Flatworld Capital LLC v Valenty
2020 NY Slip Op 31670(U)
May 29, 2020
Supreme Court, New York County
Docket Number: 650396/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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FLATWORLD CAPITAL LLC, NAGINA PARTNERS LLC, and RAJ GUPTA,

Plaintiffs,

- v -

JEFFREY VALENTY, FORTUNA CAPITAL CORP., FORTUNA CAPITAL PARTNERS LP., GERARD GIBERT, NORMAN KATOOL, JOHN LITTLE, WINCHESTER FARNSWORTH, LARRY GRAHAM, JACK LENHART, WILLIAM VALENTZ, KEVIN MCDANIEL, VENTURE TECHNOLOGIES, INC., VENTURE HOLDCO INC.,VT CONSOLIDATED, INC., GKR SYSTEMS, INC., ISC, INC., and STRATEGIC ALLIED TECHNOLOGIES, INC.,

Defendants.

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INDEX NO. 650396/2019

MOTION DATE _____

MOTION SEQ. NO. 002, 003, 004, 005

DECISION + ORDER ON MOTION

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 77, 80, 83, 86, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 131, 134, 137, 140, 141, 142, 183

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 78, 81, 84, 87, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 132, 135, 138, 143

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 79, 82, 85, 88, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 133, 136, 139, 144

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 145, 146, 147, 174

were read on this motion to/for MISCELLANEOUS.

In motion sequence number 002, defendants Jeffrey A. Valenty, Fortuna Capital Corp. (Fortuna), and Fortuna Capital Partners LP (FCP) move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (7), and (10), CPLR 1001 (a), and CPLR 3016 (b).

In motion sequence number 003, defendants Gerard R. Gibert, Norman P. Katool, John D. Little, Winchester J. Farnsworth, Larry D. Graham, Jack E. Lenhart, William L. Valentz and Kevin McDaniel (collectively, Individual Defendants) move to dismiss the complaint pursuant to CPLR 3211 (a) (7) and (8), and CPLR 3016 (b).

In motion sequence number 004, defendants Venture Technologies, Inc., VT Consolidated Inc. (VT Consolidated), GKR Systems Inc. (GKR), ISC Inc. (ISC), and Strategic Allied Technologies Inc. (SAT) move to dismiss the complaint pursuant to 3211 (a) (7), (8) and CPLR 3016 (b).

In motion sequence number 005, plaintiffs FlatWorld Capital LLC (FC), Nagina Partners LLC (Nagina), and Raj Gupta move to strike reply affidavits filed on NYSCEF Doc. No. 141 and 142.

Background

The following facts are alleged in the complaint unless noted otherwise and for purposes of these motions are accepted as true.

Corporate Parties

Plaintiff FC is a Delaware limited liability company and private equity firm, in which plaintiff Raj Gupta is a majority shareholder. (NYSCEF 16, Complaint ¶¶ 4, 12, 34.) Plaintiff Nagina is an entity owned by Gupta and majority shareholder in nonparty FWC Advisors. (*Id.* ¶¶ 9, 101).

Defendant Fortuna "is Delaware corporation with its principal place of business in New York, New York" owned and controlled by defendant Valenty. (*Id.* ¶ 16.) Defendant FCP "is a Delaware corporation with its principal place of business in New York, New York" owned and controlled by Fortuna and Valenty. (*Id.* ¶17). Defendant Venture Technologies, Inc. (formerly known as FlatWorld Investment 2013 Corp.) "is a Delaware corporation with its principal place of business in Ridgeland, Mississippi." (*Id.* ¶ 18.) Defendants VT

Consolidated and GKR are Mississippi corporations with their principal places of business in Ridgeland, Mississippi." (*Id.* ¶ 19, 20). ISC is a Wyoming corporation with its principal place of business in Englewood, Colorado. (*Id.* ¶ 21.) SAT is a Nevada corporation with its principal place of business located in Birmingham, Alabama. (*Id.* ¶ 22.)

