SECOND DIVISION
September 30, 2016

No. 1-14-0696

JOHN APOSTOLOU, individually, and as Trustee for the John Apostolou Irrevocable Trust, as Trustee for the John Apostolou Revocable Trust, and as Trustee for the Eva Apostolou Irrevocable Trust; EVA APOSTOLOU, individually, and as Trustee for the Eva Apostolou Revocable Trust; and JOANNA APOSTOLOU, as Beneficiary of the John and Eva Apostolou Irrevocable Trusts, the Dorian Trust, and the Hellenikon Trust.	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	
B. ALLEN AYNESSAZIAN, individually and as an officer and director of Giordano's Enterprises, Inc. and Randolph Partners L.L.C., and as an agent of Eat Pizza, Inc., Eat at Joe and Al's, Inc., Eat at Joe's, Inc., Eat Pizza in Port Richely, Inc., Eat at Joe's II, Inc., Eat Pizza on Dale Mabry, Inc., Eat Pizza in Downtown Naperville, Inc.; JAMES ROCHE, individually and as an agent of James J. Roche & Associates, LLP; *et al*.	)	No. 11 CH 27344
	)	Honorable Patrick J. Sherlock
Defendants-Appellees.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman concurred in the judgment.
Justice Mason concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The circuit court's order dismissing 9 counts in plaintiffs' third amended

complaint is affirmed in part and reversed in part.

¶ 2 Plaintiffs John Apostolou, Eva Apostolou, and Joanna Apostolou appeal from the dismissal of nine of the eleven counts alleged in their third amended complaint. The circuit court dismissed the nine counts with prejudice pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)), based on the plaintiffs' lack of standing to sue as shareholders of a corporation. On appeal, plaintiffs argue they suffered individual injuries, separate from the injuries suffered by the corporation, and therefore, the nine counts should not have been dismissed for a lack of standing.

¶ 3 BACKGROUND

¶ 4 We restate the following factual allegations from plaintiffs' operative complaint relevant to the issues on appeal. Plaintiffs John and Eva Apostolou were the sole owners and shareholders of Giordano's Enterprises, Inc. (GEI) and affiliated companies.[1] Plaintiff Joanna Apostolou is the beneficiary of trusts holding the assets of one of the affiliated companies.[2] Starting in 1988, John and Eva invested their time and money into growing GEI and its franchise business. By 2008, GEI was a thriving business with over 40 franchise restaurants and tens of millions of dollars in revenue. John served as GEI's president, and Eva served as GEI's treasurer and secretary. Yet, despite this apparent success, GEI filed for Chapter 11 bankruptcy on February 11, 2011. The allegations of the Apostolous' third amended complaint arise from events allegedly leading to GEI's bankruptcy filing follow.

¶ 5 The gist of the Apostolous' third amended complaint is that two corporate employees,

[1] GEI is a closely held, non-public corporation, which is not listed or traded on any exchange or over the counter market. The affiliated companies include: Giordano's Franchise, Inc.; Randolph Partners, LLC; JBA Equipment Finance, Inc.; Americana Foods, Inc.; and a number of subsidiaries (collectively referred to as GEI).

[2] Joanna was a beneficiary of the Hellenikon and Dorian Trusts, which held the assets of Randolph Partners, LLC and its subsidiaries.

James Roche and B. Allen Aynessazian, allegedly engaged in a covert scheme to drive GEI into bankruptcy, force plaintiffs out of control of the company and for Roche and Aynessazian to take control of GEI. Roche and Aynessazian, were later allegedly joined in the conspiracy by a group of Giordano's Franchisees[3].

¶ 6 Roche was hired by the Apostolous in 1988, as their personal attorney and as the attorney for GEI. Aynessazian was hired by the Apostolous in 1989, as their personal accountant and later as the accountant for GEI. Aynessazian was eventually appointed GEI's chief financial officer, vice president, and a member of GEI's board of directors. Aynessazian also co-owned eight Giordano's franchises. The Apostolous allege that due to their lack of education and expertise, they relied on Roche and Aynessazian to protect their personal financial interests as well as the

