S

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

SALVATORE BONAVITA, MARIO BONAVITA, RALPH BONAVITA, GLEN SANSONE, DANIELA SANSONE, VINCENT BONAVITA, FRANCESCA DIPUPPO, and SALVATORE M. BONAVITA, individually, and derivatively on behalf of SAVENERGY INC., as successor-in-interest of World Wide Savenergy Inc.,

Plaintiffs,

-against-

SAVENERGY HOLDINGS, INC., SAVENERGY INC., as successor–in-interest of World Wide Savenergy Inc., JOHN HYUNG CHOI, in his individual capacity, and as an officer, director and stockholder of Savenergy Holdings, Inc. and Savenergy Inc., CHRISTINE CHUNG CHOI, in her individual capacity, and as an officer, director and stockholder of Savenergy Holdings, Inc. and Savenergy Inc., MICHAEL COREY, in his individual capacity and as an officer, director and stockholder of Savenergy, Inc. and Savenergy Holdings Inc., ALICE KATHERINE COREY, in her individual capacity and as an officer, director and stockholder of Savenergy Holdings, Inc. and Savenergy, Inc., IRA FISCHER GROSS, in his individual capacity, and as an officer, director and stockholder of Savenergy Holdings, Inc. and Savenergy, Inc., DONALD GROSS, "JOHN DOE 1-10," and "JANE DOE 1-10", said names being fictitious, it being the intention of plaintiffs to designate as defendants any and all officers, stockholders and board members of SAVENERGY HOLDINGS, INC. and SAVENERGY, INC., whose identities at present are unknown to plaintiffs,

Defendants.

----------x

TRIAL/IAS PART: 15

NASSAU COUNTY

Index No. 603891-13
Motion Seq. Nos. 1 and 2
Submission Date: 10/9/14

Papers Read on these Motions:

Notice of Motion, Affirmation in Support and Exhibit.....x
Memorandum of Law in Support.....x
Verified Amended Complaint and Exhibits.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law.....x
Notice of Motion.....x
Affirmation in Support and Exhibit.....x
Memorandum of Law in Support.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law in Support.....x

This matter is before the court on 1) the motion filed by Defendants Savenergy Holdings, Inc., Savenergy Inc., John Hyung Choi, Christine Chung Choi, Michael Corey and Alice Katherine Corey ("Savenergy Defendants") on April 1, 2014 and 2) the motion filed by Defendants Ira Fischer Gross and Donald Gross ("Gross Defendants") on April 1, 2014, both of which were submitted on October 9, 2014, following oral argument before the Court.

BACKGROUND

A. Relief Sought

The Savenergy Defendants move for an Order pursuant to CPLR §§ 3211(a)(2), (3) and (7), dismissing Counts I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the Verified Amended Complaint ("Amended Complaint") [1] and dismissing this action on the grounds that the Court does not have jurisdiction of the subject matter of the cause of action, Plaintiffs do not have legal capacity to sue and the pleading fails to state a cause of action.

The Gross Defendants move for an Order 1) pursuant to CPLR §§ 3211(a)(3) and (7), dismissing each cause of action alleged against Defendant Ira Fischer Gross, with prejudice; and 2) pursuant to CPLR §§ 3211(a)(3) and (7), dismissing each cause of action alleged against Defendant Donald Gross, with prejudice.

Plaintiffs Salvatore Bonavita, Mario Bonavita, Ralph Bonavita, Glen Sansone, Daniela

[1] Defendants initially moved to dismiss the Verified Complaint ("Initial Complaint") (Ex. A to Latzman Aff. in Supp.). Plaintiffs subsequently filed the Amended Complaint dated May 30, 2014. As requested by Defendants (*see* Savenergy Defendants' Reply Memo. of Law at p. 1), the Court will apply the motions to the new pleading, the Amended Complaint, and the Court's decision contains the caption of the Amended Complaint.

Sansone, Vincent Bonavita, Francesca DiPuppo and Salvatore M. Bonavita ("Plaintiffs") oppose Defendants' motions.