Merger and Related Transactions

Since 2011, FC's membership interest has been divided as follows: (1) Gupta is the largest member with a 45% interest; (2) Fortuna holds a 30% interest; and (3) nonparty Gilbert H. Lamphere holds the remaining 25% through nonparty the Gilbert H. Lamphere TD Ameritrade Custodian Traditional IRA. (*Id.* ¶ 34.) FC's operating agreement allegedly "specifies that [FC's] partnership interests, profits, and distributions from all sources, including but not limited to all subsidiaries, must be assigned on a *pro-rata* basis." (*Id.* ¶ 55.)

In March 2018, FC incorporated FlatWorld Investment 2013 Corp. (FI) as a wholly owned subsidiary. (*Id.* ¶¶ 37, 38.) FI's membership interest distribution mirrored the FC's membership interest distribution. (*Id.* ¶ 38.) "The particular business transaction that [FI] was incorporated for never materialized" and FI "was to remain dormant unless" a legitimate corporate purpose, approved by all members of FC, determined otherwise. (*Id.* ¶ 39.)

Between 2013 and 2014, FC worked on developing a plan to go into business with defendants GKR, ISC and SAT and merge those defendants "into a new entity that would serve as a platform for future acquisitions in the information technology services industry." (*Id.* ¶ 40.) In January 2014, FC entered into a Joint Letter Agreement (JLA). (*Id.* ¶ 41.) "The JLA mandated that GKR and ISC would be merged to form a new entity, Venture Technologies," with FC serving as Venture Technologies' financial sponsor. (*Id.*) The JLA was signed by GKR officers defendants Gibert and Katool, who are residents of Mississippi, ISC officers defendants Farnsworth, Graham, and Lenhart, who are residents of Colorado, Colorado and Wyoming respectively, and Valenty on behalf of FC. (*Id.* ¶¶ 42, 23, 24.) The

JLA allegedly entitled FC to "warrants for a fully diluted ownership of 10% in Venture Technologies with an exercise price equal to the valuation of any initial equity investment" (FC Warrants); it also entitled FC to an annual management fee. (*Id.* ¶ 43 [internal quotation marks omitted.) Approximately four months after executing the JLA, Valenty and Gupta "performed due diligence on GKR and ISC" and "successfully arranged financing to complete the merger of GKR and ISC into Venture Technologies." (*Id.* ¶ 46.) After the financing was in place, Gupta went on paternity leave between May 19 and August 14, 2014. (*Id.* ¶ 48.)

Plaintiffs allege that "[b]etween June and July 1, 2014, Valenty, [the Individual Defendants], GKR, ISC, and SAT knowingly colluded with each other to allocate the [FC] Warrants to [FCP]." (*Id.* ¶ 51.) On June 23, 2014, without disclosure to Gupta, Valenty, the Individual Defendants, GKR, ISC, and SAT "renamed [FI] to 'Venture Technologies, Inc.' and prepared to appoint Gibert as CEO and Katool as CFO on July 1, 2014." (*Id.* ¶ 53.) On June 27, 2014, "Valenty, [the Individual Defendants], GKR, ISC and SAT agreed to allow Valenty to issue seventy-five percent (75%) of a newly created class of warrants in [Venture Technologies, Inc.]" to FCP. (*Id.* ¶ 54.) These warrants allegedly were "equal" to the FC Warrants in Venture Technologies Inc. before the merger occurred (*Id.* ¶ 58.) Instead of providing the FC Warrants to FC, the Individual Defendants allocated the FC Warrants to Venture Technologies, Inc. "in exchange for a waiver of Defendants' significant personal and corporate financial liabilities, offers of personal loans, and agreement [sic] to support lavish lifestyle expenses . . . to be expensed to [Venture Technologies, Inc.'s] corporate accounts, and additional representations, warranties and indemnifications worth millions of dollars from [FC] that Valenty provided without authorization from FC and . . . Gupta." (*Id.* ¶ 60.)