[3] The Franchisee Defendants are: JOSEPH LOCASCIO, individually and as agent of Eat Pizza, Inc., Eat at Joe and Al's, Inc., Eat at Joe's Inc., Eat Pizza in Port Richely, Inc., Eat at Joes's II, Inc., Eat Pizza on Dale Mabry, Inc., Eat Pizza in Downtown Naperville, Inc.; EAT PIZZA, INC.; EAT AT JOE AND AL'S, INC.; EAT AT JOE'S, INC.; EAT PIZZA IN PORT RICHEY, INC.; EAT AT JOE'S II, INC.; EAT PIZZA ON DALE MABRY, INC.; EAT PIZZA IN DOWNTOWN NAPERVILLE, INC.; PETER SKIOURIS, individually and as agent of Jason's Pizza, Inc., J.B.A., Inc., Athena's Best Pizza, Inc., and Marie's Best Pizza, Inc.; JASON'S PIZZA, INC.; J.B.A., INC.; ATHENA'S BEST PIZZA, INC.; MARIE'S BEST PIZZA, INC.; CONSTANTINOS ALEXAKOS, individually and as agent of Laganes, LLC; MILTON ALEXAKOS, individually and as an agent of Laganes, LLC; JOHN NIKOLOPOULOS, individually and as an agent of Laganes, LLC; LAGANES, LLC; JOSE CENTENO, individually and as agent of Centos, Inc., Centos & Sons, Inc., and For Love of Pizza, Inc.; KIMBERLY CENTENO, individually and as an agent of Centos, Inc., Centos & Sons, Inc., and For Love of Pizza, Inc.; ASCENCION CENTENO, individually and as an agent Of For Love of Pizza, Inc.; CENTOS INC.; CENTOS & SONS, INC.; FOR LOVE OF PIZZA, INC.; JOHN DAOULAS, individually and as agent of Stefano's Pizza on Sheridan, Inc.; STEFANO'S PIZZA ON SHERIDAN, INC.; LEONIDAS THEODOROPOULOS, individually and as an agent of Morton North, Inc., Pizza Best, Inc., and Downers CMJ, Inc.; MORTON NORTH, INC.; PIZZA BEST, INC.; DOWNERS CMJ, INC.; RAFEAL CENTENO, individually and as an agent of Cara Sales, Inc.; AMY CENTENO, individually and as an agent of Cara Sales, Inc.; CARA SALES, INC.; RAMIZ MAREEWS, individually and as agent of Rambo's Pizza of Fox Lake, Inc., and Rambo's Pizza of Lake Zurich; RAMBO'S PIZZA OF FOX LAKE, INC. AND RAMBO'S PIZZA OF LAKE ZURICH; STANLEY KONDILES, individually and as an agent of SKDD Pizza, Inc., and Giordano's of Westchester, Inc.; DIMITRI DIMITROPOULOS, individually and as an agent of SKDD Pizza, Inc. and Giordano's of Westchester, Inc.; DIMITRI DIMITRI, individually and as an agent of SKDD Pizza, Inc. and Giordano's of Westchester, Inc.; ANTHONY PROKOS, individually and as an agent of SKDD Pizza, Inc. and Giordano's of Westchester, Inc.; SKDD PIZZA, INC.; GIORDANO'S OF WESTCHESTER, INC.; TED MAVRAKIS, individually and as an agent of Mt. Prospect Venture, Inc., and Best Pizza, Inc.; MT. PROSPECT VENTURE, INC.; BEST PIZZA, INC; ANTHANASSIOS KOURLIOUROS, individually and as an agent of Randall Third, Inc., Best in Town, Inc., and Grand West, Inc.; RANDALL THIRD, INC.; BEST IN TOWN, INC.; GRAND WEST, INC.; STEPHANOS VAIOPOULS, individually and as agent of Stefano's Pizza on Sheridan, Inc.

interests of GEI; they also allege a fiduciary relationship with both Aynessazian and Roche.

¶ 7 In 2005, years before the alleged scheme, Aynessazian induced and advised the Apostolous to have GEI purchase 52 acres of vacant Florida real estate and other undeveloped properties, as part of a strategic plan to expand GEI's franchise business. GEI's acquisition cost was in excess of $36 million. To finance the purchases, Aynessazian arranged for GEI to enter into a series of loans, promissory notes, and mortgages from Fifth Third Bank. Aynessazian advised the Apostolous to personally guarantee these loans, which they did. The Apostolous claim that they could not read or understand the loan or guarantee documents and relied on Aynessazian and Roche's advice to protect their interests.

¶ 8 According to the Apostolous, sometime in early October 2009, Aynessazian and Roche devised the take-over scheme. The alleged plan involved weakening GEI's financial position to force a default on the debt to Fifth Third Bank. Aynessazian and Roche would recruit Giordano's Franchisees into the conspiracy, in part relying on the Apostolous' financial obligation relating to the Florida real estate acquisition to convince them that the Apostolous were no longer capable of operating GEI's business. The Franchisees' role in the conspiracy would be to withhold royalty fees to GEI, and to withhold the purchase of or payment for food products the franchisees were required to buy as part of their franchise agreements with GEI. The Franchisees' actions would cause GEI a severe loss of cash flow which would facilitate the loan default. GEI's default would expose the Apostolous to personal liability on the loans and force GEI into bankruptcy. Once the company declared bankruptcy, the defendants would purchase GEI's debt obligation and assets from Fifth Third Bank at a significantly deflated value.

¶ 9 The complaint alleges that in the summer of 2010, Aynessazian and Roche intentionally caused a series of actions that put GEI into default in June and July, 2010. Plaintiffs accuse the

two of instructing the Franchisees to stop making royalty and other payments to GEI and then failing to enforce the franchise agreements when those breaches occurred. Further, Aynessazian and Roche allegedly did not make required loan payments, caused GEI to fail to make the June and July loan payment, and failed to deliver GEI's 2009 financial statements to Fifth Third Bank as required by the loan agreements.

¶ 10 The Apostolous claim that Aynessazian misled them by failing to inform them of the missed loan payments, the default, and the consequences of the default, which was an acceleration of the loans. Also, Aynessazian and Roche concealed from plaintiffs the fact that they and other Franchisees were withholding the payments and franchisee fees. Around this time, John confronted Aynessazian and Roche concerning rumors that the two had been talking with other banks about acquiring GEI's debt from Fifth Third Bank and using promissory notes to acquire the Apostolous' shares. Aynessazian and Roche denied all allegations.

¶ 11 In August 2010, as a result of GEI's default, Aynessazian and Roche negotiated and advised the Apostolous to enter into a Forbearance Agreement with Fifth Third Bank, which they did. The Apostolous claim Aynessazian and Roche failed to fully and accurately explain the unfavorable terms of the Forbearance Agreement and which they described as merely a "loan extension." The unfavorable terms included: increased interest rates on the loans, an increase in GEI's liability, a cross-collateralization of all of GEI's assets and debts, an increase in the Apostolous' personal liability for GEI's debt, and a release of any claims the Apostolous had against Fifth Third Bank.

¶ 12 On August 19, one day before the Forbearance Agreement was set to expire, John suffered a heart attack. After his hospitalization, John spent time in his Florida home recuperating. The Apostolous allege that while he was recuperating, Aynessazian and Roche

took control and managed the affairs of GEI.

