of such claims. Those portions of the defendants' motion wherein they seek dismissal of all claims against the non-member defendants who are listed last in the caption is thus granted, except as to the Sixth and Thirteenth causes of action, sounding in unjust enrichment.

Also granted are those portions of the defendants' motion wherein they seek dismissal of the First cause of action set forth in the complaint in which Software claims it is a third party beneficiary of its own Operating Agreement and as such seeks damages from Tedesco and TCG by reason of their breach thereof. The court agrees with the defendants that this claim is one to vindicate plaintiff's Perez's personal contractual rights and as such, is unsuitable for assertion as a derivative claim (*see* ***Glenn v Hoteltron Sys., Inc.***, 74 NY2d 386, *supra*). The defendants' reliance upon ***Bischoff v Boar's Head Provisions Co., Inc.***, (38 AD3d 440, 834 NYS2d 22 [1st Dept 2007]) is misplaced as the breach of the Operating Agreement of the limited liability company at issue in that hybrid derivative and personal rights action was asserted personally by the plaintiff member (*see* 2007 WL 2778049; Appellate Brief for Plaintiff-Respondent).

The court disagrees with the defendants' contention that the plaintiffs' derivative Fourth cause of action, which sounds in conversion, is legally insufficient. Where, as here, the plaintiff suing derivatively alleges his or her fellow shareholders or members of limited liability company misappropriated monies in corporate accounts or that its assets or the proceeds from a sale thereof were diverted to others, a claim for conversion lies on behalf of the company (*see* ***Gordon v Credno***, 102 AD3d 584, 960 NYS2d 360 [1st Dept 2013]; ***Elenson v Wax***, 215 AD2d 429, 626 NYS2d 531 [2d Dept 1995]). The derivative claim for an accounting of Software's assets both prior to and after its sale which is advanced in the Fourth cause of action is likewise found to be legally sufficient (*see* ***Beradi v Beradi***, 108 AD3d 406, 969 NYS2d 444 [1st Dept 2013]).

The defendants' demands for dismissal of the Second cause of action sounding in a derivative claim of breach of fiduciary duties is denied. While there is established precedent providing that where the allegations in a complaint confuse a shareholder's derivative rights with individual rights is subject to a dismissal, the Second cause of action here is properly brought derivatively by plaintiff Perez on behalf of Software. The allegations of fiduciary defalcations by Tedesco and TCG include claims that the property, assets and business opportunities of Software were misapplied, mismanaged, wasted or diverted to others having no rights therein or thereto and that such conduct caused to Software suffer damages in amounts not less than the value of the misappropriated and diverted assets. That such claims of mismanagement and diversion are derivative in nature is clear (*see* ***Abrams v Donati***, 66 NY2d 951, 498 NYS2d 782 [1985]; *see also* ***Yudell v Gilbert***, 99 AD3d 108, *supra*). While some breaches of fiduciary duties give rise only to derivative claims (*see* ***Hahn v Stewart***, 5 AD3d 285, 773 NYS2d 297 [1st Dept 2004]), in some cases both derivative and direct claims for breach of fiduciary duties may be maintained by a shareholder or company member (*see* ***Gjuraj v Uplift Elevator Corp***., 110 AD3d 540, 973 NYS2d 172 [1st Dept 2013]). The Second cause of action sounding in a derivative claim for Software's recovery of damages by reasons of Tedesco and TCG is thus found to be legally sufficient and the defendants' demands for dismissal thereof are denied.

