At an IAS Term, Part Comm-1 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 12th day of April, 2016.

PRESENT:

HON. CAROLYN E. DEMAREST,
Justice.

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HENRY FERRIS, SHINE ON CORP., AND HORSESHOE HILL ROAD CORP.,

Plaintiffs,

- against -

Index No. 512220/2015

JOHN YOON, ELIZABETH YOON, SHINE ON CAR WASH CORP., AND 8603 ROCKAWAY HOLDING, INC.,

Defendants.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	41-57
Opposing Affidavits (Affirmations)	60
Reply Affidavits (Affirmations)	61
Affidavit (Affirmation)	
Memoranda of Law	58 62

In this action by plaintiffs Henry Ferris (Ferris), Shine On Corp. (Shine On), and Horseshoe Hill Road Corp. (Horseshoe) (collectively, plaintiffs) against defendants John Yoon (John), Elizabeth Yoon (Elizabeth), Shine On Car Wash Corp. (Car Wash), and 8603 Rockaway Holding, Inc. (Rockaway) (collectively, defendants), defendants move, under

motion sequence number one, for an order, pursuant to CPLR 3211 (a) (7) and (a) (1), dismissing plaintiffs' complaint as against them in its entirety for failure to state a cause of action and based upon the documentary evidence.

BACKGROUND

Rockaway, a corporation which is co-owned by John and Elizabeth (collectively, the Yoons), was the owner of certain real property located at 86-01 Rockaway Boulevard in Ozone Park (the premises), having acquired title to it on May 17, 2013. Car Wash, a corporation in which the Yoons are also co-owners and officers (Elizabeth being its president), was the owner of a car wash business operated by the Yoons at the premises. During February 2014, the Yoons and Car Wash decided to sell the car wash business, and listed the assets and operations of Car Wash for sale with a broker, Ron Ross of Ross Bros. (the broker). Ferris saw the advertisements, which listed the annual income of Car Wash and future income projections based upon that income. Plaintiffs allege that the Yoons were aware that the content of these advertisements was false, misleading, exaggerated, and untrue with respect to the statements regarding the income generated and to be generated from Car Wash.

According to Ferris, in reliance upon the information in the advertisements, he made inquiries of the Yoons, both directly and through the broker, concerning the possible purchase of the business operated by them through Car Wash. During and after February 2014, the Yoons showed Ferris the actual physical plant of Car Wash. At that time, the

Yoons, in response to Ferris' request for verification of the alleged oral representations made as to the income and expenses of Car Wash, allegedly gave Ferris monthly reports (the monthly reports), represented by John as the "actual income" generated by the operations of Car Wash for the period of approximately one year from March 2013 through February 2014. The monthly reports showed the income for Car Wash for the separate categories of cash revenue, account revenue from business charge accounts, and credit card revenue. The monthly reports showed the ratio of cash revenue to credit card revenue as frequently five to one and as high as ten to one, and almost always higher than three to one. The gross income for all categories of income set forth in the monthly reports for the entire year totaled $740,063.90. According to Ferris, the Yoons verbally confirmed to him that the actual income of Car Wash was in conformity with the monthly reports.

Ferris alleges that, based upon the representations as to Car Wash's gross annual income and projected income contained in the advertisements and as shown by the monthly reports, he made an offer to the Yoons to purchase the assets of Car Wash and to obtain a lease for the premises on or about September 25, 2014. Thereafter, Ferris caused to be formed and became an officer, director, and shareholder of both Shine On and Horseshoe.

On October 7, 2014, Shine On, by Ferris, as president, executed a Contract of Sale of Business (the contract), which was also executed by Elizabeth, on behalf of Car Wash. The contract provided that it was between Car Wash, as the seller, and Shine On, as the

purchaser.[1] It set forth that Car Wash agreed to sell and the purchaser agreed to purchase all of the assets of the car wash business located at the premises, including all of its chattels, merchandise, and stock in trade contained in the premises, together with all fixtures and equipment commonly used therein, and the company name of Shine On Car Wash.

Paragraph 2 of the contract provided that the purchase price was $700,000, payable by: (1) a down payment of $70,000, (2) the sum of $280,000 to be paid at the closing by bank or certified check payable to Car Wash, (3) the balance of $350,000 by the execution and delivery of a promissory note to the order of Car Wash, payable in 144 consecutive monthly installments of $3,415.48 each, inclusive of principal and interest at the rate of six percent per annum, with the first installment payable 30 days from the date of closing, and the remaining installments to be paid monthly thereafter. The parties agreed that the allocation of the purchase price was $80,000 for car wash fixtures and equipment, $120,000 for leasehold improvement, $440,000 for goodwill, $10,000 for inventory, and $50,000 for a restrictive covenant by Car Wash and its principals not to engage in a similar or competing business.