On July 1, 2014, Venture Technologies Inc. (f/k/a FI), GKR, ISC, and SAT merged into Venture Technologies Inc. (Merger) in accordance with a Securities Purchase and Exchange Agreement (Merger Agreement). (*Id.* ¶¶ 62-63.) The Merger Agreement memorialized the obligations of Venture Technologies Inc., FC, the Individual Defendants[1], GKR, ISC and SAT. (*Id.* ¶ 63.) Valenty allegedly (i) made the Merger Agreement the governing document that supersedes all prior agreements including the JLA; (ii) made FC a sponsor and representative of the sponsors to Venture Technologies, Inc.; and (iii) committed FC "to provide representation, warranties and indemnifications worth millions of dollars with significant potential financial and legal liabilities to [Venture Technologies, Inc.]." (*Id.* ¶ 64.) It is alleged that the purpose of the Merger Agreement was to facilitate Valenty's misappropriation of the FC Warrants from FC to FCP. (*Id.* ¶ 162.) In addition to the Merger Agreement, defendants "assigned [FC] additional liabilities" and "committed [FC] to a large set of representations, warranties and indemnifications to the Defendants" through an August 14, 2014 services agreement (FC Services Agreement). (*Id.* ¶ 66.)

Plaintiffs allege that Valenty hid the creation of Venture Technologies, Inc. and the Merger from Gupta while he was on paternity leave. (*Id.* ¶ 134.) Valenty was able to hide the reallocation of the FC Warrants and changes to FC's obligations to Venture Technologies, Inc. by keeping most of the agreements and related documents away from Gupta, including the Merger Agreement, emails, and other written or oral communications. (*Id.* ¶ 69.) If Gupta had known of these agreements and documents, he would have immediately been aware of the change in FI's ownership, FI's name change to Venture Technologies, Inc., the inappropriate allocation of the FC Warrants to Venture Technologies,

[1] At the time of the Merger, Gibert owned 47.5% of GKR, Katool owned 47.5% of GKR, Little owned 4.988% of GKR, Farnsworth owned 69.44% of ISC, Graham owned 15.278% of ISC, Lenhart owned 15.278% of ISC, Valentz, a resident of Alabama, owned 76% of SAT and McDaniel, a resident of Alabama, owned 24% of SAT. (*Id.* ¶¶ 23-30.)

Inc., and the substantial liabilities and obligations that the Merger Agreement imposes on FC. (*Id.*)

As planned, on July 1, 2014, Gibert and Katool were appointed as Chief Executive Officer and Chief Financial Officer of Venture Technologies, Inc., respectively. (*Id.* ¶¶ 70, 53.) Gibert and Katool allegedly approved the changes to the allocation of the FC Warrants knowing that this action would deprive Gupta of his ownership of FC's membership interest with respect to Venture Technologies, Inc. (*Id.* ¶ 70.)

On July 14, 2014, two weeks after the Merger, Valenty falsely told Gupta that the FC Warrants were allocated to FC and that the management fees were to be distributed to Gupta and Valenty through a newly formed entity nonparty FWC Advisors LLC. (*Id.* ¶ 71.) Additionally, Valenty informed Gupta that "Lamphere had voluntarily given up his portion of the [FC] [m]anagement fees." (*Id.*)

"From August 2014 to 2016, Valenty and Gupta assisted management in developing [Venture Technologies, Inc.] into a premium information technology outsourcing company." (*Id.* ¶ 72.) In July 12, 2016, Lamphere informed "Gupta that he had identified suspicious elements, gross misconduct, and fraud." (*Id.* ¶ 73.) Gupta investigated and discovered that (1) Valenty issued 75% of FI's common stock to Fortuna; (2) Valenty renamed FI to Venture Technologies, Inc.; (3) "[d]efendants created a class of securities (warrants) exercisable into 10% of common equity of [Venture Technologies, Inc.] and allocated 75% of those warrants" to Fortuna; (4) defendants allocated the FC Warrants to Venture Technologies, Inc.; (5) "[d]efendants allowed Valenty to create and issue warrants equal to the [FC] Warrants in [Venture Technologies, Inc.] before the Merger"; (6) "[d]efendants allocated the [FC] Warrants to [Venture Technologies, Inc.] where Valenty's entities held 75% ownership"; (7) the assignment of the FC Warrants to Venture Technologies, Inc. "eliminated [FC] and Gupta's interests entirely"; and (8) "[d]efendants created a facade to hide their ownership of

[Venture Technologies, Inc.] by exchanging equity shares and warrants they owned in [Venture Technologies, Inc.] for shares and warrants in a newly created VT Consolidated." (*Id.* ¶ 76.)

