At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of May, 2014.

P R E S E N T:

HON. RICHARD VELASQUEZ,

Justice.

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CONNIE CULLIVER, SHANNON CAREY, ROBERT CRON, CONSTANCE DOUGLAS, CHRISTOPHER and KIMBERLY DUNCAN, BEVRILIN and TRAVIS EASON, GREG ELLINGTON, BARBARA and PAUL HAWKINS, PAULA LOPEZ and RAMONA GONZALES, ANN OSTERMAN, LLOYD WHITE, and CLARICE and RICHARD WILLIAMSON,

Plaintiffs,

Index No. 23038/12

- against -

ALARCON LAW GROUP, P.C., ALARCON LAW FIRM, P.C., ALARCON & ASSOCIATES, P.C., R.M.A. LEGAL NETWORK, RORY M. ALARCON, JUSTIN ROMANO, and DOES 1 through 10,

Defendants.

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The following papers numbered 1 to 3 read herein: Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Memoranda of Law	

Upon the foregoing papers, defendant Justin Romano (Romano) moves for an order, pursuant to CPLR 3211 (a) (7) and (8), dismissing the action as against him.

Background

(1)

Connie Culliver (Culliver), Shannon Carey (Carey), Robert Cron (Cron), Constance Douglas (Douglas), Christopher and Kimberly Duncan, Bevrilin and Travis Eason, Greg Ellington (Ellington), Barbara and Paul Hawkins, Paula Lopez (Lopez) and Ramona Gonzales (Gonzales), Ann Osterman (Osterman), Lloyd White (White) and Clarice and Richard Williamson (collectively, plaintiffs) allege that Alarcon Law Group, P.C., Alarcon Law Firm, P.C., Alarcon & Associates, P.C., R.M.A. Legal Network and Rory M. Alarcon (collectively, the Alarcon defendants), as well as Romano and Does 1 through 10,[1] (collectively, defendants) operated a widespread loan modification services scam. According to plaintiffs, the scam operated as follows: Defendants marketed themselves as providing assistance in renegotiating home-loan terms and operated referral companies to steer homeowners who needed mortgage assistance to their sales representatives. Defendants and their agents purportedly told such homeowners that, for a fee,[2] defendants would negotiate more favorable loan repayment terms (generally a lower interest rate and lower monthly payment) and help prevent foreclosure. In several instances, plaintiffs claim, defendants represented either that the fee would be applied to the customer's mortgage payments or that

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[1] Plaintiffs explain that the Doe defendants represent "corporate entities owned by, operated by or associated with [Romano]."

[2] In plaintiffs' individual cases, defendants purportedly charged fees between $2195 and $8085.

they charged no fee but would accept loan payments due and forward them to the lender; in either situation, defendants allegedly told customers to stop direct payments to, as well as all other contact with, their lenders.

Plaintiffs also allege that defendants' agents consistently represented that defendants would provide their customers with legal services related to loan renegotiation, that they had a very high level of success in negotiating (between 80% and 95%), that a favorable renegotiation was "guaranteed" and that the fee would be refunded if negotiations failed to yield more favorable repayment terms. After the demanded fees had been paid (often in three installments, purportedly in order to prove the customer's ability to make specific monthly payments) and financial documentation had been submitted, defendants' agents would often report that negotiations were proceeding, or even, in some cases, had been successful, when, in fact, little or no negotiation had occurred. None of plaintiffs obtained more favorable loan repayment terms as a result of defendants' purported services, but defendants refused to refund the fees paid or, in some instances, simply ceased communicating with plaintiffs.

(2)

Plaintiffs commenced this action against the Alarcon defendants in December 2012 and alleged causes of action for violation of General Business Law §§ 349, 350 and 350-a, Banking Law § 590 and Real Property Law § 265-b, fraud, fraudulent inducement, fraudulent concealment, breach of contract and legal malpractice. Plaintiffs sought to permanently enjoin the Alarcon defendants from engaging in the activities complained of and to recover

extensive damages. The Alarcon defendants eventually reached a settlement agreement with plaintiffs that included an injunction and damages.