Paragraph 2 of the contract further provided that the promissory note would be dated as of the date of closing and would contain an acceleration clause allowing for the acceleration of the principal balance of the note upon the occurrence of a default continuing

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[1]The printed language in the contract, which stated that the purchaser was the "corporate designee of Henry Ferris," was crossed out and replaced with the name of Shine On, which was initialed by the parties.

for 30 days after 10 days' notice to Shine On of a default which had gone uncured or undefended, with a grace period of seven days and a late charge of five percent of the amount past due after a default.

Paragraph 3 of the contract set forth that as security for the payment of the promissory note, the purchaser agreed to execute and deliver to Car Wash a purchase money security agreement covering the fixtures, chattels, and equipment located in the premises. This paragraph also required the purchaser to perfect a lien on such security by executing and delivering to Car Wash a UCC-1 financing statement, as needed to create a security interest.

Paragraph 4 of the contract recognized that Car Wash had agreed to have the landlord (i.e., Rockaway) give a lease to the purchaser on the terms set forth in a lease annexed to the contract. It further provided that the contract was subject to Car Wash's delivery of a fully executed lease to the purchaser at the time of the closing.

While the contract, in paragraph 8, stated that the closing of the transaction was to take place on October 15, 2014, the closing actually took place on October 7, 2015, the same date that all of the relevant documents, i.e, the contract, the promissory note, the security agreement, the lease, and the UCC-1 financing statement, were dated. Although the contract designated Shine On as the purchaser, since Ferris was the president of both Horseshoe and Shine On, the parties elected at the closing to have Horseshoe be the owner and operator of the fixtures of Car Wash's business and the tenant under the lease with Rockaway. Therefore, Horseshoe, rather than Shine On, by Ferris, as its president, executed the promissory note,

the security agreement, and the lease, and Horseshoe's name appears on the UCC-1 financing statement.

At the October 7, 2014 closing, Horseshoe purchased the assets and business operations of Car Wash for the sum of $700,000, and executed the 30-year lease with Rockaway for its occupancy and operations at the premises. At such closing, Horseshoe paid $350,000 by a bank check and executed the promissory note as the maker, obligating it to pay Car Wash, as the note holder or lender, $350,000, and also executed the security agreement. Paragraph 1 of the promissory note provided that Horseshoe, as the borrower, promised to pay Car Wash, the sum of $350,000, together with interest at the rate of six percent per annum in monthly installments of principal and interest of $3,415.48, commencing on December 1, 2014 and each and every month thereafter on the 1st day of the month, until November 1, 2026 (the maturity date) when the entire principal balance, together with interest thereon would become due and payable.

Paragraph 2 (A) of the promissory note set forth that in the event that any payment due thereunder was not received by the 10th day after the due date of a monthly payment, a late charge in the amount of 2.5% for an overdue payment would be charged by Car Wash. Paragraph 2 (B) of the promissory note provided that if Horseshoe did not pay Car Wash the full amount of each monthly payment on the date it was due, it would be in default. Paragraph 2 (C) of the promissory note further provided that if Horseshoe were in default, Car Wash would send a written notice that if it did not pay the overdue amount by a certain

date, immediate payment of the full amount of outstanding principal and all interest owed on that amount could be demanded, and that such certain date must be at least 30 days after the date on which the notice was mailed to Horseshoe. Paragraph 2 (D) of the promissory note stated that upon default under the note, interest would be charged at the rate of 12% per annum. Paragraph 2 (G) of the promissory note provided that if Car Wash had required Horseshoe to pay immediately in full due to its default, it would have the right to be paid all of its costs and expenses in enforcing such note and/or security agreement, including reasonable attorneys' fees. Paragraph 4 of the promissory note additionally provided that if any payment were not made when due, Horseshoe agreed to pay all costs of collection when incurred, including reasonable attorneys' fees, which costs would be added to the amount due thereunder and be receivable therewith.

Horseshoe made the first three payments (i.e., for December 2014, January 2015, and February 2015), and, thereafter, it failed to make any further payments, claiming that the promissory note was fraudulently induced by defendants. According to plaintiffs, shortly after the closing, they observed that the monthly totals of revenue to Shine On substantially varied from what defendants had orally represented and had shown in the monthly reports. Specifically, plaintiffs claim that the actual cash revenue of Car Wash, as prorated and compared to the income set forth in the monthly reports, showed that the total revenue set forth had been exaggerated by more than 20% and that the cash revenue, relative to account

and credit card revenue, was only two to nearly three times higher, as opposed to being five to ten times higher, as had been represented in the monthly reports.