Gupta confronted Valenty who agreed to "fix the problem" but Venture Technologies, Inc.'s ownership structure was never changed. (*Id.* ¶¶ 77-78.) On December 12, 2018, a mutual acquaintance informed Gupta that Venture Technologies, Inc. and VT Consolidated were sold to nonparty ConvergeOne Holdings, Inc. (*Id.* ¶ 82.) This was the first time Gupta was informed of the transaction as Valenty had "hid all documents and discussion regarding" the sale. (*Id.* ¶¶ 82-84.) On December 14, 2018, Gupta demanded that Valenty transfer Gupta's Venture Technologies, Inc. shares and warrants to him. (*Id.* ¶ 85.) Plaintiffs alleged that the "[Venture Technologies, Inc.] shares and warrants had been exchanged into equivalent shares and warrants of VT Consolidated". (*Id.* ¶ 85 n 3.)

On December 25, 2018, Gupta wrote to Valenty demanding again "the return of Gupta's ownership of [Venture Technologies, Inc.], an interest equivalent to 16.2 common stock shares and 294,652.2 warrants of [Venture Technologies, Inc.] and VT Consolidated." (*Id.* ¶ 88). "[O]n January 7, 2019, Valenty exercised and sold Gupta's 16.2 common shares and 294,652.2 warrants to purchase common stock of VT Consolidated for approximately $2,800,000.00." (*Id.* ¶ 89.)

Consulting and Acquisition Fees

On July 14, 2014, Gupta and Valenty/Fortuna entered into an operating agreement forming FWC Advisors. (*Id.* ¶ 100.) On August 4, 2016, Gupta transferred his interest (60%) in FWC Advisors to Nagina; Valenty/Fortuna maintained a 40% interest. (*Id.* ¶ 101, 102.)

Pursuant to the FC Services Agreement, FWC Advisors was to receive a consulting fee of and an acquisition fees. (*Id.* ¶¶ 103-104.) The FWC Advisors Operating Agreement,

also provided that company's "profits, losses and distributions should be allocated to Gupta/Nagina Partners and Valenty/Fortuna Capital Partners *pro rata in* accordance with their respective membership interests." (*Id.* ¶ 105.)

Valenty refuses to provide Gupta with access to FCW Advisors' bank account and allegedly misappropriated Gupta and Nagina's share of the net income of FCW Advisors. (*Id.* ¶¶ 108-109.)

March 2019 Complaint

On March 14, 2019, Gupta commenced this action on behalf of himself and derivatively on behalf of FC together with Nagina. (*Id.* ¶¶ 113-116.) They allege causes of action for conversion, aiding and abetting conversion, fraud, constructive fraud, aiding and abetting fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, piercing the corporate veil, breach of fiduciary duty, unjust enrichment, an accounting, violations of the Defend Trade Secrets Act codified in18 USC § 1839, unfair competition, constructive trust, money had and received, declaratory judgment, and prima facie tort.

Discussion

Jurisdiction

Motion Sequence Number 002

Valenty argues that this court does not have jurisdiction over the eighteenth cause of action which alleges that Valenty violated the Defend Trade Secrets Act of 2016. Plaintiffs do not oppose this argument or offer any authority on this point. The Defend Trade Secrets Act "created a federal cause of action for the misappropriation of trade secrets used in interstate commerce." (*Broker Genius, Inc. v Zalta*, 280 F Supp 3d 495, 510 [SD NY 2017].) The statute states that "[t]he district courts of the United States shall have original

jurisdiction of civil actions brought under this section." (15 USC § 1836.) Accordingly, the eighteenth cause of action is dismissed.

Motion Sequence Number 003

The Individual Defendants argue that this court lacks personal jurisdiction over them.

CPLR 3211 (a) (8) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the court has not jurisdiction of the person of the defendant." "On a motion to dismiss pursuant to CPLR 3211 (a) (8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction." (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017] [citations omitted].)