Before submitting a stipulation of discontinuance, plaintiffs and the Alarcon defendants stipulated to permit amendment of the complaint and plaintiffs filed and served an amended complaint, adding Romano and Does 1 through 10 as additional defendants. The amended complaint retained the same causes of action,[3] but additionally alleged that Romano oversaw the referral network designed to "lure" customers into the purported scam and also trained and supervised employees of the Alarcon entities. Plaintiffs claimed that Romano "is at the center of a sprawling network of interconnected companies that operate either under the guise of professional law firms . . . or as non-legal companies cross-promoting the legal services of entities he controls." They further alleged that Romano oversaw the scam and that he, as well as Alarcon, owned, directed or were affiliated with entities that caused plaintiffs harm.

(3)

Romano now moves for an order, pursuant to CPLR 3211 (a) (7) and (8), dismissing the amended complaint as against him. He first argues that plaintiffs failed to properly attain personal jurisdiction over him, as they never obtained leave or a stipulation of the parties permitting the complaint's amendment. He contends that any cross motion for leave to

[3] The legal malpractice claim was still asserted solely against the Alarcon defendants.

amend should be denied, since the delay in adding him as a defendant would produce prejudice.

Romano additionally argues that the complaint must be dismissed as against him because its allegations concerning him are conclusory and "entirely lacking in factual support." He contends that the General Business Law claims must be dismissed as they attribute no misrepresentations or false advertising to him. He further urges that the false-advertising claim must be dismissed because plaintiffs fail to identify misleading content in any of the advertisements mentioned. The complaint, Romano argues, fails to allege that he had any involvement in negotiating mortgage loans or distressed property consulting, and he asserts that plaintiffs' Banking Law § 590 and Real Property Law § 265-b claims must, therefore, be dismissed.

Romano contends that plaintiffs fail to plead their fraud, fraudulent-inducement and fraudulent-concealment claims with the specificity required by CPLR 3016 (b). The complaint, he urges, provides no details of misrepresentations by him nor does it demonstrate any special duty of disclosure to underlie alleged fraudulent concealment. Finally, Romano argues that plaintiffs do not identify him as party to any contract and that all contracts were entered into between plaintiffs and the Alarcon defendants.

(4)

Plaintiffs, in opposition, first emphasize that they and the Alarcon defendants, in fact, executed a stipulation permitting the complaint's amendment on October 23, 2013 and filed

it with the court on October 28, 2013. They urge that facts in a complaint must be accepted as true for the purposes of a dismissal motion. The complaint, they contend, sufficiently alleged that Romano oversaw and directed the scam, whether or not he had any direct contact with plaintiffs, and they assert that liability may be imputed to Romano for his agents' conduct. Plaintiffs argue that their claims are not conclusory and that they sufficiently give notice of the conduct they intend to prove and the elements of each claim. They assert that "Romano is seemingly asking this Court to require Plaintiffs to produce detailed information, without the benefit of discovery, about the inner workings of a loan modification scam that, given the use of various corporate entities and numerous websites for a single business, was apparently designed to avoid detection" (internal citation omitted).

Plaintiffs argue that, although they have not alleged false statements in written advertising, the false-advertising claim is premised on defendants' "intentional and concerted practice of communicating false information to members of the public over the telephone in order to convince people to sign up for their loan modification services, both through direct marketing calls and through conversations after the initial contact." Plaintiffs assert that courts have found Banking Law § 590 applicable to loan modification scams and that Romano oversaw such a scam. They stress that Real Property Law § 265-b explicitly applies to persons who "directly or indirectly" engage in distressed property consulting, and they contend that Romano violated § 265-b by accepting payment for distressed property consulting services before such services were complete.