Plaintiffs claim that beginning in February, through April 2015, they recovered forensic evidence from the computer of Car Wash that defendants had left behind after the closing of the purchase of Car Wash, which showed that manipulations had been made by defendants as to Car Wash's income. They state that although defendants had "erased" these manipulations, they were still contained in the memory of the computer. They explain that they were able to retrieve them by their expert, Innovative Control Systems, which monitors and maintains computer systems and was able to penetrate the computer's memory to uncover data and generate reports which showed the actual income, as input by defendants on a daily basis before they manipulated it. They assert that this forensic evidence from the computer showed that some time prior to, or during, the due diligence period and in response to Ferris' demand for written verification of Car Wash's income, defendants had manipulated the data on the computer to generate the monthly reports so as to embellish and grossly overstate the amount of cash receipts. They note that defendants were able to manipulate the amount of cash receipts undetected since they had no paper backup for cash receipts, as opposed to the credit card income, which necessarily had a paper trail and, therefore, could not be manipulated. They assert that during April 2015, this forensic evidence retrieved from Car Wash's computer disclosed that the actual gross income for Car Wash from March 1, 2013 through February 28, 2014 was approximately $607,465.43, rather than $740,063.90,

as represented by the Yoons orally and in the written monthly reports. They point out that they could not independently verify the amount of cash receipts and had relied upon the monthly reports when determining the value and worth of Car Wash and the lease prior to entering into the contract for the purchase of Car Wash's assets and the lease of the premises.

Subsequent to the sale, in a meeting between John and Ferris and their attorneys, Ferris presented John with the monthly reports, and John confirmed that he did give Ferris the monthly reports, and insisted that they reflected the actual income for Car Wash for that period, blaming the lower income obtained by Shine On on Ferris' mismanagement. According to Ferris, the income from business accounts and credit cards derived by Shine On from operating the business was not at variance with the non-manipulated numbers reflected in the monthly reports from defendants' operation. He asserts that the total income numbers presented by defendants in the monthly reports could not possibly be generated at the prices then in effect with the labor that was on hand to do the work. He also asserts that certain employees at Car Wash had reported to him that they actually observed the Yoons "working feverishly to erase records in the computer system" before the closing on October 7, 2015.

By a letter dated March 15, 2015, Elizabeth informed Ferris and Horseshoe that they had defaulted on the payment due on March 1, 2015 in the amount of $3,415.48, and that demand was thereby being made for that payment of $3,415.48 plus a 2.5% late charge in the total amount of $3,500.86. She further stated that notice was thereby given that the 12% per

annum interest rate upon default would be charged on the remaining balance on the loan so that the remaining 141 monthly payments would be $4,596.97 per month. Horseshoe did not make the payment demanded by this notice, nor did it make any other further payment under the promissory note.

On April 17, 2015, Car Wash commenced an action in this court against Horseshoe (*Shine On Car Wash Corp. v Horseshoe Hill Road Corp.*, Sup Ct, Kings County, index No. 504553/2015) by notice of motion for summary judgment in lieu of complaint pursuant to CPLR 3213 (the Note Action). Car Wash sought summary judgment in its favor against Horseshoe for the sum of $346,676.08 plus 12% interest from March 1, 2015, together with the attorneys' fees and costs incurred in that action.

On May 29, 2015, plaintiffs commenced the present action against defendants in the Supreme Court, Westchester County. Plaintiffs' complaint alleges five causes of action. Plaintiffs' first cause of action for fraud in the inducement seeks rescission of the contract, the lease, the promissory note, and the security agreement. Plaintiffs seek to have returned to them all of the proceeds paid toward the purchase of the assets and operations of Car Wash, plus their costs in entering into and closing on the contract, including the taxes and legal fees paid. Plaintiffs' second cause of action seeks reformation of the contract based upon a unilateral mistake of fact as to the value of the assets and operations of Car Wash. Plaintiffs, in this cause of action, seek to reform the contract so as to reduce the purchase price to $210,000, reduce the rent paid under the lease to $2,000 per month with an annual

escalation of 2% after the first five years of operation, reduce the cash paid towards the purchase price to $105,000 and require defendants to return $245,000 to them, reduce the balance due under the promissory note to $105,000 as amortized pro rata from October 7, 2014 to the effective date of the reduction, and modify the terms of the security agreement to reflect the proper amount being secured and therewith correct all liens of record. Plaintiffs' third cause of action also seeks reformation based upon inequitable conduct by the Yoons due to their alleged erasing of the computer which, they claim, prevented Ferris from performing an accurate independent due diligence investigation and determination as to the actual income generated by Car Wash, and resulted in a unilateral mistake of fact by him. Plaintiffs' fourth cause of action seeks reformation based upon a mutual mistake of fact. Plaintiffs' fifth cause of action alleges a claim of unjust enrichment and seeks to recover damages of not less than $500,000. It is asserted, in this cause of action, that defendants were unjustly enriched as a result of the sale of Car Wash and the payments received from Ferris and the obligations assumed by them under the lease, the promissory note, and the security agreement, which, they claim, far exceed the actual value received at the closing of the transaction.