B. The Parties' History

The Amended Complaint alleges that Plaintiffs have filed this action to recover damages resulting from fraudulent misrepresentations and omissions made by Defendant John Hyung Choi ("Choi"), individually and as an officer and director of the corporate defendants, that induced Plaintiffs to purchase stock in World Wide Save Energy Inc. ("WSEI") in 2008 ("2008 Stock Purchase") and Savenergy, Inc. in 2010. Plaintiffs allege that Defendant Savenergy Holdings, Inc. ("SHI") is a Delaware corporation that is the parent company of Defendant Defendant Savenergy, Inc. ("Savenergy"). Plaintiffs also allege that Savenergy is a foreign corporation organized under the laws of the state of Delaware.

Plaintiffs allege that the individual defendants, except Donald Gross, were and are officers, directors and inside stockholders of the corporate defendants who dominate and control the corporate defendants "so as to render meaningless the distinction between the corporate and Individual Defendants" (Am. Compl. at ¶ 2) as evidenced by the disregard of corporate formalities and use of corporate funds for personal purposes. Plaintiffs allege that SHI and Savenergy 1) share ownership, officers and directors; 2) have the same address and telephone numbers; 3) treat each other's property as though it were owned by the other corporate entity; 4) are inadequately capitalized; 5) are not independent profit centers; 6) have insufficient funds to pay their debts; and 7) are insolvent. Defendants allegedly used this misconduct, domination and control to perpetrate a fraud on Plaintiffs and prevent Plaintiffs from recovering or receiving, *inter alia*, any of the principal sum invested in the corporate defendants, and any profits, distributions, return or dividends from their investment in the corporate defendants.

Plaintiffs allege that they purchased stock in the corporate defendants in reasonable reliance on Choi's misrepresentations and omissions of material fact, and on guarantees allegedly made by Choi, individually and as an officer and director of the corporate defendants. Those misrepresentations, omissions and guarantees included, *inter alia*, that 1) the corporate defendants owned valuable patents for numerous LED semiconductor light sources, related

products, motors and temperature control devices (collectively "Products"); 2) the patents for the Products were worth in excess of $70 million; 3) third parties had offered Choi and the corporate defendants "enormous sums of money" (Am. Compl. at ¶ 6(c)); 4) the Products were cost effective to install, maintain and service; 5) the Products were state of the art technology; 6) the corporate defendants' stock would be listed on the NASDAQ Over-the-Counter Bulletin Board ("Bulletin Board"); 7) the price of the corporate defendants' stock would rise rapidly as soon as the stock began trading on the Bulletin Board; 8) Plaintiffs could sell their stock shortly after it began publicly trading; 9) such sales would result in "tens of millions" in profits (Am. Compl. at ¶ 6(i)) to Plaintiffs and enable Plaintiffs' supermarket chain and Plaintiff Salvatore Bonavita ("S. Bonavita") to pay off all principal and interest on a $6 million dollar bank loan; and 10) the corporate defendants had numerous contracts to sell and service Products, and to provide consulting services to large users of the Products. Plaintiffs seek monetary damages and other legal and equitable relief, including but not limited to the dissolution of Savenergy, Inc. and the setting aside of allegedly fraudulent conveyances made to the Individual Defendants and Donald Gross.

The Amended Complaint also includes allegations that Ira Gross' father, Donald Gross, purchased stock in the Corporate Defendants. Ira Gross and the other Individual Defendants allegedly caused the Corporate Defendants to make at least one $50,000 payment to Ira and Donald Gross to the detriment of other investors in and creditors of the Corporate Defendant, including the Bonavita family. Plaintiffs allege that this payment was made to fend off a potential lawsuit by Ira Gross against the Choi family and the Corporate Defendants (*see* Am. Compl. at ¶ 94).