¶ 13 Between September 2010 and February 2011, Aynessazian and Roche allegedly held "secret meetings" with the Franchisees and disclosed their scheme. In a September 2010 secret meeting, Aynessazian allegedly told the Franchisees: John was embezzling money from GEI; he was a "lunatic" and "unstable"; he had a medical condition that affected him mentally, which they would use to their advantage; both the Apostolous and GEI were in very bad financial shape, and that GEI would inevitably go into bankruptcy. Aynessazian told the Franchisees that to protect their interests, the Franchisees would expedite the inevitable failure of GEI by cooperating with him and Roche to "push John over the edge" by withholding their royalty payments and fees due GEI. The Franchisees allegedly agreed to play their part. Finally, Aynessazian told them that those on board with the plan had the financial funding to purchase GEI's debt from Fifth Third Bank to take over GEI, and that Franchisees should also consider forming an entity to acquire GEI's debt obligations.

¶ 14 In mid-October 2010, Roche and Aynessazian allegedly presented John with new Amended Loan Agreements with Fifth Third Bank. Purportedly acting in the Apostolous' best interests, they advised John to sign the Amended Loan Agreements. John claims he could not read or understand the legal documents, he was weakened and in poor health and, relying on the advice of Aynessazian and Roche, the Apostolous signed the Amended Loan Agreements. The Apostolous claim the Amended Loan Agreements were not in their best interest.

¶ 15 In December 2010, Aynessazian and Roche held another "secret meeting" with the Franchisees where they discussed the scheme. At this meeting, they told the Franchisees to begin withholding an advertising fee owed to GEI. They also represented that financing to buy-out the Apostolous and take control of GEI "would not be a problem." Aynessazian and Roche told the

Franchisees that they would have the opportunity to organize a new entity to purchase GEI's notes and the Apostolous' guarantees from Fifth Third Bank. Finally, the Franchisees were told if they did not join in the conspiracy, they would be kicked out of the GEI franchise.

¶ 16 In January 2011, while allegedly in control of GEI's financial operations, Aynessazian and Roche caused GEI to default on the Amended Loan Agreements by failing to make loan payments. GEI then received another notice of default from Fifth Third Bank. At this point, Aynessazian and Roche advised the Apostolous to file for Chapter 11 Bankruptcy.

¶ 17 On February 4, 2011, a Giordano's franchisee contacted John in Florida and informed him of the ongoing scheme to take control of GEI. John returned to Chicago to regain control of GEI and get its financial condition back in order. The Apostolous claim that as a result of scheme and conspiracy, on February 11, 2011, GEI and its subsidiaries filed for Chapter 11 Bankruptcy in the Northern District of Illinois in an attempt to save GEI and restructure plaintiffs' bank obligations.

¶ 18 Around this time, the Apostolous were induced by Aynessazian and Roche into signing Amended Loan Agreements and an Irrevocable Proxy Agreement. They claim Roche failed to advise them of the material terms of the Irrevocable Proxy Agreement, only advising them that the agreement was "part of the bankruptcy filing." Unbeknownst to the Apostolous, the Irrevocable Proxy Agreement conveyed all of their voting rights to GEI's newly appointed chief restructuring officer on February 16, 2011. The Apostolous claim that Aynessazian and Roche intentionally misled them into giving up their voting rights as sole shareholders of GEI when the company filed for bankruptcy.

¶ 19 In November 2011, GEI's assets were auctioned and sold by the bankruptcy trustee to VPC Pizza Operating Corporation, to satisfy GEI's debts. VPC Pizza Operating Corporation now

operates the Giordano's franchise business. In addition, as a result of the Apostolous' guarantees of GEI's debt, their personal assets were sold in the bankruptcy proceeding.

¶ 20 On August 3, 2011, the Apostolous filed this action against defendants, as well as Fifth Third Bank. After the original complaint was filed, Fifth Third Bank filed a motion for removal to the Bankruptcy Court. The Bank argued that the complaint violated the Bankruptcy Court's automatic stay because it sought damages incurred by GEI. The Bankruptcy Court found that portions of the complaint violated the automatic stay and struck those portions. The court also reviewed a proposed amended complaint and indicated that the claims in the proposed amended complaint were not property of the Estate and did not violate the automatic stay. Fifth Third Bank appealed the determination that the proposed amended complaint did not violate the automatic stay. The United States District Court for the Northern District of Illinois affirmed the bankruptcy court. *Fifth Third Bank v. Apostolou* (*In re Girodanos's Rest. Enters.*), No. 11 C 8117, 2012 U.S. Dist. LEXIS 46504 (N.D. Ill. Apr. 3, 2012). In affirming, the district court stated:

> "[T]he Apostolous assert in the Amended Complaint that certain non-debtor third parties, such as the Chief Financial Officer of Debtors, owed the Apostolous certain personal duties. The Apostolous are seeking to obtain relief based upon the relationships of certain individuals and entities with the Apostolous and are not seeking to obtain funds from the Estate. In the Amended Complaint, the Apostolous bring claims, such as breach of fiduciary duty claims, premised upon alleged personal duties owed uniquely to the Apostolous. The Apostolous have included claims in the Amended Complaint that are based on a special injury to the Apostolous, rather than common indirect injuries that

> should be deemed derivative claims. For example, the Apostolous allege direct financial harm resulting from an alleged covert scheme to force out the Apostolous and take control of Debtors. The Apostolous also allege that the participants in the scheme breached their personal duties owed to the Apostolous as financial advisors, not that they breached any duties owed to Debtors." *Id.* at *13-14.

¶ 21 On May 2, 2012, in the circuit court of Cook County, the Apostolous filed their first amended complaint and voluntarily dismissed claims against Fifth Third Bank. The circuit court dismissed the remaining claims without prejudice pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). The circuit court found, for the most part, that the Apostolous lacked standing to bring the claims, and that the claims could only be brought derivatively on behalf of all shareholders.

¶ 22 On May 24, 2013, the Apostolous filed their second amended complaint. Subsequently, on July 11, 2013, with leave of court, the Apostolous filed their third amended complaint.

¶ 23 The third amended complaint alleges the following counts: count I (Shareholder Oppression under section 12.56 of the Business Corporation Act) against Aynessazian and Roche; count II (Tortious Interference with Prospective Economic Advantage) against Aynessazian, Roche, and the Franchisee Defendants; count III (Tortious Interference with Contractual Relations) against Aynessazian, Roche, and the Franchisee Defendants; count IV (Breach of Fiduciary Duty) against Aynessazian and Roche; count V (Fraud and Constructive Fraud) against Aynessazian, Roche, and the Franchisee Defendants; count VI (Defamation) against Aynessazian; count VII (Conspiracy to Commit Fraud) against Aynessazian, Roche, and the Franchisee Defendants; count VIII (Conspiracy to Injure the Apostolous' Business) against

Aynessazian, Roche, and the Franchisee Defendants; count IX (Conspiracy to Violate Fiduciary Duty) against Aynessazian, Roche, and the Franchisee Defendants; count X (Conspiracy to Defame) against Aynessazian, Roche, and the Franchisee Defendants; and count XI (Aiding and Abetting) against Roche.[4] The Apostolous allege that their injuries are the result of the scheme including conversion and/or appropriation of the economic value of their stock ownership interest in GEI, thereby depriving them of their right to own, manage, and control the company, and continued income and other employment benefits from the company. They also allege they were personally injured when they became liable on their personal guarantees of GEI's debt, and that their personal and business reputations were damaged. Joanna claimed the loss of economic value of the stock she would have received as an inheritance from John and Eva.

¶ 24 Defendants separately moved to again dismiss plaintiffs' claims, pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2012)). Defendants argued that plaintiffs' injuries were derivative of injuries sustained by GEI, and therefore, plaintiffs did not have standing to individually bring the claims. Alternatively, defendants argued that plaintiffs failed to plead sufficient facts to sustain the alleged causes of action.

¶ 25 After hearing, in a written order, the circuit court dismissed counts I-III, V, VII-XI with prejudice pursuant to section 2-619 of the Code. The circuit court also dismissed subparagraphs (b) and (c) of count VI without prejudice, but allowed subparagraph (a) to stand. In addition, the circuit court allowed count IV to stand. Lastly, the circuit court found there was no just reason to delay the enforcement or appeal of the dismissal of counts I-III, V, VII- XI. This timely filed appeal followed. Thereafter, plaintiff filed a motion to voluntarily dismiss with prejudice and without costs defendants-appellees, James J. Roche and James J. Roche & Associates, which we

[4] Counts II, III, V, VII, VIII, IX, and X were also brought against Michael Maksimovich and Michaela Stapleton-Corcoran. However the Apostolous do not appeal the dismissal of their claims against these two individuals.

granted on August 31, 2015.

¶ 26 ANALYSIS

¶ 27 A section 2-619 motion to dismiss, admits the legal sufficiency of the complaint, but asserts an affirmative matter that allows for an involuntary dismissal of the claim based on certain defects or defenses. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13. The basis of the 2-619 motion must go to an entire claim or demand. *Id.* When ruling on a motion to dismiss under section 2-619, the court accepts as true all well-pled facts in the complaint and draws all reasonable inferences from those facts in favor of the nonmoving party. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). We review a trial court's dismissal of a complaint for a lack of standing under section 2-619 *de novo*. *Id.*

¶ 28 On appeal, plaintiffs argue that the circuit court erred when it dismissed nine of plaintiffs' claims under section 2-619 of the Code, finding the claims were derivative claims of GEI, and therefore, plaintiffs, individually, did not have standing to bring the claims. Plaintiffs assert their injuries are personal and can only be redressed thru the assertion of individual claims against the defendants.

¶ 29 A shareholder seeking relief for an injury to a corporation, rather than a direct injury to the shareholder himself, must bring the suit derivatively on behalf of the corporation. *Small v. Sussman*, 306 Ill. App. 3d 639, 643 (1999). Conversely, a shareholder who has a direct and personal interest in a cause of action may bring suit in an individual capacity even if the corporation's rights are also implicated. *Sterling Radio Stations, Inc. v. Weinstine*, 328 Ill. App. 3d 58, 62 (2002). To acquire standing to sue individually a shareholder must allege more than an indirect injury. An indirect injury is an injury inflicted directly on the corporation and felt by the shareholder only because he or she owns shares of the company. *See Mann v. Kemper Financial*

Cos., 247 Ill. App. 3d 966, 975-76 (1992). A shareholder "must allege something more than wrong to the corporate body." *Davis v. Dyson*, 387 Ill. App. 3d 676, 689 (2008). This injury must be "separate and distinct from that suffered by other shareholders." *Spillyards v. Abboud*, 278 Ill. App. 3d 663, 671 (1996). Plaintiffs rely on the frequently cited *Zokoych v. Spalding*, 36 Ill. App 3d 654 (1976) in support of their contention that they have standing.

¶ 30 The *Zokoych* court explained that when considering whether a claim is individual or derivative "a court must preliminarily determine if the 'gravamen' of the pleadings states injury to the plaintiff upon an individual claim as distinguished from an injury which indirectly affects the shareholders or affects them as a whole." *Id.* at 663. "Where there is no showing that plaintiff himself had been injured in any capacity other than in common with his fellow stockholders, the cause of action belongs to the corporation, and a stockholder may not seek relief on his own behalf." *Id.* However, a stockholder may maintain a cause of action on his own behalf "where the wrongful acts are not only against the corporation but are also violations of a duty arising from a contract or otherwise, and owed directly by the wrongdoer to the stockholders." *Id.*

¶ 31 Where the injury is to the corporation, with the shareholders only indirectly affected by their stake in the company, all those with an interest in the company must share in the recovery. "Recovery by the firm, followed by division according to entitlements, is especially important when the firm has landed in bankruptcy." *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1336 (7th Cir. 1989). This is true because "[s]uits by shareholder, guarantors, and the like may well be efforts to divert the debtor's assets-to pay off one set of creditors [here, the Apostolous] while keeping the proceeds out of the hands of the firm's other creditors." *Id.*

¶ 32 To support their argument that the dismissed claims are not derivative but rather individual claims, the Apostolous point to four injuries which they claim are direct, personal

injuries: (1) the loss of their stock ownership and control of GEI, including the loss of voting rights and the power to control the company; (2) lost employment, including lost salary and employment benefits; (3) liability on their personal guarantees of GEI's loans; and (4) injuries to their reputation.

¶ 33 With regard to the enumerated injuries, we examine not only the alleged injury, but "the nature of the injury" alleged. See *Sterling*, 328 Ill. App. 3d at 62 ("*i.e.*, whether it is to the corporation or to the individual shareholder that injury has been done."). The gravamen of the third amended complaint is Aynessazian and Roche's bad advice and the actions of the Franchisee defendants (non-payment of fees, advertising costs, purchase of product with the intent to harm the company) as it related to GEI, caused GEI's failure and bankruptcy, thereby harming the Apostolous. Although the Apostolous' injuries were personally felt, they were only incurred indirectly through their interest in GEI. When the Franchisee defendants withheld royalty fees and payments, this directly harmed GEI; when Aynessazian and Roche caused GEI to miss loan payments, this directly harmed GEI. Arguably, these cumulative actions wronged GEI, causing it to lose money and pushed it into bankruptcy; these same actions forced the Apostolous' to satisfy their loan guarantees and suffer a loss of personal assets and the loss of value of the GEI stock. Because the Apostolous injuries arose from direct injury to the corporation and not from direct actions against them, their injuries are derivative.

¶ 34 The shareholder standing rule has been described as follows: "[a]n action in which the holder [i.e., the investor] can prevail only by showing an injury or breach of duty to the corporation should be treated as a derivative action *** An action in which the holder can prevail without showing an injury or breach of duty to the corporation should be treated as a direct action that may be maintained by the holder in an individual capacity." *Frank v. Hadesman &*

Frank, 83 F.3d 158, 160 (7th Cir. 1996) (quoting The American Law Institute's Principles of Corporate Governance: Analysis and Recommendations § 7.01 (1992)). The Apostolous' injuries are derivative because it is only through injuries to GEI that plaintiffs can establish their own loss. While the Apostolous' complaint is couched as an overarching conspiracy to "squeeze them out" of GEI, that does not change the fact that the alleged actions taken by the Franchisee Defendants and Aynessazian and Roche (as agents of GEI) were directed at the corporation and directly harmed the corporation. The Apostolous' injures were the result of their interest in GEI and only when the company failed and went into bankruptcy were their guarantees, personal assets and stock ownership and control of GEI lost.

¶ 35 A review of a few of the direct injury cases upon which the Apostolous rely supports this distinction between direct and indirect injury. For instance, in *Zokoych v. Spalding*, 36 Ill. App 3d 654 (1976), the plaintiff was one of two shareholders in a small tool company. *Id.* at 657. Plaintiff sued his fellow shareholder and others alleging that the second shareholder did not return the stock plaintiff pledged in breach of an agreement between the two. *Id.* Plaintiff also alleged that defendants removed him and his wife as directors of the company, removed him as president, and stopped paying his salary. *Id.* at 664. The court found that the plaintiff could properly maintain the action in his own behalf because he suffered direct injuries where actions were taken directly against him, his fellow shareholder refused to return his shares, and defendants fired him and stopped paying his salary. In contrast, here, there was no pledge of plaintiff's stock to any defendant and there was no allegation that any defendant did any tortious act directly against plaintiffs; all the alleged misconduct was between defendants and GEI. Further, as we discuss later in this decision, these defendants were not directly responsible for removing the Apostolous from the company: that occurred in the bankruptcy case. *In re*

Giordano's Enterprises, Inc., No. 11-06098 (Bankr. N.D. Ill. May 12, 2011).

¶ 36 In *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355 (1994), Levy, a 40% shareholder, sued Gust and Bakal, who owned 40% and 20% of the corporation's shares respectively. Levy alleged, among other things, that the defendants "froze him out" of the company. *Id.* at 359, 371, 381. The defendants, without plaintiff's knowledge, entered into an agreement with the corporation ensuring both continued employment. *Id.* at 359. Gust, as the corporation's president, signed on behalf of the corporation. *Id.* The defendants then voted to terminate Levy's employment and excluded him from all the corporation's operations. *Id.* The court treated the "freeze out" as a conversion of Levy's stock and allowed him to maintain an individual action, upon which he was awarded the value of his stock. *Id.* at 371. The defendants directly harmed Levy when they voted to remove him from the company and exclude him from the company's operations. Here, there was no "freeze out" orchestrated by the defendants; the diminished value of their stock in GEI was the result of the failure of the company, an injury suffered by all the stockholders in proportion to their ownership interests, and, again, the Apostolous lost control of the company through the bankruptcy proceedings.

¶ 37 In *Sterling Radio Stations, Inc. v. Weinstine*, 328 Ill. App. 3d 58, 62 (2002), Seith, a shareholder of a SRS corporation, guaranteed the corporation's promissory note to purchase a radio station. *Id* at 60. When the corporation stopped making payments, Seith refused to pay as guarantor. The radio station sued both the corporation and Seith and Seith hired the defendant law firm to defend himself and the corporation separately. Both were found liable and both sued the law firm for legal malpractice arising from the underlying case. *Id.* at 61. Seith claimed he was personally damaged because he had to pay on his guarantee. The law firm argued that Seith, in his capacity as guarantor and a shareholder of the corporation, lacked standing to bring the

legal malpractice case. *Id.* at 62. The appellate court found that Seith lacked standing to recover for the loss due to his guarantee but he did have standing to recover his legal expenses because he was seeking to recover for damages done to him directly as a result of malpractice, and he was "not suing defendants to recover damages for a harm done to [Sterling]." *Id.* Seith's injury was direct because he hired the law firm to represent him personally; when it negligently performed legal services the law firm breached a duty owed directly to him.

¶ 38 While the Apostolous may maintain an action on their own behalf against their personal advisor for liability related to the personal guarantee, they may not maintain a cause of action for that liability against Franchisee Defendants whose actions indirectly caused their loss by causing harm to the corporation. For instance, in *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333 (7th Cir. 1989), a shareholder-guarantor's liability for the debts of a corporation was found to be a derivative injury. 877 F.2d 1333. In *Mid-State Fertilizer*, the managers and shareholders of a corporation guaranteed corporate debt owed to a bank. *Id.* at 1335. When the bank stopped making advances under a revolving credit arrangement, the corporation was unable to find new financing, fell apart, and was liquidated in Chapter 7 Bankruptcy. *Id.* at 1334. The corporation sued the bank alleging breach of contract and violation of several federal statutes. The shareholder-guarantors joined the suit but were dismissed for lack of standing. *Id.* The Seventh Circuit affirmed the dismissal for lack of standing, holding that because guarantor injuries are directly tied to the fate of the corporation, their losses are derivative. *Id.* at 1336-37. The court explained that guarantors are a form of contingent lenders and, like investors, gain and lose with the corporation. *Id.* at 1335. Recovery by the corporation would have put the guarantors in the position they would have occupied had the bank not wronged the corporation. *Id.* at 1336. The guarantors' injury was derivative because the harm was done directly to the

corporation – the bank violated duties owed to the company. *Id*.; see also *Weissman v. Weener*, 12 F.3d 84, 86 (7th Cir. 1993) (noting when third party injures corporation, forcing it into bankruptcy and triggering guarantor's obligations on loans, shareholder-guarantor's claims are generally derivative rather than direct). Similarly in this case, the Apostolous' liability on their guarantees was also tied directly to the alleged harm done to the corporation by the defendants.

¶ 39 In *Sterling Radio,* Seith also claimed damages for the underlying judgment against him that was paid by the SRS successor corporation as part settlement with the trustee of the SRS bankruptcy estate. Seith claimed he was damaged because the payment by the successor corporation was effectively a payment by him since he was the largest shareholder of the successor corporation. *Id*. at 63. The *Sterling Radio* court held that because the judgment was paid from the assets of the corporation and not from the assets of individual shareholders, Seith only suffered "a diminution of the value of his shares and not a loss of his personal funds." *Id*. at 63.

¶ 40 The Franchisee Defendants cite *Cashman v. Coopers & Lybrand*, 251 Ill. App. 3d 730, in support of their argument that the Apostolous' injuries are derivative. In *Cashman*, a group of shareholders brought a complaint against the corporation's auditors alleging accounting negligence and misrepresentation of the corporation's financial condition knowing the shareholders would rely on the audit reports. *Id.* at 732. When the accounting irregularities came to light, the corporation's stock became worthless, forcing the company into bankruptcy. *Id.* The shareholders claimed injury due to the lost opportunity to make a fully informed investment decision regarding their continued ownership of the stock. *Id.* The appellate court affirmed the dismissal of the complaint for lack of standing. *Id.* at 736. The court found that the real damage was suffered by the corporation when the corporation's stock became worthless due to the

accountants' alleged mistakes. *Id.* The court explained that the shareholders alleged an injury to the corporation which only affected them indirectly and no contractual duty existed between the shareholders and the accountants that was any different from the duty existing between the accountants and the company. *Id*.

¶ 41 The real damaged suffered by the Apostolous, and GEI, was that the company went bankrupt due to the defendants' alleged misconduct. The injuries the Apostolous sustained indirectly as a result of GEI's bankruptcy cannot be recovered in an action brought on their own behalf. The Apostolous chose to operate their business in the corporate form and "even if all the stock of a corporation is owned by one person, the corporation is an entity different from that of the stockholder." *Bevelheimer v. Gierach*, 33 Ill. App. 3d 988, 992 (1975). By incorporating their business, the Apostolous gained advantages over operating the business as a sole proprietorship, such as no liability for corporate debts; however, they also gave up privileges, such as the right of direct legal action to redress an injury to them as primary shareholders in the company. See *Kush v. American States Insurance Co.*, 853 F.2d 1380, 1384 (1988). One who has operated a corporate entity "will not be permitted to disregard it to gain an advantage which under it would be lost." *Bevelheimer v. Gierach*, 33 Ill. App. 3d at 993.

¶ 42 Furthermore, we find that the complaint does not explain how many of plaintiffs' alleged injuries ultimately came about. The complaint lacks any detail as to how the Apostolous were separated from their employment, stock ownership, and control of GEI (with the exception of their voting rights, which they signed away). For instance, the complaint does not allege that the defendants fired the Apostolous; it merely alleges that they lost their employment. The complaint does not allege that defendants shut the Apostolous out of the business; it merely alleges that they lost the right to operate GEI.

¶ 43 For the foregoing reasons, we affirm the dismissal of Counts II-III, V, VII-X.

¶ 44 In addition to our holding that Counts II-III, V, VII-X fail for lack of standing, we also find plaintiffs' argument on appeal that the circuit court erred in dismissing counts II-III, V, VII-VIII, and X[5] has been forfeited because their appellate brief fails to put forth a fully developed legal argument to support their claim of error. Illinois Supreme Court Rule 341 (Ill. S. Ct. Rule 341(h) (eff. Feb. 6, 2013) governs the procedure concerning appellate briefs and is compulsory (*Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999)). The purpose of appellate rules is to require the parties to present clear and orderly arguments to the appellate court, so that we can properly understand, evaluate and dispose of the issues involved. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. Rule 341 requires, among other things, that an appellant present a fully developed argument with adequate legal and factual support (*Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009)), cite to the record for all factual assertions made and cite to legal authority for the arguments advocated (*Soter v. Christoforacos*, 53 Ill. App. 2d 133, 137 (1964)). See generally Ill. Sup. Ct. Rule 341(h)(6), (7) (eff. Feb. 6, 2013). That portion of plaintiffs' brief which addresses counts II-III, V, VII-VIII, and X, does not comply with Rule 341 because it contains only a recitation of case law and the cursory assertion that plaintiffs properly pled their claims. There is no fully developed legal argument presented in this portion of the appellate brief. General references to the complaint are not sufficient to create a fully developed argument sufficient to comply with Rule 341. An appellant's failure to properly develop an argument does "not merit consideration on appeal and may be rejected for that reason alone." *Housing Authority*, 395 Ill. App. 3d at 1040. This court is not "a depository into which a party may dump the burden of research" and "[a] conclusory

[5] Counts II-III, V, VII-VIII, and X allege tortious interference with contract and prospective economic advantage, fraud and constructive fraud, conspiracy to commit fraud and injure plaintiffs' business, and conspiracy to defame.

assertion, without supporting analysis, is not enough" to satisfy Rule 341. (Internal quotation marks omitted.) *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶¶ 38-40.

¶ 45 For all the foregoing reasons we affirm the circuit court's order dismissing counts II, III, V, VII, VIII, IX, and X.

¶ 46 However, we find count I is not so barred. In count I, the Apostolous allege shareholder oppression against Aynessazian. Section 12.56 of the Illinois Business Corporation Act of 1983 provides remedies to a shareholder if it is established that "[t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent with respect to the petitioning shareholder whether in his or her capacity as a shareholder, director, or officer." 805 ILCS 5/12.56. The Apostolous, citing *Mann v. Kemper Financial Companies*, 247 Ill. App. 3d 966 (1992), argue that they have standing to bring a cause of action under the statute regardless of the nature of their injury.

¶ 47 In *Mann*, this court found that "[i]f a statute provides a right of action to a shareholder, then the *Zokoych* examination of the nature of the injury does not apply." *Id.* at 977. The court then went on to hold that where only the plaintiff, and not the company, could sue for a violation of the statute, the claim was properly brought as an individual action. See, e.g., *Id.* at 977-78 ("Section 11 of the Securities Act creates a cause of action in favor of plaintiffs based on the filing of registration statements containing material misrepresentations. The mutual funds could not sue for violation of section 11 because they did not acquire securities in themselves.").

¶ 48 Notwithstanding the previous discussion of the nature of the Apostolous' injuries, and based on the rule announced in *Mann*, we find that the Apostolous have standing to bring count I as an individual action. Section 12.56 creates a cause of action in favor of an individual shareholder. GEI is not a shareholder and therefore could not have brought the action.

Accordingly, we reverse the dismissal of count I pursuant to section 2-619.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, the order of the circuit court dismissing counts II, III, V, VII, VIII, IX, and X of the third amended complaint affirmed, but we reverse the dismissal of count I and remand this matter to the circuit court for further proceedings consistent with this order.

¶ 51 Affirmed in part; reversed in part; cause remanded.

¶ 52 JUSTICE MASON, concurring, in part and dissenting, in part:

¶ 53 According to their complaint, the Apostolous built a multi-million dollar business from scratch and did so without understanding virtually anything about the financial workings of the business, relying instead on advice from their lawyer and accountant who ultimately betrayed them, allegedly in an effort to steal the business. The effort failed as a third party purchased GEI's assets out of bankruptcy, but, again according to their third amended complaint, the Apostolous, wholly apart from losing the value of their shares in the enterprise, (i) were forced to honor personal guarantees of $36 million worth of GEI's debts, (ii) lost employment and other benefits as a result of their termination from GEI and (iii) lost personal property, including their personal residence, pledged as collateral for the guarantees.

¶ 54 I concur in the reversal of the trial court's order insofar as it dismissed the Apostolous' shareholder oppression claim as GEI could not have pursued this claim.

¶ 55 My colleagues conclude that the Apostolous lack standing to pursue the majority of their remaining claims because their injuries are derivative of injuries sustained by GEI. I respectfully disagree. The gravamen of the third amended complaint is that defendants devised their scheme specifically to harm the Apostolous by depriving them of their interest in GEI, knowing that if GEI defaulted on its obligations to Fifth Third Bank, the Apostolous would be unable to pay on

the guarantee. Thus, this is unlike those cases where a guarantor lacks standing because the harm the guarantor suffers is wholly derivative of the harm to the corporation where none of the conduct directed at the corporation was specifically designed to injure the guarantor. The losses allegedly sustained by the Apostolous were suffered by them individually. They were personally obligated to honor the guarantees, they lost income and benefits derived not from their shareholder status, but from their employment with the company and their personal assets were sold to satisfy their obligations. These losses are not tied to the Apostolous' position as sole shareholders of GEI, nor do they constitute losses that GEI could pursue directly.

¶ 56 *Sterling Radio Stations, Inc. Weinstine*, 328 Ill. App. 3d 58 (2002), illustrates the point. In *Sterling*, a shareholder, Seith, sued attorneys for legal malpractice. The corporation, Sterling Radio Stations, entered into an agreement to buy another radio station and executed a promissory note guaranteed by the Seith. The transaction fell through and the seller later sued on the promissory note and Seith's guarantee. Seith hired a law firm to represent both the corporation and himself in the suit. A money judgment was entered against the corporation on the promissory note and against Seith on his guarantee.

¶ 57 When the corporation and Seith later sued the law firm for malpractice, the law firm successfully argued in the trial court that Seith lacked standing to pursue his claim because his injuries were derivative of the injury to the corporation. Rejecting this contention on appeal, the *Sterling* court (Theis, J.) concluded:

> "Seith, as guarantor of the promissory note, was personally liable in the [underlying] [a]ction. Seith hired defendants to represent both the corporation, [ ] and Seith individually. In this lawsuit, Seith is not suing defendants to recover damages for a harm done to [the

corporation], but is instead seeking to recover for a harm done to him directly and, has standing to bring this suit in his individual capacity." *Sterling,* 328 Ill. App. 3d at 62.

The court ultimately concluded that Seith could not recover amounts paid in satisfaction of the judgment against him because that judgment was paid by another corporation in which Seith was a shareholder. *Id.* at 63 ("Seith suffered only a diminution of the value of his shares and not a loss of his personal funds."). So while the requirement that Seith honor his guarantee was an individual injury sufficient to confer standing, he could not recover those amounts as damages because he did not personally pay them. But that is not the case here.

¶ 58 I see no distinction between the personal losses the shareholder in *Sterling* sought to recover and the losses identified by the Apostolous in the third amended complaint. Like the shareholder in *Sterling,* the Apostolous personally guaranteed GEI's debt to Fifth Third Bank in connection with the Florida property purchase. The amounts they paid to honor the guarantee came from personal, not corporate funds and not, like *Sterling*, from a third party. The property they claim was sold to satisfy that debt likewise belonged to them, not the corporation. And the alleged loss of benefits and income was personal to them. See *Zokoych v. Spalding,* 36 Ill. App. 3d 654, 663-64 (1976) (shareholder permitted to pursue individual claim that he was fired from his position as president and director of corporation). And while it is true that the Apostolous would not have sustained injury had the defendants not conspired, as the Apostolous claim, to seize control of GEI and force it into bankruptcy, that does not make their claims derivative any more than the shareholder's claims in *Sterling* were derivative. Nothing in the majority's reasoning convinces me that the nature of the damages sought by the Apostolous bars their claims as a matter of law based on lack of standing.

¶ 59 The majority incorrectly analyzes whether the *cause* of the Apostolous' injuries was direct or indirect. ("While the Apostolous may maintain an action on their own behalf against their personal advisor for liability related to the personal guarantee, they may not maintain a cause of action for that liability against Franchisee Defendants whose action *indirectly caused their loss* by causing harm to the corporation."). But the proper focus is not on the cause of the loss, but on whether the Apostolous sustained injury *directly*, in the form of, *e.g.*, their responsibility to personally pay on their guarantee, or *indirectly* in the form of loss of the value of their shares as a result of damage to the corporation. Because the claimed losses sustained by the Apostolous were direct, personal losses, they have standing to pursue them. At this juncture, whether the franchisees will ultimately prevail because their conduct did not proximately cause those personal losses does not implicate standing, but instead goes to the merits of the Apostolous' claims. Consequently, I would reverse the order dismissing their claims based pursuant to section 2-619 (a)(2). 735 ILCS 5/2-619(a)(2) (West 2010).

¶ 60 But this is not to say that there are not serious obstacles to the Apostolous' effort to hold the defendant franchisees liable for their personal losses. Wholly apart from the wildly complicated and ultimately unsuccessful "scheme" and "conspiracy" outlined in the third amended complaint, the franchisees had no contractual relationship with and owed no duties to the Apostolous personally, they were uninvolved in the purchase of the Florida real estate, which was ultimately the Apostolous' downfall, they did not advise the Apostolous to put GEI into bankruptcy and they did not control the course of the bankruptcy prior to the sale of GEI's assets to the a third party. The franchisees' liability, according to the Apostolous, boils down to their conduct in withholding certain franchise payments at the direction of the Chief Financial Officer of GEI, allegedly based on the promise that they would reap a benefit from ousting the

Apostolous and later purchasing GEI's assets at a discount. However, as parties to contracts with GEI, the franchisees were privileged to breach those contracts if they deemed the breach—withholding franchise payments and fees—to be in their respective economic interests. See *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 157-58 (1989) (in intentional interference case, recognizing that corporation, through its officers, may elect to protect the corporation's own economic interest over that of a party to a contract with the corporation even if it causes a breach). Of course, whether the franchisees withheld payments for legitimate economic reasons or because they hoped to benefit, along with insiders, from GEI's demise, presents factual issues that we could not possibly resolve in this appeal. Additionally, the franchisees point out numerous other bases for challenging the legal and factual sufficiency of the claims against them, which the trial court has not yet addressed.

¶ 61 Based on its conclusion that the Apostolous lacked standing, the trial court never reached the sufficiency of the numerous claims against the franchisees. And although we may affirm on any basis appearing in the record, I would decline to address as a matter of first impression on appeal, the sufficiency of the allegations of the third amended complaint as they relate to the franchisees. Nor would I penalize the Apostolous, as the majority does, for failing to address in their opening brief any alternative grounds for affirming the trial court's dismissal of their complaint. The only argument that the Apostolous were obligated to address as appellants was the basis on which the trial court actually dismissed the complaint, *i.e.*, their lack of standing, which they did. It was not their obligation to anticipate what defendants might argue in their appellees' briefs. As it is, the Apostolous' reply brief devotes 10 pages to a discussion of the sufficiency of their various claims. Thus, they have not "waived" anything and in light of the fact that the trial court has never addressed the sufficiency of their claims, I would remand for

consideration of the substance of defendants' 2-615 motion. While the Apostolous have been afforded numerous opportunities to amend in this five year-old litigation and the trial court may ultimately conclude that dismissal of some or all of the claims with prejudice is appropriate, this task is best undertaken at the trial level subject to appellate review. See *Mann v. Kemper Financial Co.*, 247 Ill. App. 3d 966, 984 (1992).