Plaintiffs, simultaneously with the commencement of this action in the Supreme Court, Westchester County, moved, by order to show cause, to consolidate this action with the Note Action. Defendants opposed that motion and cross-moved to dismiss this action, pursuant to CPLR 3211 (a) (1) and (7), or, in the alternative, to transfer and consolidate this

action with the Note Action. By a decision and order dated October 6, 2015, Justice Francesca E. Connolly granted that branch of plaintiffs' motion which sought consolidation, and ordered that this action be transferred to the Supreme Court, Kings County, and consolidated with the Note Action, pursuant to CPLR 602 (b), for joint discovery and trial, and granted defendants leave to make a new motion to dismiss in this Court for the same relief sought therein.

On November 2, 2015, defendants brought their instant motion in this court for dismissal of this action as they had previously sought before the Supreme Court in Westchester County. Plaintiffs oppose defendants' motion.

DISCUSSION

In addressing defendants' motion, the court notes that "[w]hen dismissal is sought pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the facts alleged in the complaint are accepted as true and are afforded the benefit of every favorable inference, and the court must determine whether they fit within any legally cognizable theory, making use of the affidavits submitted by the plaintiffs to remedy any defects in the complaint" (*Goodale v Central Suffolk Hosp.*, 126 AD3d 671, 672 [2d Dept 2015]; *see also Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]; *Cervini v Zanoni*, 95 AD3d 919, 921 [2d Dept 2012]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]). As to dismissal pursuant

to CPLR 3211 (a) (1) based upon the documentary evidence, such dismissal "may appropriately be granted only where the documentary evidence proffered in support of the motion utterly refutes the plaintiffs' factual allegations, thus conclusively establishing a defense as a matter of law" (*Goodale*, 126 AD3d at 672; *see also Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Fontanetta v John Doe 1*, 73 AD3d 78, 83 [2d Dept 2010]).

Defendants, in moving to dismiss plaintiffs' complaint, do not deny that the alleged fraudulent misrepresentations were made by them orally or in the monthly reports, and they do not address plaintiffs' assertions that they had manipulated the income information contained in Car Wash's computer. Rather, they seek dismissal of this action on the claimed basis that plaintiffs' first cause of action for fraudulent inducement, as well as their other claims, to the extent that they are based upon alleged fraudulent misrepresentations by them, are barred by the disclaimers set forth the contract.

Specifically, defendants rely upon paragraph 12 of the contract, entitled "Representations of Purchaser," which provided as follows:

> "Purchaser warrants and represents that it has inspected and is fully familiar with the Premises and with the physical condition of the Assets of the Business sold hereunder and accepts the same as is, which the parties acknowledge is in working condition, and Seller will maintain same in such condition until closing. In making and executing this Contract, the Purchaser has not relied upon or been induced by any statements or representations of any person with respect to title to, or the physical condition of the property, other than those, if any, set forth in this Contract. The Purchaser has relied solely upon such

> investigations, examinations and inspections as the Purchaser has chosen to make or had made. The Purchaser acknowledges that the Seller has afforded the Purchaser the opportunity to conduct a full and complete investigation, inspection and examination of the Business and this Contract is not conditioned on any inspections of any kind other than as may be set forth in this Contract. Buyer is not relying on any information other than his own due diligence in making this purchase."

Defendants further rely upon paragraph 23 (l) of the contract, under the heading, "Miscellaneous," which provided as follows:

> "No Other Representations. No representation, warranty, promise, inducement or statement of intention has been made by any of the parties which is not embodied in this agreement and such other agreements related to this transaction executed simultaneously herewith, or other documents delivered pursuant to this agreement or in connection with the transactions contemplated hereby and none of the parties to this agreement shall be bound by or liable for any alleged representation, warranty, promise, inducement or statement of intention not so set forth. All representations and warranties given by the parties hereunder shall survive the Closing and the consummation of the transactions contemplated hereby except as otherwise stated herein."