Rejected as unmeritorious are the defendants' demands for dismissal of the plaintiffs' derivative and direct conversion claims (Second and Twelfth causes of action) on the grounds that they are duplicative of the plaintiffs' derivative and direct breach of contract claims. The derivtive breach of contract has itself been dismissed thereby nulifying the claim that the deravitive Second cause of action is duplicative of the First casue of action. With respect to contention that the Twelfth cause of action is duplicative of the direct breach of contract claim, the court finds that it is not duplicative thereof. It is well settled that the same conduct which constitutes a breach of a contractual obligation may also constitute the breach of a duty arising out of the contract relationship which is independent of the contract itself (*see* ***Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp***., 64 AD3d 85, 878 NYS2d 97 [2d Dept 2009]; ***Bank of N.Y. v Skrelja***, 227 AD2d 372, 372, 642 NYS2d 84 [2d Dept 1996]). Where it does, "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract" (***North Shore Bottling Co. v Schmidt & Sons***, 22 NY2d 171, 179 [1968]; *see* ***Sommer v Federal Signal Corp***., 79 NY2d 540, 551 [1992]; ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389 [1987]; ***Rich v New York Cent. & Hudson Riv. R.R. Co.***, 87 NY 382, 398 [1882]). Here, the Twelfth cause of

action contains allegations of wrongful conduct that charge Tedesco and TCG with wrongs independent of the purported breaches of the operating agreement that form the basis of Perez's individual claim (cause Ninth) for breach thereof. Dismissal of the Second and the Twelfth causes of action against Tedesco and TCG on grounds of duplication is thus denied.

Likewise rejected are the defendants' claims that the derivative waste claim advanced in the Fifth cause of action is duplicative of the derivative breach of contract claim. As indicated above, the First cause of action sounding in breach of contract asserted derivatively on behalf of Software has been dismissed. Such dismissal interdicts all demands for dismissal of the waste claim or any others on duplicative grounds. For the same reasons, the defendants' demand for dismissal of the derivative claim sounding in unjust enrichment that is advanced in the Sixth cause of action is thus denied. With respect to plaintiff Perez's individual claim sounding in unjust enrichment that is set forth in the Thirteenth cause of action, the court finds that the defendants failed to demonstrate that it should be dismissed since the damages sought are limited to events arising from the same subject matter that is governed by an enforceable contract (*see* ***Sebastian Holdings, Inc. v Deutsche Bank AG***, 78 AD3d 446, 912 NYS2d 13 [1st Dept 2010]; ***Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.***, 64 AD3d 85, 112–115, 878 NYS2d 97 [2d Dept 2009]). The Fifth, Sixth and Thirteenth causes of action to the extent asserted against defendants Tedesco and TCG are thus sustained as legally sufficient.

The defendants next contend that plaintiff Perez's individual fraud in the inducement claim advanced against defendant Tedesco, alone, in the Fifteenth cause of action and said plaintiff's common law fraud claim that is the subject of his Sixteenth cause of action against Tedesco and TCG are subject to dismissal on various grounds. For the reasons stated below, the Fifteenth and Sixteenth causes of action are dismissed as legally insufficient.

The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation and damages" (***Fromowitz v W. Park Assoc., Inc.***, 106 AD3d 950, 965 NYS2d 597 [2d Dept 2013]; *quoting*, ***Introna v Huntington Learning Ctrs., Inc.***, 78 AD3d 896, 898, 911 NYS2d 442 [2d Dept 2010]; *see* ***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, 559, 883 NYS2d 147 [2009]; ***County of Suffolk v Long Is. Power Auth.***, 100 AD3d 944, 954 NYS2d 619 [2d Dept 2012]). Where the facts allegedly misrepresented are not matters peculiarly within the knowledge of the presenter of such facts and the claimant has the means to discover the true nature of the transaction by the exercise of ordinary intelligence and fails to make use of those means, he or she cannot claim justifiable reliance on misrepresentations of his adversary (*see* ***Danann Realty Corp. v Harris***, 5 NY2d 317, 320–321, 184 NYS2d 599 [1959]; ***DiBuono v Abbey, LLC***, 95 AD3d 1062, 944 NYS2d 280 [2d Dept 2012]; ***Urstadt Biddle Prop., Inc. v Excelsior***, 65 AD3d 1135, 885 NYS2d 510 [2d Dept 2009]).