Plaintiffs also assert that they properly stated a claim for fraud. Citing the Court of Appeals' opinion in *Pludeman v Northern Leasing Systems, Inc.* (10 NY3d 486 [2008]), plaintiffs contend that, "while the facts constituting fraud must be stated in detail, the facts connecting an individual within a corporation or other joint enterprise to the alleged fraud need not be, as that would essentially require plaintiffs to state with detail facts that they often could not possibly know." Defendants had an affirmative duty to disclose, plaintiffs allege, because they were in a unique position to control the information plaintiffs needed to make informed decisions and knew that plaintiffs relied on the information they provided. They argue that equity requires piercing the corporate veil to hold Romano liable for defendants' breaches of contracts to provide loan modification services. They add that "Romano was at the heart of this scam and exercised such a degree of control as to be considered an officer."

Finally, plaintiffs assert that, if dismissal is granted as to any of their claims, they should be granted leave to amend their complaint and dismissal should be without prejudice.

(5)

In reply, Romano argues that the action still must be dismissed pursuant to CPLR 3211 (a) (8), as plaintiffs filed their amended complaint on October 25, 2013, but did not file their stipulation permitting amendment until October 28, 2013. He again contends that plaintiffs' delay in initiating claims against him has resulted in prejudice.

Romano reiterates his argument that plaintiffs' allegations concerning him are conclusory and unsupported by facts sufficient to demonstrate his involvement in the purported scheme. He characterizes the *Pludeman* opinion as distinguishable from the circumstances herein, as the plaintiffs in that case demonstrated that the individual defendants were closely involved in the operations of the corporate defendants that purportedly committed a fraud. Romano argues that plaintiffs have failed to plead facts sufficient to support piercing the corporate veil in order to hold Romano individually liable for the Alarcon defendants' acts and that, as the action has been discontinued against the Alarcon defendants, he could not be held personally liable for any misconduct on their part. He further contends that plaintiffs allege no facts that would support finding that Romano, as an individual, acted as principal towards any agents such as to justify an imputation of liability. Romano concludes that the action should be dismissed with prejudice due to the complaint's insufficient allegations.

Discussion

CPLR 3211 (a) (8)

CPLR 3211 (a) (8) permits dismissing an action if the court lacks jurisdiction over the defendant. Here, Romano argues that plaintiffs filed their amended complaint on October 25, 2013, but did not file the stipulation permitting amendment until October 28, 2013 and that the amended complaint is, thus, a nullity, creating a fatal jurisdictional defect. Without reaching the question of whether a slight flaw in the order of filing papers would effectively

nullify an amended complaint, it must be noted that the amended complaint is, in fact, dated as executed on October 28, 2013 and that court records indicate its filing on November 1, 2013, not October 25, 2013. Accordingly, Romano's argument has no factual basis, and dismissal under 3211 (a) (8) must be denied.

CPLR 3211 (a) (7)

In deciding a defendant's dismissal motion under CPLR 3211 (a) (7), without considering evidence, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 887 [2013]; *Freeman v City of New York*, 111 AD3d 780, 781 [2013]; *Gale v Animal Med. Ctr.*, 108 AD3d 497, 498 [2013]). CPLR 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Nevertheless, a court considering a CPLR 3211 (a) (7) motion must liberally construe the complaint, accept facts alleged therein as true and make any possible favorable inferences for the plaintiff (*see Romanello*, 22 NY3d at 887; *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013]; *Gershner v Eljamal*, 111 AD3d 664, 665 [2013]; *Gale*, 108 AD3d at 498). Whether a plaintiff can actually establish the complaint's allegations is not considered in deciding a dismissal motion (*see J.P. Morgan Sec. Inc.*, 21 NY3d at 334;

EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; *Dee v Rakower*, 112 AD3d 204, 208 [2013]).

General Business Law § 349

General Business Law § 349 (a) renders unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Although § 349 primarily discusses enforcement by the Attorney General, subsection (h) explicitly permits an individual injured by a § 349 violation to bring a private action seeking injunctive relief or damages. Such a plaintiff must demonstrate that the defendant engaged in a consumer-oriented act or practice, that such act or practice was materially deceptive or misleading and that it caused the plaintiff injury (*see David v #1 Mktg. Serv., Inc.*, 113 AD3d 810, 811 [2014]; *Beneficial Homeowner Serv. Corp. v Williams*, 113 AD3d 713, 714 [2014]; *see generally Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 24-26 [1995]). Practices treated as deceptive are limited to "representations or omissions . . . likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 26; *see also David*, 113 AD3d at 811-812).