In addition, plaintiffs point to paragraph 20 of the lease, entitled "No Representations by Owner," which provided as follows:

> "Neither Owner nor Owner's agents have made any representations or promises with respect to the physical condition of the building, the land upon which it is erected or the demised premises, the rents, leases, expenses of operations, or any other matter or thing affecting or related to the demised premises, except as herein expressly set forth, and no rights, easements or licenses are acquired by Tenant by implication or otherwise, except as expressly set forth in the provisions of this lease. Tenant has inspected the building and the demised

> premises and is thoroughly acquainted with their condition, and agrees to take the same 'as-is' and acknowledges that the taking of possession of the demised premises by Tenant shall be conclusive evidence that the said premises and the building of which the same form a part were in good and satisfactory condition at the time such possession was so taken, except as to latent defects. All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between Owner and Tenant, and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought."

With respect to the above cited clauses, the court notes that "a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract" (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]; *see also Sabo v Delman*, 3 NY2d 155, 161 [1957]). "To put it another way, where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud either in the inducement or in the execution despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made" (*Danann Realty Corp.*, 5 NY2d at 320; *see also Black Rock, Inc. v Z Best Car Wash, Inc.*, 27 AD3d 409, 409-410 [2d Dept 2006]; *Cleangen Corp. v Filmax Corp.*, 3 AD3d 468, 460 [2d Dept 2004]). A general merger clause in a contract "cannot be used as a shield to protect [a party] from [its] fraud" (*Danann Realty Corp.*, 5 NY2d at 321). Thus, fraud will vitiate a contract regardless of the fact that it contains a general provision to the effect that no representations have been made as an

inducement to enter into the contract (*see Black Rock, Inc.*, 27 AD3d at 409-410; *Massler v Smit*, 279 App Div 941, 942 [2d Dept 1952], *appeal dismissed* 304 NY 719 [1952]).

It is well established that in order to be effective to bar an action for fraud based on extraneous representations, the contractual disclaimer must have the requisite degree of specificity (*see Benson v White*, 72 AD2d 627, 627 [3d Dept 1979]). Moreover, a specific disclaimer will not operate to bar a fraud claim based on statements not addressed by the disclaimer (*see Loreley Fin. [Jersey] No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 143 [1st Dept 2014]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]; *Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666, 667 [1st Dept 2011]).

Indeed, "'[t]he law is abundantly clear in this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge'" (*Loreley Fin. [Jersey] No. 3 Ltd.*, 119 AD3d at 143 [1st Dept 2014], quoting *Basis Yield Alpha Fund [Master]*, 115 AD3d at 137; *see also Danann Realty Corp.*, 5 NY2d at 323; *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419 [1st Dept 2011]; *Joseph v NRT Inc.*, 43 AD3d 312, 313 [1st Dept 2007]; *Capital Z Fin. Servs. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100, 111 [1st Dept 2007]; *Culinary Connection Holdings v Culinary Connection of Great Neck*, 1 AD3d 558, 559 [2d

Dept 2003], *lv denied* 3 NY3d 601 [2004]). "Accordingly, only where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying upon representations or omissions as to the specific matter, is a plaintiff precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter" (*Basis Yield Alpha Fund [Master]*, 115 AD3d at 137; *see also Silver Oak Capital L.L.C.*, 82 AD3d at 667; *Steinhardt Group v Citicorp*, 272 AD2d 255, 256 [1st Dept 2000]). "In other words, in view of the disclaimer, no representations exist and that being so, there can be no reliance" (*Basis Yield Alpha Fund [Master]*, 115 AD3d at 137; *see also HSH Nordbank AG v UBS AG*, 95 AD3d 185, 201 [1st Dept 2012]).

Here, defendants argue that the disclaimers in the contract are sufficiently specific and applicable to the information that was allegedly misrepresented by them. They assert that these disclaimers provided that neither Horseshoe nor Shine On, through Ferris, were relying upon any representations made by Car Wash or the Yoons, and that the purchase of Car Wash was made solely upon Ferris' own due diligence. This argument is rejected. These disclaimers fall well short of encompassing the particular misrepresentations alleged by plaintiff.[2] Paragraph 23 (l) is a general merger clause, and paragraph 12 of the contract relates specifically to representations with respect to "title to, or the physical condition of the property." The misrepresentations alleged by plaintiffs do not involve the title to, or physical

[2]It is also noted that Horseshoe, which is alleged to have been the actual purchaser of Car Wash's assets, did not sign the contract containing these disclaimers.

condition of the purchased assets. Rather, plaintiffs allege that defendants affirmatively misrepresented the income derived from Car Wash's business both verbally and through fabricated documentation. These alleged misrepresentations are not addressed by these disclaimers, and, therefore, these disclaimers patently lack the requisite specificity to bar a claim of fraudulent inducement based upon such misrepresentations. Similarly, paragraph 20 of the lease, cited by defendants, which involves the lease of the premises, as opposed to the contract for the sale of Car Wash's assets, and which was entered into between Rockaway and Horseshoe, is a general merger clause which only addresses representations with respect to the physical condition of the demised premises and does not constitute a specific disclaimer as to the representations regarding the income of Car Wash.