The Amended Complaint contains detailed allegations regarding 1) the 2008 Stock Purchase, 2) the lack of corporate formalities, 3) additional misrepresentations by Choi, 4) the looting, mismanagement and waste of the corporate defendants' assets, 5) additional piercing the corporate veil allegations, and 6) the futility of making a demand on the corporate defendants. Plaintiffs allege that they did not make a demand on the corporate defendants to commence an action against SHI, Savenergy and the Individual Defendants for an accounting, waste and looting of corporate assets, mismanagement, breach of fiduciary duty and other related causes of

action because 1) the Individual Defendants have refused to speak with Plaintiffs regarding the operations, management and finances of the corporate defendants, or provide Plaintiffs with meaningful access to the corporate defendants' books and records; 2) the Individual Defendants are the controlling shareholders, officers and directors of the corporate defendants who have a personal interest and benefit in the outcome of this action that is adverse to the interests of the plaintiffs and the corporate defendants and, therefore, cannot be objective in determining whether to initiate a lawsuit; 3) the challenged transactions are so egregious on their face that they are not the product of sound business judgment by the Individual Defendants; 4) Choi and the Corporate Defendants made repeated misrepresentations and omissions of material facts to Plaintiffs; 5) Choi and Savenergy issued phony stock certificates to Plaintiffs; and 6) the Individual Defendants agreed and conspired to make fraudulent conveyances to the Gross investors in order to return funds invested by the Gross investors at the expense of and to the detriment of Plaintiffs.

The Amended Complaint contains fourteen (14) causes of action: 1) a request for dissolution of the Corporate Defendants and the appointment of a receiver to distribute and sell the assets of those corporations, 2) against the Individual Defendants for breach of fiduciary duty pursuant to Business Corporation Law ("BCL") § 626, 3) against the Individual Defendants for failure to pay dividends pursuant to BCL § 626, 4) against the Individual Defendants for waste and neglect pursuant to BCL § 626, 5) a request for an accounting of the assets and property of the Corporate Defendants and Individual Defendants pursuant to BCL § 626, 6) against the Individual Defendants for breach of fiduciary duty, 7) a request for an accounting from the Individual Defendants and Corporate Defendants with respect to the disposition and use of Plaintiffs' $768,000 investment in the Corporate Defendants, 8) a request, pursuant to BCL § 626, to set aside allegedly unlawful and fraudulent conveyances from the Corporate Defendants to the Individual Defendants, 9) against the Individual Defendants for unjust enrichment pursuant to BCL § 626, 10) against the Individual Defendants for money had and received pursuant to BCL § 626, 11) against Choi and the Corporate Defendants for fraud in connection with Plaintiffs' $263,000 investment in the Corporate Defendants, 12) against Choi and the Corporate Defendants for fraud in connection with Plaintiffs' $505,000 investment in the Corporate Defendants, 13) a request to pierce the corporate veil and hold the Individual Defendants

personally liable for the Corporate Defendants' debt to Plaintiffs, and 14) a request to pierce the corporate veil of SHI and hold SHI liable for Savenergy's debts, obligations and liabilities.

The Amended Complaint contains six (6) exhibits, designated Exhibits A-F, which counsel for Plaintiffs describes as follows: 1) Delaware Secretary of State, Division of Corporations, Entity Details for SHI as of May 29, 2014 (Ex. A), 2) October 2, 2013 letter from S. Bonavita to Choi and Christina Chung Choi ("Chung Choi"), the CEO and Executive Vice President of Savenergy, respectively (Ex. B), 3) Delaware Secretary of State, Division of Corporations, Entity Details for Savenergy as of May 29, 2014 (Ex. C), 4) Savenergy stock certificates issued to each Plaintiff (Ex. D), 5) December 30, 2011 email sent at 1:52 p.m. from Choi to Glen Sansone ("Sansone") and S. Bonavita which also contains an email from Sansone to Choi sent on December 30, 2011 at 12:55 p.m. (Ex. E), and 6) August 2, 2013 letter from Doloboff, Nadler & Upbin LLP, Certified Public Accountants addressed "To the Stockholder Savenergy, Inc." (Ex. F).

Plaintiffs' counsel also provides a copy of 1) the verified complaint and answer in the matter of *Savenergy, Inc. v. Starter Food Corp.*, Nassau County Index Number 601191-13 (Ex. G to Kebbe Aff. in Opp.), which is also assigned to the Court, and 2) the summons and complaint in an action formerly pending in the Supreme Court of Westchester County titled *Goel et al. v. Ranachandran, et al.,* Westchester County Index Number 50017-10 (*id.* at Ex. H). Plaintiffs' counsel affirms that the complaint in the Westchester action ("Goel Action") alleges that Defendant Bunge Ltd. is a Bermuda corporation with its headquarters in White Plains, New York, and also reflects that Bunge, S.A. is a subsidiary of Bunge Ltd. and a Swiss corporation with its principal place of business in Switzerland.

C. The Parties' Positions

The Savenergy Defendants submit that it is undisputed that the Corporate Defendants were incorporated in Delaware and, therefore, may only be dissolved by order of a Delaware court. The Savenergy Defendants contend, further, that, under New York law, the Court should apply the law of Delaware, the incorporating state, to the internal affairs of the subject corporations, and to determine the rights and obligations of the parties.

The Savenergy Defendants submit that, with respect to the Initial Complaint, 1) the Court should dismiss the first cause of action, seeking dissolution of the Defendant Corporations, on the grounds that New York courts do not have subject matter jurisdiction over dissolution of

these foreign corporations; 2) the Court should dismiss the second and third causes of action, alleging breach of fiduciary duty, on the grounds that these are derivative claims that must be brought on behalf of the corporation as evidenced by the fact that Plaintiffs plead injury to the corporations (*see, e.g.*, ¶¶ 122 and 126 to Initial Compl.), and because they lack the particularity required by CPLR § 3016(b); 3) the Court should dismiss the fourth cause of action, seeking an accounting, because the rationale requiring the breach of fiduciary claim to be brought derivatively applies to this cause of action, and because Plaintiffs have not complied with Delaware Corporation Law § 220 which governs a demand for inspection of corporate and financial books and records and for an accounting; 4) the Court should dismiss the fifth cause of action, which seeks to set aside allegedly unlawful conveyances, and the sixth cause of action alleging unjust enrichment because these claims belong to the corporations and must be brought derivatively on behalf of the corporations; 5) the Court should dismiss the seventh cause of action, alleging money had and received, on the grounds that the Initial Complaint does not adequately allege that the individual Savenergy defendants received money that rightfully belongs to Plaintiffs; 6) the eighth and ninth causes of action, alleging fraud by Choi and the corporate defendants, are insufficient because a) only factual representations are actionable and Plaintiffs have alleged only promissory statements regarding future acts that cannot sustain an action for fraud; and b) Plaintiffs have not pleaded the alleged fraud with the particularity required by CPLR § 3016(b); 7) the Court should dismiss the tenth cause of action, in which Plaintiffs seek to pierce the corporate veil and hold the Individual Defendants personally liable for corporate obligations, because a) under Delaware Corporation Law § 325(b), Plaintiffs must first obtain a judgment against the corporations which remains unsatisfied; and b) there is no claim of fraud alleged against Defendants Chung Choi, Michael Corey and Alice Katherine Corey; and 8) the Court should dismiss the eleventh cause of action, seeking to pierce the corporate veil and hold SHI and Savenergy responsible for each other's obligations, because mere control of a corporation is not in itself a sufficient basis for ignoring the separate entity.

The Gross Defendants submit that, with respect to the Initial Complaint, Plaintiffs do not have the legal capacity to assert direct claims against Donald Gross for injuries sustained by them as individual shareholders. As the claims asserted individually by the Plaintiffs belong to the Corporate Defendants, they should be dismissed. The Gross Defendants also argue that, 1) even assuming *arguendo* that Plaintiffs had standing to maintain a cause of action against Donald

Gross, Plaintiffs fail to allege facts sufficient to state a claim against Donald Gross as the alleged transferee of a fraudulent conveyance because Plaintiffs are not, and do not allege that they are, creditors of the Corporate Defendants, Ira Fischer Gross or Donald Gross; 2) Plaintiffs' cause of action for unjust enrichment is legally insufficient because Plaintiffs have not pled that the Gross Defendants possess value that rightfully belongs to Plaintiffs; and 3) there is no agreement between Plaintiffs and the Gross Defendants that would support the cause of action for money had and received.

Plaintiffs, in their opposition, submit that the Court should deny the motions to dismiss the Amended Complaint. Plaintiffs contend, *inter alia*, that 1) the Court should apply New York law to all of the causes of action in the Amended Complaint with the exception of Plaintiffs' derivative claims because a) the Corporate Defendants' principal and only place of business is located in Garden City, New York; b) the fact that they were incorporated in Delaware is the only connection that the Corporate Defendants have with Delaware; c) the Corporate Defendants' officers and directors reside in New York and "directed and controlled the wrongdoing at issue" (Ps' Memo. of Law at p. 12); d) the Corporate Defendants' bank accounts, books and records, to the extent that they exist, are located in Nassau County, New York; e) all of the material witnesses in the action reside in New York; f) the misconduct alleged in the Amended Complaint occurred in New York; and g) Savenergy has initiated other litigation in New York; 2) the Court should dissolve Savenergy and SHL under New York common law in light of allegations that the Individual Defendants have breached their fiduciary duty to Plaintiffs to the extent that they are "disqualified from exercising the exclusive discretion and the dissolution power given to them by statute" (Ps' Memo. of Law in Opp. at p. 14, quoting *Matter of the Judicial Dissolution of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 69-70 (1984)); 3) as the Amended Complaint addresses the issues raised by Defendants regarding the initial complaint's failure to assert certain claims derivatively, the Court should deny Defendants' motion to dismiss on that ground as moot; 4) there is no requirement that Plaintiffs demand an inspection of the corporation's books and records before pleading a claim for an accounting; 5) the Amended Complaint adequately alleges that making a demand on the Individual Defendants to maintain the derivative causes of action on behalf of the Corporate Defendants would be futile; 6) the causes of action alleging fraud adequately allege that Choi and the Corporate Defendants made material misrepresentations and omissions of material existing facts, and are pled with adequate particularity; 7) the allegations in the

Amended Complaint establish that the Court should apply New York law to Plaintiffs' causes of action for piercing the corporate veil, and Plaintiffs have adequately alleged facts establishing that the Individual Defendants exercised complete domination and control of the Corporate Defendants and failed to adhere to corporate formalities; and 8) Plaintiffs may assert direct claims for breach of fiduciary duty and an accounting against the Individual Defendants in light of Plaintiffs' allegations that the Individual Defendants, and Choi in particular, breached their fiduciary duties of good faith and loyalty and acted in bad faith for their personal gain.

In reply, the Savenergy Defendants contend that the law of Delaware applies to Plaintiffs' derivative claims, and note that Plaintiffs concede this point (*see* Ps' Memo. of Law in Opp. at p. 12). The Savenergy Defendants note further that, in the Amended Complaint, Plaintiffs assert four (4) direct claims for damages against Savenergy, the corporation that they "purport to represent derivatively" (Savenergy Defendants' Reply Memo. of Law at p. 2). The Savenergy Defendants submit that, under Delaware law, a plaintiff in a shareholder derivative action, to have standing, must show both shareholder status at the time of the complained-of transaction and be qualified to serve in a fiduciary capacity as a representative of the shareholder class. The Savenergy Defendants submit that, under both Delaware and New York law, Plaintiffs' direct claims against Savenergy create a conflict of interest that renders Plaintiffs inadequate derivative representatives. The Savenergy Defendants cite case law holding that an individual shareholder has a conflict of interest, and therefore cannot adequately represent other shareholders, when he simultaneously brings a direct and derivative action.

The Savenergy Defendants argue that Plaintiffs, in an effort to address the weaknesses in the Initial Complaint, have asserted the second, third, fourth, eighth, ninth and tenth causes of action in the Amended Complaint both derivatively on behalf of Savenergy and individually. The Savenergy Defendants submit that, for the reasons outlined in their initial Memorandum of Law, the Court must dismiss the individual claims pleaded in those causes of action because they belong to Savenergy. The Savenergy Defendants also reaffirm their position, as set forth in their initial Memorandum of Law, that 1) the first cause of action for dissolution is not viable because a New York court does not have subject matter jurisdiction to dissolve a foreign corporation; and 2) the causes of action for fraud and breach of fiduciary duty lack the required particularity.