A cause of action to recover damages for fraudulent concealment requires, in addition to allegations of scienter, reliance, and damages, an allegation that the defendant had a duty to disclose

material information and that it failed to do so (*see* ***Sutton v Hafner Valuation Group, Inc.***, 115 AD3d 1039, 982 NYS2d 185, [3d Dept 2014] [*While an omission or concealment can constitute fraud, it is actionable only where the defendant had a duty to disclose the material fact alleged to be omitted or concealed*]; *see also* ***Manti's Transp., Inc. v C.T. Lines, Inc.***, 68 AD3d 937, 940, 892 NYS2d 432 [2d Dept 2009]). Such a duty arises where a fiduciary or confidential relationship between the parties exists (*see* ***Barrett v Freifeld***, 64 AD3d 736, 738, 883 NYS2d 305 [2009]).

Where a cause of action is based on a misrepresentation or fraudulent concealment, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]; *see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***High Tides, LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]). The purpose of this pleading requirement "is to inform a defendant of the complained-of incidents" (***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, *supra*; *see* ***Quinones v Schaap***, 91 AD3d 739, 937 NYS2d 262 [2d Dept 2012]; ***Scott v Fields***, 85 AD3d 756, 925 NYS2d 135 [2d Dept 2011]). A cause of action alleging fraud must thus be pleaded with the requisite particularity imposed by CPLR 3016(b). General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim (*see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 318, 639 NYS2d 283 [1995]; ***Dune Deck Owners Corp. v Liggett***, 85 AD3d 1093, 927 NYS2d 125 [2d Dept 2011]). This result is derived from the general rule that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct (*see* ***Cerabono v Price***, 7 AD3d 479, 775 NYS2d 585 [2d Dept 2004]; ***Brown v Lockwood***, 76 AD2d 721, 731, 432 NYS2d 186 [2d Dept 1980]).

Here, Perez alleges in his Sixteenth cause of action that Tedesco and TCG misrepresented the true state of the assets and liabilities of Software and made representations of current facts regarding Software's ability to pay Perez all monies owing from Software to Perez for loans he advanced and for compensation he deferred. The allegations are non-specific in as much as they provide no details of the misstatements or misrepresentations made to Perez by either Tedesco or TCG or any time and place when spoken or otherwise communicated. The court thus finds that the allegations set forth in the Sixteenth cause of action in which Tedesco and TCG are charge with common law fraud do not comport with the specificity requirements of CPLR 3016(b) (*see* ***Scott v Fields***, 85 AD3d 756, *supra*).

In addition to their non-specific nature, the allegations of the Sixteenth cause of action assert misstatements that are futuristic and/or promissory in nature which makes them non-actionable on this separate ground. Finally, there are insufficient allegations of justifiable reliance as there are no allegations that Perez had no means of acquiring the true state of the financial circumstances at the time any of the alleged misrepresentations were made by the member defendants. Accordingly, the Sixteenth cause of action in which Perez asserts a personal claim sounding in common law fraud against the member defendants is dismissed due to legal insufficiency.

Likewise dismissed is the Fifteenth cause of action wherein plaintiff Perez seeks recovery of damages from Tedesco by reason of his acts of fraudulent inducement and concealment upon which

Perez allegedly relied when he agreed to the sale of Software to Tiburon in June of 2012. This claim is premised upon the following allegations; "Tedesco, as day-to-day manager of Software, was obligated to report to members regarding the financial status of Software and to act in good faith. Prior to the sale to Tiburon in June of 2102, Tedesco represented to Perez that he would receive his pro rata share of the $8 million in cash and $5 million in earnouts received by Software in connection with that sale. Tedesco failed to notify Perez of the extensive debt that defendants claim is crippling Software. Tedesco never intended to honor or to be bound by the representations that he made to Perez. Upon information and belief, said representations and promises were false when made and Tedesco knew that said representations and promises were false. Tedesco also remained silent when he had the obligation to disclose". Continuing, Perez alleges that Tedesco "furnished misleading spreadsheets of alleged disbursements that contain omissions, errors and false and fraudulent statements. The false and fraudulent spread sheets were designed for the purposes of convincing Perez to acquiesce to the Tiburon sale". Perez goes on to allege that the he "reasonably relied upon these misrepresentation, promises and material omissions" and "has suffered a substantial loss, damage, injury and detriment as a result thereof."

These allegations lack the specificity required by CPLR 3016(b) for the assertion of legally sufficient claims sounding in fraud in the inducement or fraudulent concealment that are outlined above. These omissions were not remedied by the plaintiffs' evidentiary submission in opposition to this motion since the post-sale accountings furnished by Tedesco and TCG upon Perez's post-sale demand cannot serve to establish inducement for Perez's acquiescence in the previously completed sale of Software to Tiburon that closed in June of 2012. The attached bank statements, e-emails and other submissions do not establish Tedesco's fraudulent concealment of the financial status of Software or concealment of improper payouts by Software to the defendants. In addition, both of these claims are duplicative of the Perez's personal breach of contract claim which rests upon the Operating Agreement signed by Tedesco, TCG for which Perez is seeking damages for its breach and the plaintiffs' claims for breach of fiduciary duties against the member defendants. For these reasons, the court dismisses the Fifteenth cause of action sounding in fraudulent inducement and fraudulent concealment for legal insufficiency.

Also dismissed are the plaintiffs' derivative and direct claims for preliminary injunctive relief that are advanced in the Seventh and Fourteenth causes of action, as no claim for such relief lies under CPLR Article 63 or otherwise. The deficiencies were not remedied by a demand for permanent injunctive relief that is set forth in the wherefore clause. Likewise dismissed are the plaintiffs' pleaded demands for punitive damages, which are advanced in causes Fourth, Fifth, Sixth, Twelfth, as the conduct complained of does not give rise to a viable claim for recovery of punitive damages (*see* ***Rocanova v Equitable Life Assur. Soc. of U.S.***, 83 NY2d 603, 612 NYS2d 339 [1994]; ***Prozeralik v Capital Cities Communications***, 82 NY2d 466, 479, 605 NYS2d 218 [1993]; *cf.*, ***Stein v McDowell***, 74 AD3d 1323, 905 NYS2d 242 [2d Dept 2010]). The demands for punitive damages advanced in these causes of action are thus dismissed.

Finally, the court finds that the Seventeenth Cause of action in which Perez advances an individual claim against Tedesco and TCG to recover damages by reason of their purported violations

of the Limited Liability Company Law at §§ 504 and 704 and of the Partnership Law at § 121-604 is legally insufficient. These latter two statutes relate to the winding up of the affairs of a limited liability company or partnership and have no application here, while LLCL § 504 merely provides an LLC with a default operating agreement that is applicable only when the LLC's operating agreement doesn't govern the subject matter or is non-existent (*see* McKinney's Cons. Laws of N.Y., Book 32/32A, Limited Liability Company Law; Practice Commentaries, Preface, 1, Background, A, General, Bruce A. Rich). The plaintiff's claims for breach of the distributions contemplated by LLCL § 504 do not appear to support a claim for the recovery of damages by a member under the circumstances of this action. The plaintiffs reliance upon non controlling case authorities are unavailing. Perez's individual claim for damages that is asserted in the Seventeenth cause of action is thus dismissed for legal insufficiency.

In view of the foregoing, this motion (#001) by the defendants for dismissal for certain of the causes of action advanced in the amended complaint is granted to the following extent: the First, Seventh, Fourteenth, Fifteenth, Sixteenth and Seventeenth are dismissed for legal insufficiency as are all causes of action asserted against the non-member defendants, Total Computers, Group, LLC and Total Computer Group, LTD, except the Sixth and the Thirteenth each of which sound in unjust enrichment. In addition, those portions of the plaintiffs' Fourth, Fifth, Sixth, and Twelfth wherein they demand punitive damages are dismissed as legally insufficient. Finally, the court notes that the plaintiffs' Eighth cause of action in which they demand the appointment of a temporary receiver for Software has been withdrawn. The preliminary conference scheduled above shall thus be limited to the surviving claims and the court expects that issue shall have been joined with respect thereto prior to the conference date.

Dated: July 7 2014

THOMAS F. WHELAN, J.S.C.