Since none of the above provisions specifically address representations relating to Car Wash's income, they are general merger clause provisions, and, thus, do not preclude plaintiffs' claim of fraud in the inducement or the use of parol evidence to establish the reliance upon the representations allegedly made by defendants (*see Sabo*, 3 NY2d at 161; *Joseph*, 43 AD3d at 313; *Black Rock, Inc.*, 27 AD3d at 409-410; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 AD3d at 275; *Cleangen Corp.*, 3 AD3d at 469; *Culinary Connection Holdings*, 1 AD3d at 559; *Su Nam Bu v Sunset Park Deli of NY Corp.*, 36 Misc 3d 1233[A], 2012 NY Slip Op 51584[U], *3 [Sup Ct, Kings County 2012]). Defendants' reliance upon cases (*see e.g. Bando v Achenbaum*, 234 AD2d 242, 244[2d Dept 1996], *lv denied* 90 NY2d 920 [1997]; *Rudnick v Glendale Sys.*, 222 AD2d 572, 573 [2d Dept 1995];

Taormina v Hibsher, 215 AD2d 549, 549-550 [2d Dept 1995]), which have held that a specific disclaimer defeats any allegation that the contract was executed in reliance upon contrary oral representations, is misplaced since the disclaimers here do not specifically address the type of information allegedly misrepresented.

In addition to the court's finding that the disclaimers relied upon by defendants were not made sufficiently specific to the particular type of fact misrepresented, the court further finds that the alleged misrepresentations concerned facts that were peculiarly within plaintiffs' knowledge. It is well settled that "'a purchaser may not be precluded from claiming reliance on misrepresentations of facts peculiarly within the seller's knowledge'" (*Basis Yield Alpha Fund [Master]*, 115 AD3d at 139, quoting *Steinhardt Group*, 272 AD2d at 257; *see also Danann*, 5 NY2d at 322; *Loreley Fin. [Jersey] No. 3 Ltd.*, 119 AD3d at 143; *China Dev. Indus. Bank v Morgan Stanley & Co., Inc.*, 86 AD3d 435, 436 [1st Dept 2011]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996]; *Tahini Invs. v Bobrowsky*, 99 AD2d 489, 490 [2d Dept 1984]). In this regard, it has been expressly held that under the "special facts" doctrine, "a duty to disclose arises 'where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair'" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003], quoting *Chiarella v United States*, 445 US 222, 248; *see also Swersky*, 219 AD2d at 327-328). Even a specific disclaimer of reliance on representations cannot bar a fraudulent inducement claim where the facts represented are matters peculiarly within the representing party's knowledge,

and the other party lacks the means to ascertain the truth of the representations (*see Danann Realty Corp.*, 5 NY2d at 322; *TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 87 [1st Dept 2015]).

Here, plaintiffs allege that the income information was controlled exclusively by defendants and the amount of Car Wash's cash receipts were peculiarly within their knowledge. As attested by Ferris, in his affidavit, defendants represented that the income figures were derived from Car Wash's computer and the computer remained within their exclusive control until the sale of the business closed. Ferris' efforts at due diligence were thus defeated by defendants' actions since they allegedly gave him manipulated monthly reports, which caused his evaluation of the business to be based upon false information. Plaintiffs, therefore, have sufficiently alleged that defendants possessed peculiar knowledge of the facts underlying their alleged fraud claim (*see China Dev. Indus. Bank*, 86 AD3d at 436; *Su Nam Bu*, 2012 NY Slip Op 51584[U], *4).