CPLR 301 states that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." However, a nonresident individual is not subject to general jurisdiction under CPLR 301 unless he or she is "doing business here individually, rather than on behalf of a corporation." (*Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 159 [1st Dept 1992] [citation omitted].) Here, the court lacks personal jurisdiction, pursuant to CPLR 301, over the Individual Defendants, who are all nonresidents, because these defendants were not doing business in New York individually. Katool's ownership of a timeshare in Manhattan does not yield an alternative result for him. (*Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014] [holding no jurisdiction over an individual pursuant to CPLR 301 where the individual owns an apartment in New York but is not domiciled there].) Accordingly, there is no basis for general jurisdiction under CPLR 301.

Plaintiffs assert that the Individual Defendants are also subject to jurisdiction under CPLR 302 (a) (1). Specifically, they contend that the Individual Defendants travelled to New

York to physically meet with the plaintiffs in a meeting in a midtown Manhattan hotel in respect to the Merger transaction. (*See* NYSCEF 104, Gupta aff, ¶¶ 5-11, 13.)[2] Plaintiffs also argue that the Individual Defendants negotiated, finalized and signed off on the alleged scheme with Valenty, Fortuna and FCP in New York. (*Id.*)

CPLR 302 (a) (1) provides that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state." CPLR 302(a) (1) is a "'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." (*Kreutter v McFadden Oil Corp.,* 71 NY2d 460, 467 [1988] [citations omitted]).

"Purposeful activities are volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014] [internal quotation marks and citations omitted].). "More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York." (*Id.* [citation omitted].) "[A] non domiciliary transacts business when on his [or her] own initiative . . . [the non-domiciliary] project[s] himself [or herself] into this state to engage in a sustained and substantial transaction of business." (*Id.* at 377 [internal quotation marks and citations omitted].) "The lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York."

[2] Gupta does not aver that defendant McDaniel specifically was ever in New York. (NYSCEF 104, Gupta aff, ¶ 12.) However, Gupta generally states that he met with all defendants in New York prior to the Merger. (*Id.*, ¶ 5.)

(*Id.* at 376.) Indeed, CPLR 302 (a) (1) long-arm jurisdiction may exist "over commercial actors . . . using electronic and telephonic means to project themselves into New York to conduct business transactions." (*Id.* [internal quotation marks and citations omitted].)

Here, the complaint is bereft of any allegations about defendants transacting business in New York or contracting to provide services in New York. However, to satisfy his burden to demonstrate jurisdiction, Gupta submits an affidavit (*Coast to Coast Energy, Inc.*, 149 AD3d at 486.) In his affidavit, Gupta states, "I recall personally meeting with ALL OF THE DEFENDANTS and a large number of their officers, directors, or legal and financial representatives in a midtown New York hotel prior to the Merger transaction. The Merger transaction was conceived, designed, and executed in New York." (NYSCEF 104, Gupta aff, ¶ 5.) Gupta then goes on to detail the meetings he had or believed to have had with the Individual Defendants involving the Merger. (*Id.*, ¶¶ 6-11, 13.)

Gupta's affidavit is insufficient to show that the Individual Defendants, on their own initiative, projected themselves into New York to engage in a sustained and substantial transaction of business with respect to the Merger. (*Paterno*, 24 NY3d at 376.) To reiterate, plaintiffs allege in the complaint that "[d]efendant Valenty intentionally *hid the creation of* [Venture Technologies, Inc.] and the Merger, from Gupta" which the court must accept as true. (NYSEF 16, Complaint ¶ 134 [emphasis added].) Now that the Individual Defendants challenge jurisdiction, plaintiffs submit Gupta's sworn affidavit that he recalls personally meeting with all of the defendants in New York. As Gupta's affidavit directly and substantially contradicts his own complaint, and thus, the court affords it no weight in demonstrating personal jurisdiction over these defendants.

The court does not have jurisdiction over Gibert, Katool, Little, Farnsworth, Graham, Lenhart, Valentz and McDaniel. Therefore, the complaint is dismissed against them in its entirety with prejudice.

Motion Sequence Number 004

Venture Technologies, Inc., VT Consolidated, GKR, ISC and SAT argue that this court lacks general jurisdiction over them under. In the corporate context, corporations are considered at home in New York, and thus subject to general jurisdiction, when they are incorporated in New York or have a principal place of business in New York. (*Magdalena*, 123 AD3d 601.) According to the complaint, Venture Technologies, Inc., VT Consolidated, GKR, ISC and SAT are not incorporated in New York and they do not have a principal place of business in New York. (NYSCEF 16, Complaint ¶¶ 17-22.) Plaintiffs' argument that Venture Technologies Inc.'s main office was in New York City during the Merger is unavailing because "a fundamental *sine qua non* . . . is the requirement that defendant be showing to have been 'doing business' at the time when the action was commenced." (*Lancaster v Colonia Motor Frgt. Line*, 177 AD2d at 156 [citation omitted].) Accordingly, there is no basis for general jurisdiction under CPLR 301.

Plaintiffs also assert that a basis for jurisdiction exists under CPLR 302 (a) (1). Plaintiffs argue that these corporate defendants and their representatives travelled to New York to physically finalize the transactions with the plaintiffs in a meeting in a midtown Manhattan hotel. Plaintiffs further argue that these corporate defendants also negotiated, finalized, and signed off on the scheme in New York.

Plaintiffs once again rely on Gupta's affidavit, which as discussed above, substantially contradicts the allegations of the complaint. This affidavit is insufficient to meet plaintiffs' burden on a dismissal motion based on jurisdiction. (*Compare* NYSCEF 16, Complaint ¶ 134; NYSCEF 104, Gupta aff ¶ 5.) Further as to VT Consolidated specifically, Gupta avers that he met Gilbert, CEO and Director of VT Consolidated, in New York in connection with the Merger. (NYSCEF 104, Gupta aff ¶ 6.) However, the complaint states

that the Merger occurred on July 1, 2014 (NYSCEF 16, Complaint ¶ 62) and that VT Consolidated was "newly created" as of June 1, 2016. (*Id.* ¶ 76.) Thus, it is not possible that Gilbert was conducting business on behalf of VT Consolidated prior to June 1, 2016. It appears that Gupta would have this court believe that he met with an entity in New York approximately two years before the entity existed. This is yet another internal inconsistency in plaintiffs' submissions.

Accordingly, the court has no jurisdiction over Venture Technologies, Inc., GKR, ISC, SAT and VT Consolidated. The complaint is dismissed against Venture Technologies, Inc., GKR, ISC, SAT and VT Consolidated in its entirety with prejudice.

Pleading Direct or Directive Claims

FC is a Delaware limited liability company (NYSCEF 16, Complaint ¶ 12.) "Since [FC] is a Delaware limited liability company, the question of whether plaintiff's claims are derivative is governed by Delaware law, not New York law." (*Finkelstein v Warner Music Group Inc.*, 32 AD3d 344, 345 [1st Dept 2006] [citation omitted].) Accordingly, the court must apply Delaware substantive law. However, as to procedural rules, New York law applies. (*Davis v Scottish Re Group Ltd.*, 30 NY3d 247, 252 [2017] [citations omitted].)

Under New York's procedural rules, a complaint the allegations of which confuse a shareholder's derivative and individual rights will be dismissed. (*Abrams v Donati*, 66 NY2d 951, 953 [1985] [citations omitted].) Even when the substantive law of another state or country applies in a derivative action, a complaint, the allegations of which confuse derivative and individual rights, must be dismissed. (*Davis v Scottish Re Group, Ltd.*, 138 AD3d 230, 234-235, 236 [1st Dept 2016] [applying the substantive law of the Cayman Islands and the procedural law of New York] *revd on other grounds* 30 NY3d 247.) Here, plaintiffs have failed to delineate any of the causes of action as direct or derivative. Indeed,

the causes of action are a "confusing hodge-podge of ... personal claims [and] claims derivative in nature." (*Barbour v Knecht*, 296 AD2d 218, 228 [1st Dept 2002].) Plaintiffs' complaint is dismissed with leave to replead except as to those defendants for which the court has no personal jurisdiction and the claim for which the court has no subject matter jurisdiction as set forth above.

Because the complaint is dismissed, motion sequence number 005 is rendered academic.

Accordingly, it is

ORDERED that the complaint is dismissed.

Motion Seq. No. 002:

5/29/20
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

Motion Seq. No. 003:

5/29/20
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

Motion Seq. No. 004:

5/29/20
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	x	CASE DISPOSED				NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

Motion Seq. No. 005:

5/29/20
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	NON-FINAL DISPOSITION			
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