The Gross Defendants submit that, while the Amended Complaint may cure the defect in the Initial Complaint regarding Plaintiffs' failure to bring their claims derivatively, the Court

should still dismiss the new derivative claims as against the Gross Defendants for failure to make a demand. The Gross Defendants note that Plaintiffs do not allege that the Gross Defendants engaged in fraudulent conduct or mismanagement of the Corporate Defendants. Plaintiffs' only factual allegations concerning the Gross Defendants are that the Individual Defendants, including Ira Gross, authorized the Corporate Defendants to make a single $50,000 payment to the Gross Defendants to settle a threatened lawsuit.

The Court conducted oral argument on the motions. At that oral argument, counsel for the parties expounded on their respective positions. Counsel for Defendants Savenergy, Choi and Corey argued *inter alia* that 1) the second, third, fourth, eighth, nine and tenth causes of action are corporate claims that cannot be brought by the individual; 2) those causes of action also lack the adequate particularity; 3) as applicable to the eleventh through fourteenth causes of action, when an individual brings a direct claim against a corporation, that creates a conflict of interest which disqualifies that individual from bringing an action on behalf of the corporation; 4) the accounting cause of action, which is controlled by Delaware law, does not set forth a claim because Plaintiffs have not established that they made the demand required by the applicable Delaware statute; and 5) the only causes of action that arguably contain sufficient particularity are those that assert fraud against Defendant John Choi. Counsel for the Gross Defendants argued *inter alia* that Plaintiffs have not adequately alleged the futility of a demand on the Gross Defendants. Plaintiffs argued *inter alia* that 1) Plaintiffs may properly assert both direct and derivative claims in the same action; and 2) there is support for the conclusion that a New York court may dissolve a foreign corporation.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are

flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Required Particularity

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008).

A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR § 3016(b). *Deblinger v. Sani-Pine Products Co., Inc.*, 107 A.D.3d 659, 660 (2d Dept. 2013), quoting *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 (2d Dept. 2011).

C. Governing Law

One of the abiding principles of the law of corporations is that the issue of corporate governance, including threshold demand issues, is governed by the law of the State in which the corporation is chartered. *Hart v. General Motors Corp.*, 129 A.D.2d 179, 182 (1st Dept. 1987), *app. den.*, 70 N.Y.2d 608 (1987). In incorporating in a particular state, shareholders, for their own particular reasons, determine the body of law that will govern the internal affairs of the corporation and the conduct of their directors. *Id.* at 184. More specifically, the state of incorporation determines the applicable law on the question of the necessity of demand on a board of directors before commencing an action against a corporation. *O'Donnell v. Ferro*, 303 A.D.2d 567 (2d Dept. 2013).

D. Shareholder Demand on Corporation

In New York, a demand would be futile if a complaint alleges with particularity that 1) a majority of the directors are interested in the transaction; or 2) the directors failed to inform themselves to a degree reasonably necessary about the transaction; or 3) the directors failed to exercise their business judgment in approving the transaction. *Marx v. Akers*, 88 N.Y.2d 189, 198 (1996). Under Delaware law, a demand on the directors of a corporation will be excused only when the plaintiff alleges with particularity facts which create a reasonable doubt that the directors' action was protected by the business judgment rule. *O'Donnell v. Ferro*, 303 A.D.2d

at 568, citing *Brehm v. Eisner*, 746 A.2d 244, 245 (Del. 2000), quoting *Grimes v. Donald*, 673 A.2d 1207, 1217 (Del. Ch. 1996) and citing *Ryan v. Aetna Life Ins. Co.*, 765 F. Supp. 133, 137 (S.D.N.Y. 1991). In determining the futility of such a demand, the court must decide whether a reasonable doubt is created that the directors are disinterested and independent or that the challenged transaction was otherwise the product of a valid exercise of business judgment. *O'Donnell v. Ferro*, 303 A.D.2d at 568, citing *Brehm v. Eisner*, 746 A.2d at 256, quoting *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984), and citing *Ryan v. Aetna Life Ins. Co.*, 765 F. Supp. At 137.