Consequently, plaintiffs' first cause of action, which seeks rescission based upon the alleged fraudulent inducement by defendants, is not barred by the disclaimers relied upon by defendants. As to the viability of plaintiffs' fraudulent inducement claim, "[i]t is axiomatic that in order to state a claim for fraudulent inducement, 'there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury'" (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 438-439 [1st Dept 2015], quoting *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010],

lv dismissed 17 NY3d 782 [2011]; *see also Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 119 [1969]; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 348 [1999]; *McMorrow v Angelopoulos*, 113 AD3d 736, 739-740 [2d Dept 2014]; *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951, 965 [2d Dept 2013]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Here, plaintiffs have pleaded the requisite elements of material misrepresentations by defendants of existing facts regarding Car Wash's income, which was made by defendants with knowledge of their falsity, an intent by defendants to induce their reliance thereon, justifiable reliance upon the misrepresentations, and resulting injury to them. "'A contract induced by fraud . . . is subject to rescission, rendering it unenforceable by the culpable party'" (*International Exterior Fabricators, LLC v Decoplast, Inc.*, 128 AD3d 1016, 1018 [2d Dept 2015], quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 AD3d at 275; *see also Cusack v American Defense Sys., Inc.*, 86 AD3d 586, 588 [2d Dept 2011]). "The effect of rescission is to declare the contract void from its inception and to put or restore the parties to status quo" (*Cusack*, 86 AD3d at 588).

Upon review of the complaint and plaintiffs' submissions in support thereof, the court concludes that defendants have failed to sustain their burden for dismissal of plaintiffs' first cause of action under CPLR 3211 (a) (7) (*see Goodale*, 126 AD3d at 672). Furthermore, the documentary evidence proffered by defendants in support of their motion does not utterly refute plaintiffs' allegations that they were fraudulently induced to enter into the contract and

the related documents, and, thus, defendants have failed to establish their entitlement to dismissal of this action pursuant to CPLR 3211 (a) (1) (*see id.*).

Plaintiffs' second, third, and fourth causes of action seek reformation, as an alternative to the remedy of rescission. A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 [1st Dept 1998], *lv dismissed in part and denied in part* 92 NY2d 1000 [1998]). That is, "[a] party seeking reformation of a contract by reason of mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake or a unilateral mistake induced by the other party's fraudulent misrepresentation" (*Yu Han Young v Chiu*, 49 AD3d 535, 536 [2d Dept 2008]; *see also M.S.B. Dev. Co., Inc. v Lopes*, 38 AD3d 723, 725 [2d Dept 2007]; *John John, LLC v Exit 63 Dev., LLC*, 35 AD3d 538, 539 [2d Dept 2006]; *Kadish Pharm. v Blue Cross & Blue Shield of Greater N.Y.*, 114 AD2d 439, 439 [2d Dept 1985]; *Janowitz Bros. Venture v 25-30 120th St. Queens Corp.*, 75 AD2d 203, 215 [2d Dept 1980]).

Plaintiffs' second cause of action for reformation based upon unilateral mistake due to fraud, alleges that Ferris was suffering from a unilateral mistake of fact as to the value of the assets and operations of Car Wash due to the fraud perpetrated upon him by the Yoons. Plaintiffs allege that if not for this unilateral mistake of fact, Ferris (through Horseshoe) would not have purchased the assets and operations of Car Wash nor entered into the lease,

the promissory note, or security agreement under the terms agreed upon, but, rather, he would not have purchased them, or would have purchased them under different terms and conditions.

Where a plaintiff claims a unilateral mistake, however, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement (*see Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 800 [3d Dept 2004]; *New York First Ave. CVS v Wellington Tower Assoc.*, 299 AD2d 205, 206 [1st Dept 2002], *lv denied* 100 NY2d 505 [2003]). Moreover, "[t]he proponent of reformation must 'show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties'" (*Chimart Assoc.*, 66 NY2d at 574, quoting *Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]; *see also Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 29 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *South Fork Broadcasting Corp. v Fenton*, 141 AD2d 312, 314 [1st Dept 1988], *lv dismissed* 73 NY2d 809 [1988]). While plaintiffs allege fraud on the part of defendants, they do not allege that they omitted some provision agreed upon, or inserted one not agreed upon (*see William P. Pahl Equip. Corp.*, 182 AD2d at 29; *see also Chimart Assoc.*, 66 NY2d at 574). "Reformation is not a mechanism to interject into the writings terms or provisions not agreed upon" (*William P. Pahl Equip. Corp.*, 182 AD2d at 29). Thus, while plaintiffs seek, in this

cause of action, to have the court reform the contract, lease, promissory note, and security agreement so as to reduce the purchase price to $210,000, reduce the rent paid under the lease to $2,000 per month with an annual escalation of 2% after the first five years of operation, reduce the cash paid towards the purchase price to $105,000 and have defendants return to them the sum of $245,000, reduce the balance due under the promissory note to $105,000 as amortized pro rata from October 7, 2014 to the effective date of the reduction, and to modify the terms of the security agreement to reflect the proper amount being secured and therewith correct all liens of record, such relief would require that the court rewrite the parties' contract to include terms that were never agreed upon by the parties. Consequently, reformation based upon a unilateral mistake cannot be granted, and plaintiffs' second cause of action must be dismissed (*see* CPLR 3211 [a] [7]).