Here, plaintiffs have alleged that Romano oversaw the luring of homeowners into a loan modification scam, including the running of a referral network and the training and supervision of the Alarcon defendants' employees. The gist of the scam, as alleged by plaintiffs, was that salespersons falsely represented to customers that defendants would

negotiate better home-loan repayment terms in exchange for a fee, when, in fact, little or no negotiation ever occurred. Plaintiffs have alleged that, in the course of the scam, defendants misrepresented, among other things, the nature of the business, the history and likelihood of successful negotiations, the applicability of fees to loan payments due, the progress of services rendered and that fees would be refunded in the event of a failed negotiation. The complaint thus suffices to make out a claim that defendants participated in consumer-oriented conduct (i.e., inducing and attempting to induce homeowners to purchase purported loan modification services), that defendants made materially deceptive statements in the course of this conduct and that these statements caused plaintiffs injury. Although plaintiffs do not claim that Romano personally made any specific material misrepresentation, their allegations that he generally oversaw and operated the referral network are sufficient to infer the existence of an agency relationship that could permit imputation of liability against him (*see Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 58 [2013] ["(a) principal must answer to an innocent third person for the misconduct of an agent acting within the scope of its authority"]). Relying on such an inference is justified given plaintiffs' allegations of the wide scope of defendants' purported scheme and the active steps taken to conceal its organizational structure. Accordingly, Romano's motion must be denied as to plaintiffs' General Business Law § 349 cause of action.

General Business Law §§ 350 And 350-a

General Business Law § 350 proscribes false advertising for business, trade, commerce or the rendering of any service. Section 350-a defines false advertising as advertising that is determined to be materially misleading upon examination of

> "representations made by statement, word, design, device, sound or any combination thereof, [and] also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

General Business Law § 350-e (3) explicitly permits an individual to bring a private action to recover for damages caused by false advertising. The standard for recovery under §§ 350, 350-a, and 350-e is "identical to section 349," but limited to false *advertising* as opposed to all deceptive, consumer-oriented business practices (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 n 1 [2002]; *see also Koch v Acker, Merall & Condit Co.*, 18 NY3d 940, 941 [2012]).

Although § 350-a (1) specifies that advertising includes "labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity," the statute does not otherwise define what constitutes advertising. Similarly, no case law defines what may be considered advertising for false-advertising purposes, but New York appellate courts have, in other contexts, examined dictionary definitions of the term in interpreting its meaning (*see Matter of Koffler*, 51 NY2d 140, 146 [1980] [defining advertising in freedom-

of-speech context], *cert denied sub nom. Joint Bar Assn. Grievance Comm., Tenth Jud. Dist. v Koffler*, 450 US 1026 [1981]; *Matter of United Parcel Serv., Inc. v Tax Appeals Trib. of State of N.Y.*, 98 AD3d 796, 798, 799-800 [2012] [defining advertisements in taxation context], *lv denied* 20 NY3d 860 [2013], quoting *Matter of Scotsmen Press v State of N.Y. Tax Appeals Trib.*, 165 AD2d 630, 633 [1991]). Advertising may thus be considered "[t]he action of drawing the public's attention to something to promote its sale" (Black's Law Dictionary [9th ed 2009], advertising) or "the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public esp[ecially] by means of printed or broadcast paid announcements" (Webster's Third New International Dictionary 31 [1993]).

Plaintiffs identify defendants' representations over the telephone as the advertisements underlying their false-advertising claim. The majority of such telephone conversations first occurred as a result of the individual plaintiffs' actions, either initiating the call themselves or receiving a call after affirmatively expressing interest in some other way. These sorts of interactions cannot properly be considered advertising, primarily as they fail to constitute an attempt to sell to the public or draw its attention. To expand the scope of General Business Law §§ 350 and 350-a to include one-on-one interactions initiated by the potential customer would eradicate any meaningful distinction between false advertising and the deceptive business practices broadly proscribed by § 349. The complaint alleges that plaintiffs Ellington, White, and Clarice and Richard Williamson, however, received initial calls from

defendants either without prompting or after entering information on the government's Making Home Affordable website. That these plaintiffs did not initiate such calls suggests that they resulted from a calling campaign seeking to draw the attention of the public, or some portion of the public, and thus may state a claim for false advertising. The General Business Law § 350 and § 350-a claims by the other plaintiffs must be dismissed.

Banking Law § 590 And Real Property Law § 265-b

Banking Law § 590 (2) (b) requires any person or entity who engages in, inter alia, negotiating or offering to negotiate a mortgage loan to register as a mortgage broker with the superintendent of financial services.[4] Banking Law § 598 (5) creates a private right of action against an unregistered person or entity who engages in covered mortgage activity, which permits recovering "a sum of money of not less than the amount of money paid to an affected person or entity in connection with such activities, nor more than four times such sum." At least one court has found these statutes applicable to persons or entities offering loan modification services (*see Timofeyev v Palant & Shapiro, P.C.*, 30 Misc 3d 546, 550-552 [Civ Ct, Richmond County 2010]; *see also Dell'Olio v Law Off. of Charles S. Spinardi P.C.*, 30 Misc 3d 1220[A], 2011 NY Slip Op 50144[U], *5 [Civ Ct, Richmond County 2011]).

Real Property Law § 265-b (2) prohibits a distressed property consultant from, among other activities, performing consulting services without a written, executed contract with a homeowner, charging or accepting payment before fully completing such consulting

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[4] It exempts, however, an attorney who provides such a service "incidental to his legal practice" (Banking Law § 590 [2] [b]).

services, retaining original loan documents and inducing or attempting to induce a homeowner to execute a consulting contract that fails to meet statutory requirements.[5] A distressed property consultant is a person or entity "that, directly or indirectly, solicits or undertakes employment to provide consulting services to a homeowner for compensation or promise of compensation with respect to a distressed home loan or a potential loss of the home for nonpayment of taxes" (§ 265-b [1] [e]).[6] The section also defines a distressed home loan as one at risk of foreclosure due to a homeowner's defaults or the commencement of a foreclosure action (§ 265-b [1] [d]) and defines consulting services as any services by a distressed property consultant that are intended, among other things, to stop or delay foreclosure, obtain loan forbearance or obtain a waiver of a loan acceleration clause (§ 265-b [1] [c]).

Section 265-b (4) (b) creates a private right of action, allowing a homeowner who suffers injury due to violation of the section to recover actual and consequential damages from the consultant and, if the violation was intentional or reckless, to recover treble damages, attorney's fees and costs. Despite the explicit right of action, no reported case law appears to have interpreted this section.

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[5] Real Property Law § 265-b (3) contains numerous requirements for such contracts.

[6] Like Banking Law § 590, Real Property Law § 265-b exempts an attorney from being treated as a distressed property consultant for providing homeowners consulting services "in the course of his or her regular legal practice" (§ 265-b [1] [e] [i]).

Here, given plaintiffs' pleading of Romano's organization and oversight of defendants' activities, dismissal must be denied as to the Banking Law § 590 and Real Property Law § 265-b claims. Defendants' alleged activity appears to fit directly within the terms of these statutes and, accordingly, liability for such activity could potentially be imputed to Romano.

Fraud, Fraudulent Inducement And Fraudulent Concealment

A plaintiff in a fraud action must show "'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also Salazar v Sacco & Fillas, LLP*, 114 AD3d 745, 746 [2014]; *Curtis-Shanley v Bank of Am.*, 109 AD3d 634, 636 [2013], *lv denied* 22 NY3d 1133 [2014]). A promissory statement may constitute a factual misrepresentation if a plaintiff shows that the promisor harbored a concurrent, undisclosed intent not to honor the promise (*see Venables v Sagona*, 85 AD3d 904, 906 [2011]). "In actions for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]; *see also Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 44 [1980]; *Great Eagle Intl. Trade, Ltd. v Corporate Funding Partners, LLC*, 104 AD3d 731, 732 [2013]).

"To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury" (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [2002]; *see also Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 118-119 [1969]). A fraudulent concealment claim requires a plaintiff to show, in addition to the elements of fraud, "that the defendant had a duty to disclose material information and that it failed to do so" (*McDonnell v Bradley*, 109 AD3d 592, 593 [2013]; *see Schwatka v Super Millwork, Inc.*, 106 AD3d 897, 900 [2013]; *Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067, 1067 [2012]). Such a claim may arise when the party that purportedly concealed information "has superior knowledge or means of knowledge, such that the transaction without disclosure is rendered inherently unfair" (*Miele v American Tobacco Co.*, 2 AD3d 799, 803 [2003]).

CPLR 3016 (b) requires that a plaintiff plead the circumstances of any purported fraud "in detail," and the Appellate Division, Second Department, has treated this as requiring that "fraud must be pleaded with particularity so as to inform the defendant of the alleged wrongful conduct and give notice of the allegations plaintiff intends to prove" (*McDonnell*, 109 AD3d at 593; *see also Greenberg v Blake*, ___ AD3d ___, 2014 NY Slip Op 03233, *1 [2014]; *House of Spices [India], Inc. v SMJ Servs., Inc.*, 103 AD3d 848, 850 [2013]). Where the detailed circumstances of an alleged fraud may be only within the knowledge of a defendant, however, "the heightened pleading requirements of CPLR 3016 (b) may be met

when the material facts alleged in the complaint, in light of the surrounding circumstances, are sufficient to permit a reasonable inference of the alleged conduct including the adverse party's knowledge of, or participation in, the fraudulent scheme" (*House of Spices [India], Inc.*, 103 AD3d at 850 [internal quotation marks omitted] [finding allegation that a defendant conspired to defraud the plaintiff sufficient to plead that he knew of and intended to aid fraud]; *see also Pludeman*, 10 NY3d at 491-492 ["where concrete facts 'are peculiarly within the knowledge of the party' charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings"] [internal citation omitted], quoting *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]).

The circumstances of the scheme that plaintiffs have alleged herein are sufficiently analogous to the facts underlying the Court of Appeals' opinions in *Pludeman* and *Polonetsky v Better Homes Depot* (97 NY2d 46) that to reach a different result would appear erroneous. In *Polonetsky*, the Court held that a complaint stated a cause of action under New York City Consumer Protection Law against the president of a corporate defendant, as he had "participated in [the company's] operations on a day-to-day basis and [was] actively involved in its marketing and sales activities" (*Polonetsky*, 97 NY2d at 55 [second alteration in original]). The *Pludeman* Court maintained fraud claims against the "top management" of a corporate defendant, as the nature of the nationwide scheme, which unfolded over several years, "gives rise to the inference—rebuttable though it may later prove to be—that the

officers, as individuals and in the key positions they held, knew of and/or were involved in the fraud." The Court continued that, "[a]lthough plaintiffs have not alleged specific details of each individual defendant's conduct, we have never required talismanic, unbending allegations[;] . . . sometimes such facts are unavailable prior to discovery." It concluded by finding that, "in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud." (*Pludeman*, 10 NY3d at 493.)

Romano asserts that, unlike the allegations concerning individual defendants in *Polonetsky* and *Pludeman*, plaintiffs have not alleged that he was involved in the day-to-day operations of the scheme. The fact, however, that plaintiffs have failed to denominate Romano's exact role or identify the details of his involvement—perhaps unsurprising given the purportedly clandestine and purposely abstruse organization of the scheme—is insufficient to draw a meaningful distinction between the circumstances herein and those considered by the Court of Appeals. Plaintiffs assert that Romano oversaw parts of the scheme, operated a referral network and trained and supervised employees, each of which suggests day-to-day involvement. As plaintiffs have otherwise successfully pleaded the elements of fraud and fraudulent inducement, which Romano does not contest, the motion must be denied as to these claims. Furthermore, as defendants were seemingly possessed of superior knowledge of the nature and details of their business and their withholding of such information could have rendered transactions with plaintiffs inherently unfair, plaintiffs have successfully pleaded a cause of action for fraudulent concealment.

Breach Of Contract

A breach-of-contract claim requires showing a contract between the plaintiff and the defendant, that the plaintiff performed under the contract's terms, that the defendant did not perform and that damages resulted to the plaintiff (*see Dee*, 112 AD3d at 208-209; *Brualdi v IBERIA, Lineas Aereas de España, S.A.*, 79 AD3d 959, 960 [2010]).

A pleading seeking to hold an individual owner or shareholder of a corporate entity liable for its acts generally "must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice'" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]; *see James v Loran Realty V Corp.*, 20 NY3d 918, 919 [2012]).

Here, plaintiffs have alleged the creation and breach of contracts between individual plaintiffs and specific entities among the Alarcon defendants, each of which was party to the stipulation of discontinuance. Plaintiffs do not claim that Romano was party to any of these contracts. Furthermore, plaintiffs do not plead facts supporting a piercing of the corporate veil to hold Romano liable for the Alarcon defendant entities' purported contractual breaches, particularly as they do not plead that Romano was an owner or shareholder of any of those entities. Consequently, Romano's motion must be granted as to plaintiffs' breach-of-contract claim.

Requests For Dismissal With Prejudice And Leave To Amend

Romano requests that any dismissal be with prejudice. A dismissal for failure to state a claim or legal insufficiency, however, is generally not treated as a disposition on the merits and thus has no preclusive effect on bringing a subsequent claim based on the same transaction (*see Pereira v St. Joseph's Cemetery*, 78 AD3d 1141, 1142 [2010]; *Rapp v Lauer*, 200 AD2d 726, 727-728 [1994]; *Furia v Furia*, 116 AD2d 694, 695 [1986]; *see generally Plattsburgh Quarries v Palcon Indus.*, 129 AD2d 844, 845-846 [1987]). Moreover, the Court of Appeals has held that "[w]here . . . a dismissal of a cause of action occurs prior to the close of the proponent's evidence, the dismissal will not be deemed on the merits so as to preclude the commencement of a second action" (*Maitland v Trojan Elec. & Mach. Co.*, 65 NY2d 614, 615 [1985], citing CPLR 5013). Consequently, the dismissals that result from this decision and order shall not be prejudicial.

CPLR 3025 (b) governs amendments of pleadings and states that leave to amend "shall be freely given upon such terms as may be just." Leave shall be withheld, however, when the proposed amendment would cause prejudice or surprise to the opposing party or is palpably insufficient or devoid of merit (*see Seidman v Industrial Recycling Props., Inc.*, 83 AD3d 1040, 1040-1041 [2011]). As plaintiffs make no representations as to the substance of a potential amendment, no basis exists for determining whether such an amendment might

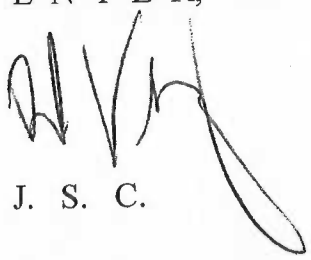
be insufficient or prejudicial.[7] Consequently, plaintiffs shall not, at this time, be granted leave to amend their complaint. Accordingly, it is

ORDERED that defendant Romano's motion, pursuant to CPLR 3211 (a) (7) and (8), is granted to the extent of dismissing, without prejudice, plaintiffs' breach-of-contract claim and the General Business Law § 350 and § 350-a claim insofar as asserted by plaintiffs Culliver, Carey, Cron, Douglas, Christopher and Kimberly Duncan, Bevrilin and Travis Eason, Barbara and Paul Hawkins, Lopez, Gonzales, and Osterman, and is otherwise denied; and it is further

ORDERED that plaintiffs' request for leave to amend is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

Hon. Richard Velasquez, JSC

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[7] Were plaintiffs' contingent request to amend their complaint treated, instead, as a request to replead, the result herein would be unchanged. "[T]he standard to be applied on a motion for leave to replead pursuant to CPLR 3211 (e) is consistent with the standard governing motions for leave to amend pursuant to CPLR 3025" (*Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2008]).