E. Dissolution of Foreign Corporation

A foreign corporation is controlled, as to its dissolution, by the laws of its domicile, and is not affected by laws which are intended to govern the dissolution of corporations created under local laws. *Matter of Warde-McCann v. Commex, Ltd.*, 135 A.D.2d 541, 542 (2d Dept. 1987), citing 17A Fletcher's Cyclopedia, Corporations § 8579, at 516 (Perm ed). In *Matter of MHS Venture Management Corp. v. Utilisave, LLC*, 63 A.D.3d 840 (2d Dept. 2009), the Second Department held that a claim for dissolution of a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction. *Id.* at 841 citing, *inter alia*, *Matter of Warde-McCann v. Commex, Ltd., supra.* In *Matter of MHS Venture Management Corp. v. Utilisave, LLC*, the Second Department dismissed a proceeding pursuant to New York Limited Liability Company Law § 701 for the dissolution of a limited liability company formed in Delaware for lack of subject matter jurisdiction. 63 A.D.3d at 840.

F. Actions against Corporations

Allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually. *Abrams v. Donati,* 66 N.Y.2d 951, 953 (1985), citing *Niles v. New York Cent. & Hudson Riv. R.R. Co.*, 176 N.Y. 119 (1903); *Carpenter v. Sisti*, 45 A.D.2d 529, 531 (1st Dept. 1974). Generally, a direct cause of action is not permitted when the plaintiff is seeking a return on his investment. *Corso v. Byron,* 11 Misc. 3d 1072A (Supreme Court of Suffolk County, 2006), citing *Greenfield v. Denner,* 6 N.Y.2d 867 (1959). Where the standing of the plaintiff is that of a shareholder who is suing other shareholders for converting corporate assets and profits, the plaintiff may sue only derivatively. *Corso v. Byron, supra*, quoting *Glenn*

v. Hotelron Systems, 74 N.Y.2d 386 (1989); *Menna v. DiMenna*, 232 A.D.2d 257 (1st Dept. 1996).

The pertinent inquiry in determining whether an individual has standing to assert a claim against a corporation is whether the thrust of the plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation. *Craven v. Rigas*, 85 A.D.3d 1524, 1527 (3d Dept. 2011), *lv. dism.*, 17 N.Y.3d 932 (2011), quoting *Albany-Plattsburgh United Corp. v. Bell*, 307 A.D.2d 416, 419 (3d Dept. 2003), *lv. dism. and den.*, 1 N.Y.3d 620 (2004) (internal quotation marks and citations omitted).

There is a two-part test under Delaware law to determine whether a claim asserts direct or derivative harm. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004); *Protas v. Cavanagh*, 2012 Del. Ch. LEXIS 88, *17 (Del. Ch. 2012). The court must determine: 1) who suffered the alleged harm (the corporation, or the suing stockholders, individually); and 2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)? *Protas*, 2012 Del. Ch. LEXIS 88 at *17, quoting *Tooley*, 845 A.2d at 1033. If the corporation suffered the harm and would receive the requested relief, the claim is derivative. *Protas*, 2012 Del. Ch. LEXIS 88 at *17, citing *MCG Capital Corp. v. Maginn*, 2010 Del. Ch. LEXIS 87, 2010 WL 1782271, at *7 (Del. Ch. 2010), citing *Tooley*, 845 A.2d at 1036. On the other hand, the claim is direct if the plaintiff has suffered harm independent of any injury to the corporation that would entitle him to an individualized recovery. *Protas*, 2012 Del. Ch. LEXIS 88 at *17, quoting *Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 1008).

Generally, when a corporation commits waste through overpayment, it is the corporation that is damaged directly and the shareholders suffer only derivative injury. *St. Clair Shores General Employees Retirement System v. Eibeler*, 745 F. Supp. 2d 303, 311 (S.D.N.Y. 2010) citing, *inter alia*, *Tooley*, 845 A.2d at 1033. Delaware law does recognize an exception to this rule - a situation where corporate waste also directly harms shareholders. Specifically, where a stockholder having "majority or effective control" of the company causes it to issue excessive equity in exchange for assets of the controlling shareholder with lesser value, and the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder and a corresponding decrease in the share percentage owned by the minority shareholders, shareholders can maintain a direct suit when challenging the injurious transaction.

St. Clair Shores General Employees Retirement System v. Eibeler, 745 F. Supp. 2d at 311 citing, *inter alia, Gatz v. Ponsoldt*, 925 A.2d 1205, 1278-1279 (Del. 2007). In *Gatz*, the Supreme Court of Delaware held that claims arising from a recapitalization could be brought directly and derivatively. *Loral Space & Communications Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 870 (Del. 2009) (defendant corporation offered no authority for its position that pendency of derivative action precluded stockholders from bringing direct action and court concluded there was no bar to direct action).

G. Fraud

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

H. Breach of Fiduciary Duty

The elements of a claim for breach of fiduciary duty are: (1) existence of a fiduciary relationship, (2) misconduct, and (3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). Corporate directors and officers assume a fiduciary role in relation to the corporate entity and the shareholders. *Tornick v. Dinex Furniture Industries, Inc.*, 148 A.D.2d 602, 603 (2d Dept. 1989).

I. Accounting

The right to an accounting is premised on the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking an accounting has an interest. *Dee v. Rakower*, 112 A.D.3d 204, 214 (2d Dept. 2013), citing *Lawrence v. Kennedy*, 95 A.D.3d 955, 958 (2d Dept. 2012), quoting *Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (1st Dept. 1986).

J. Unjust Enrichment

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *rearg. den.*, 19 N.Y.3d 937 (2012), citing *Mandarin Trading Ltd. v.*

Wildenstein, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829 (1973). Unjust enrichment is not a catchall cause of action to be used when others fail. Rather, it is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d at 790. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. *Id.* at 790-791 citing, *inter alia*, *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388-389 (1987).

Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d at 182.

K. Personal Liability for Corporate Obligations

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 66 A.D.3d at 126, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton,* 66 A.D.3d at 126, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal

use. *East Hampton,* 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

L. Application of these Principles to the Instant Action

Initially, the Court concludes that it lacks subject-matter jurisdiction to dissolve a Delaware corporation, and thus dismisses the First Cause of Action. With respect to the remaining causes of action, there appears to be some support for permitting a plaintiff to assert both derivative and direct claims in the same action. Accordingly, the Court declines to dismiss the action solely on the grounds that the Amended Complaint asserts both derivative and direct claims. Moreover, the Plaintiff has adequately demonstrated the futility of a demand on the board of directors prior to commencing the derivative claims. See Verified Amended Complaint at ¶¶ 106-109 The derivative claims, which the parties agree arise under Delaware law, see Pl. Memo in Opp. At p. 13; Savenergy Reply Memorandum at 7, have been sufficiently pleaded against defendant John Hyung Choi. Indeed, the Verified Amended Complaint is replete with details of Choi's involvement in numerous alleged schemes that provide factual support for the various claims. That same Verified Amended Complaint is, however, bereft of details sufficient to provide notice to all of the other individual defendants regarding their participation in those schemes. Accordingly, the Court denies the motion to dismiss the derivative claims asserted against defendant John Hyung Choi in causes of action 2 through 10, and grants the motion to dismiss the claims asserted against the remaining individual defendants in those causes of action.

The direct claims asserted against Mr. Choi for fraud (causes of action 11 and 12) are also pleaded with sufficient particularity, in that those causes of action incorporate by reference a detailed scheme sufficient to establish fraud. Finally, the court declines to dismiss the thirteenth and fourteenth causes of action, in which Plaintiffs seek to pierce the corporate veil based on the Court's conclusion that, at this nascent state of the litigation, Plaintiffs have alleged facts sufficient to maintain those causes of action. Consistent with the Court's rulings regarding the lack of particularity in the allegations against the individual defendants other than John Hyung Choi, the thirteen cause of action shall survive only insofar as it is asserted against Mr. Choi.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on December 19, 2014 at 9:30 a.m.

ENTER

DATED: Mineola, NY
December 8, 2014

HON. TIMOTHY S. DRISCOLL
J.S.C.