Plaintiffs' third cause of action for reformation based upon unilateral mistake alleges that defendants' actions, if not found to be fraudulent, constituted inequitable conduct, which resulted in a unilateral mistake of fact by Ferris and warranting reformation of the contract. However, "[a] unilateral mistake provides grounds for reformation of a contract only when coupled with fraud" (*Ivory Dev., LLC v Roe*, __AD3d __, 2016 NY Slip Op 00413 [3d Dept Jan. 21, 2016]). Thus, plaintiffs' third cause of action does not state a viable cause of action and must be dismissed (*see* CPLR 3211 [a] [7]).

As to plaintiffs' fourth cause of action for reformation based upon a mutual mistake of fact, plaintiffs' factual allegations do not support any mutual mistake of fact. In the case

of mutual mistake, it must be alleged that "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Chimart Assoc.*, 66 NY2d at 573; *see also Phillips v Phillips*, 300 AD2d 642, 643 [2d Dept 2002]). Here, there are no factual allegations or showing that there was any oral agreement by defendants with plaintiffs, which, unknown to defendants or plaintiffs, was not set forth in the contract, and that the contract did not, therefore, express their agreement (*see Greater N.Y. Mut. Ins. Co.*, 36 AD3d at 443). Therefore, dismissal of plaintiffs' fourth cause of action for reformation is mandated (*see* CPLR 3211 [a] [7]).

As to plaintiffs' fifth cause of action for unjust enrichment, it is true that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]). Thus, a cause of action sounding in quasi contract based on the doctrine of unjust enrichment must generally be dismissed on the ground that it arises out of the same subject matter governed by a contract (*see Neos v Lacey*, 2 AD3d 812, 814 [2d Dept 2003]). Here, however, the contract is subject to plaintiffs' claims of fraudulent inducement, in which they seek the remedy of rescission. Moreover, Horseshoe, which executed the promissory note and lease, is not a party to the contract. Consequently, the court finds that plaintiffs' fifth cause of action, which seeks recovery based upon unjust enrichment in the event that rescission cannot

be granted to restore the parties to their status quo ante positions, should not be dismissed at this juncture.

Defendants further argue that dismissal of this action must be granted as to Rockaway because it was not a party to the contract and plaintiffs have not specifically alleged that it was involved in the fraud. This argument must be rejected. Plaintiffs' complaint alleges, at paragraph 41, that based upon the oral and written representations of the Yoons as to Car Wash's income, Horseshoe entered into a 30-year lease with Rockaway for the occupancy and operations of Shine On at the premises. The Yoons, who, plaintiffs claim, fraudulently created the monthly reports, upon which they allegedly relied in executing the lease, are the principals of Rockaway. Furthermore, the lease, which is annexed to plaintiffs' complaint, is inextricably intertwined with the contract and the sale of Car Wash, which, plaintiffs allege, were fraudulently induced, and plaintiffs seek rescission of the lease. Thus, dismissal of plaintiffs' complaint as against Rockaway must be denied.

Defendants additionally argue that this action must be dismissed as against the Yoons because they did not engage in any type of fraudulent conduct in their individual capacities, but acted solely in their capacity as officers of Car Wash. This argument is rejected. While it is true that an officer of a corporation does not incur personal liability for its torts merely by reason of being a corporate officer, "[a] corporate officer can be held personally liable for his [or her] own tortious conduct" (*Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 110 [1st Dept 2005]; *see also Meyer v Martin*, 16 AD3d 632, 634 [2d Dept

2005]; *W. Joseph McPhillips, Inc. v Ellis*, 278 AD2d 682, 684 [3d Dept 2000]). Thus, "'a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced'" (*Rajeev Sindhwani, M.D., PLLC v Coe Bus. Serv., Inc.*, 52 AD3d 674, 677 [2d Dept 2008], quoting *American Express Travel Related Servs. Co. v North Atl. Resources*, 261 AD2d 310, 311 [1st Dept 1999]). Here, plaintiffs allege that the Yoons were actual participants in the alleged fraud, and therefore, whether or not such alleged fraud was also by or for Car Wash, they may be held liable to them (*see Savannah T & T Co., Inc. v. Force One Express Inc.*, 58 AD3d 409, 409 [1st Dept 2009]). Consequently, dismissal of plaintiffs' claims as against the Yoons must be denied.

CONCLUSION

Accordingly, defendants' motion to dismiss plaintiffs' complaint is denied insofar as it seeks dismissal of plaintiffs' first and fifth causes of action, and is granted insofar as it seeks dismissal of plaintiffs' second, third, and fourth causes of action.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST