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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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S. LOUIS RATHJE, as Trustee of the S. Louis Rathje Trust U/T/A dated February 24, 1984,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 11-CH-3589
HORLBECK CAPITAL MANAGEMENT, LLC, TODD HORLBECK, and HCM L.P.,	)	
Defendants-Appellees.	)	Honorable James R. Murphy, Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed with prejudice plaintiff's third amended complaint, where plaintiff failed to plead facts establishing damages; the appellate court also held that plaintiff's action in part was not derivative and that it was not a "holder" action.

¶ 2 Plaintiff, S. Louis Rathje, appeals from an order of the circuit court of Kane County dismissing with prejudice his third amended complaint. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This is the fourth time that this matter has been before this court, and the parties are well acquainted with the facts. We will recite them here only as they pertain to the issues raised in the present appeal. Where necessary, we will supplement the facts in our analysis.

¶ 5 Todd Horlbeck was an owner/manager of Horlbeck Capital Management, LLC (HCM), an investment firm in St. Charles, Illinois. HCM, L.P. (the partnership) was an Illinois limited partnership in which HCM was the general partner. The partnership operated a hedge fund. In 2002 and 2003, plaintiff invested a total of \$1.3 million in the hedge fund as a limited partner. Plaintiff received quarterly statements from the partnership valuing his share of the partnership's assets. Based upon the December 31, 2008, statement, plaintiff believed that his share was approximately \$1.4 million. However, when the partnership was dissolved on April 29, 2009, plaintiff learned that the actual value of his share of the partnership's assets at that time was \$421,217.64. In statements to plaintiff and to financial regulatory authorities, Horlbeck admitted that the partnership had committed "performance and reporting inaccuracies," although all of the partners' losses were market related. However, as a result of those "inaccuracies," the partners, including plaintiff, were misinformed as to the true value of their investments.

¶ 6 In September 2009, Horlbeck also informed plaintiff that some partners were "inadvertently" overpaid, because they received the wrongly inflated value of their shares of the partnership's assets when they withdrew. The total amount of the overpayments was \$464,988, which was owed to the partnership by the overpaid partners. Plaintiff's share of the overpayment was \$27,733.29. Horlbeck offered to enter into a promissory note with the partnership to repay that amount to plaintiff over time in exchange for a release of all claims. Plaintiff did not sign the release.

¶ 7 On October 7, 2011, plaintiff filed suit against HCM, Horlbeck, and the partnership. On April 8, 2014, plaintiff filed his third amended complaint, which is the subject of this appeal.

¶ 8 In the factual allegations preceding the numbered counts of the third amended complaint, plaintiff alleged, *inter alia*, that the false statements in 2007 and 2008 valuing his share of the partnership's assets prevented him from making "informed investment decisions with respect to his participation in the partnership." He further alleged that he justifiably relied on the statements in making the decision to remain in the partnership in 2007 and 2008, because defendants were "obligated to generate and disseminate accurate statements of returns" for his share of the partnership assets. Under the section titled "Rathje's Damages," plaintiff alleged that he is entitled to the difference between the value he would have received upon withdrawing prior to the partnership's dissolution and the value he actually received after the partnership dissolved. In each count of the third amended complaint, plaintiff alleged that those damages were in addition to the \$27,733.29, which represented his share of the overpayment to some of the partners.

¶ 9 Count I of the third amended complaint was against HCM for breach of contract. It alleged that HCM maintained inaccurate books, records, and accounts with respect to the value of plaintiff's share of the partnership assets and systematically misrepresented the value of those assets. To illustrate the allegation that defendants misrepresented the actual value of plaintiff's share of the partnership's assets, plaintiff included a chart in paragraph 93 showing the dates of the 2007-2008 quarterly statements furnished him by the partnership, the inflated values of his share, and the corrected, or actual, values of his share. Count II was against HCM and alleged a breach of fiduciary duty. In count II, plaintiff alleged that he incurred significant damages, including the "difference between the value he would have received for his share of the

partnership” upon withdrawing prior to dissolution and the value he actually received after the partnership dissolved. Further, plaintiff alleged that HCM’s failure to maintain accurate books, records and accounts, and its failure to generate accurate valuations in 2007 and 2008, were a “material and substantial factor” in plaintiff’s decision not to withdraw from the partnership before it was dissolved. Count III was against Horlbeck for breach of fiduciary duty and pleaded damages and reliance in substantially identical language as that used in count II. Count IV was for fraudulent misrepresentation against HCM. Plaintiff alleged that the value of his share of the partnership’s assets was a “material fact” in his investment decisions, including his decision to remain in the partnership. He further alleged that he did not withdraw prior to the partnership’s dissolution, because the false statements showed satisfactory returns on his investment. Count IV alleged damages in substantially identical language as that used in count III. Count V alleged fraudulent misrepresentation and was directed against Horlbeck. In count V, plaintiff pleaded that he “reasonably relied” on the statements valuing his share of the partnership’s assets in making investment decisions, including his decision to remain in the partnership. He further alleged that he did not withdraw prior to dissolution because the false statements for 2007 and 2008 showed a satisfactory return on his investment. He pleaded damages in substantially the same language as in the earlier counts. Count VI was directed against the partnership and alleged fraudulent misrepresentation in terms substantially similar to those pleaded against Horlbeck in count V. Count VII was pleaded in the alternative to count IV and alleged negligent misrepresentation against HCM. Plaintiff alleged in count VII that he “reasonably relied” on the statements valuing his partnership share and in making investment decisions, including the decision to remain in the partnership. Further, he alleged damages in substantially similar language as in the previous counts. Count VIII was pleaded against Horlbeck in the alternative

to count V and alleged negligent misrepresentation in terms substantially similar to those in count VII. Count IX alleged negligent misrepresentation against the partnership as an alternative to count VI and pleaded the allegations in substantially similar language as that used in count VIII. Counts X, XI, and XII alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (Act) (815 ILCS 505/1 *et seq.* (West 2012)) against HCM, Horlbeck, and the partnership, respectively. Those counts alleged that the respective defendants committed deceptive acts and practices in 2007 and 2008 by generating inaccurate statements valuing plaintiff's partnership share. Plaintiff further alleged in each count that those statements were material factors in his determination not to withdraw his investment prior to the partnership's dissolution, and he alleged damages as pleaded in the previous counts.

¶ 10 Exhibits were attached to, and incorporated into, the third amended complaint. Specifically, plaintiff entered into a written partnership agreement that provided in relevant part: (1) for the initial period of the agreement, a partner's percentage was determined by dividing the amount of each partner's capital contribution by the sum of the capital contributions of all of the partners; thereafter, a partner's percentage was the pro rata share of the fair market value of the partnership's assets as determined by the general partner; (2) the general partner determined the fair market value of the partnership's assets and each partner's percentage as of January 1st of each year, allocating 20% of any net gains to the general partner and 80% of net gains to the limited partners according to their respective partnership percentages; (3) the partnership was to maintain accurate books, records, and accounts reflecting the partnership's assets, liabilities, and financial condition; and (4) at the close of the fiscal year, the general partner was to prepare and furnish to each partner a balance sheet, a statement of profits and losses, and a statement of cash flow. In addition, the partnership was required to furnish to each partner quarterly statements of

the financial performance of the top ten investments and a summary of the “company’s” investment performance.

¶ 11 Exhibit G was a letter dated May 18, 2009, from Todd Horlbeck to plaintiff explaining that the partners suffered losses that were attributable to “overall market losses.” Horlbeck further explained that there were “performance and reporting inaccuracies” that did not alter the overall results of the partnership or the amount of plaintiff’s final distribution.

¶ 12 Exhibit I was another letter from Horlbeck to plaintiff dated September 4, 2009. In that letter, Horlbeck again explained that “all losses are market related and accounted for.” Horlbeck further informed plaintiff that, upon dissolution of the partnership, some of the partners were inadvertently overpaid, meaning that the amount of the overpayment was owed to the partnership by the overpaid partners. Horlbeck offered to personally compensate plaintiff the \$27,733.29 due to him from the partnership in return for a release.

¶ 13 Exhibit K was a letter of acceptance, waiver, and consent signed by Horlbeck and submitted to the Financial Industry Regulatory Authority (FINRA), detailing Horlbeck’s violation of industry rules in connection with operating the hedge fund. In the letter, Horlbeck stated that, during 2008 and 2009, the partnership values decreased as the value of its investments dropped. During that period, Horlbeck misstated the value of each investor’s holdings on approximately four quarterly account statements that he sent to the investors. Approximately 11 investors took distributions from the partnership based on the incorrect value of the fund, leaving other investors who did not take distributions with a shortfall.

¶ 14 Defendants moved to dismiss with prejudice the third amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). They moved to dismiss the counts based on the Act on the basis that plaintiff did not purchase

anything in reliance on the alleged misrepresentations and, therefore, was not a consumer. Defendants moved to dismiss the claims for fraudulent and negligent misrepresentation on the basis that plaintiff failed to plead facts establishing reliance. They moved to dismiss the breach-of-contract claim on the basis that HCM had no contractual duty to prepare quarterly statements. Finally, with respect to all counts, defendants contended that plaintiff's damages were speculative.

¶ 15 On October 29, 2014, the court granted defendants' motion to dismiss with prejudice and issued a written memorandum accompanying the order. First, the court dismissed the counts based on the Act because plaintiff was not a "purchaser" as defined by the Act, and, therefore, was not a consumer. Second, the court ruled that plaintiff failed adequately to plead reliance in the fraudulent and negligent misrepresentation counts. Third, the court found that plaintiff did not sufficiently plead damages, because accurate statements in 2007 would have shown an increase in his investment, just not as much as represented on the inflated statements. Therefore, it was possible that plaintiff would have remained in the partnership had he known the truth. With respect to 2008, plaintiff contractually could not have withdrawn until December 15, 2008, for a distribution in January 2009 for whatever value his partnership share was worth, which is what he received upon the partnership's dissolution. The court also found that damages were speculative. Fourth, the court ruled that plaintiff was required to bring a derivative action rather than an individual shareholder action, because plaintiff was essentially seeking recovery for diminution in the value of his partnership share. Plaintiff filed a timely appeal.

¶ 16

## II. ANALYSIS

¶ 17 First, with respect to the entire third amended complaint, plaintiff contends that he appropriately brought a direct action instead of a derivative action, because he is alleging that

defendants' false representations prevented him from taking informed action regarding his particular interest in the limited partnership. Second, with respect to counts IV through XI (the misrepresentation counts), he contends that he adequately pleaded reliance and damages. Third, with respect to counts X through XII (consumer fraud counts), he contends that he adequately pleaded that he was a consumer and, as such, has standing to bring claims under the Act. Fourth, he contends that he adequately pleaded that HCM breached its obligation to keep accurate partnership books. We consider plaintiff's contentions after examining the legal standards appropriate to review a complaint's dismissal.

¶ 18 A section 2-615 motion to dismiss tests the legal sufficiency of the complaint based on defects apparent on its face. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25. A section 2-615 motion presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences to be drawn from those facts as true, are sufficient to state a cause of action upon which relief can be granted. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25. A complaint should not be dismissed pursuant to section 2-615 unless it is apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25. This court reviews the granting of a section 2-615 motion to dismiss *de novo*. *Estate of Powell ex rel. Harris v. John C. Wunsch, P.C.*, 2013 IL App (1st) 121854, ¶ 15.

¶ 19 A. Whether Plaintiff's Action Was Direct or Derivative

¶ 20 Plaintiff was a limited partner in the partnership. Limited partners are in positions analogous to corporate shareholders and cannot pursue individual actions for damages to their interests in a limited partnership. *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1069 (2001). To bring a direct claim, the plaintiff must allege an injury "separate and distinct" from that

suffered by other shareholders, or an injury that involves a contractual right, such as the right to vote or the right of majority control, that exists independently of any right of the corporation. *Caparos v. Morton*, 364 Ill. App. 3d 159, 167 (2006). Courts treat limited partners similarly to corporate shareholders in this respect. *Caparos*, 364 Ill. App. 3d at 167. Further, limited partners seeking redress for the decreased value of their shares in the limited partnership must do so in a derivative action. *Caparos*, 364 Ill. App. 3d at 168; *Dolan*, 324 Ill. App. 3d at 1069. Proper derivative actions include claims for a general partner's mismanagement, negligence, diversions of assets, actions beyond their authority, and failure to perform elements of an agreement. *Caparos*, 364 Ill. App. 3d at 168.

¶ 21 Here, plaintiff denies that he seeks damages for the diminution in value of his share of the partnership's assets. Rather, he asserts that defendants' false representations prevented him from taking informed action regarding his personal limited partnership interest. We agree with plaintiff in part. Plaintiff has alleged two kinds of injuries: those that resulted from harm to the partnership and those that allegedly resulted in harm to himself. Horlbeck revealed to plaintiff in his September 4, 2009, letter that some partners were "inadvertently" overpaid approximately \$464,988. The overpayment resulted from Horlbeck distributing those partners' interests at falsely inflated values. That overpayment caused harm to the partnership, because it resulted in an actual diminution in value of the partnership's assets. Consequently, plaintiff had to pursue a derivative action to recover the amount that was overpaid, including his share of that amount, which was \$27,733.29. In contrast, the falsely inflated values on plaintiff's 2007-2008 statements did not cause harm to the partnership, because the partnership suffered no actual losses. Pursuing the corporate analogy, an action in which the plaintiff might prevail without showing an injury or breach of duty to the corporation can be maintained directly. *Frank v.*

*Hadesman and Frank, Inc.*, 83 F.3d 158, 160 (7th Cir. 1996). Consequently, we conclude that, except for the \$27,733.29 overpayment, plaintiff could bring a direct action for the balance of his losses, if any.

¶ 22 B. Whether Plaintiff Stated a Cause of Action For a “Holder” Claim

¶ 23 According to the third amended complaint, defendants made false and misleading statements regarding the value of plaintiff’s share of the partnership’s assets in 2007 and 2008 in a calculated effort to encourage him to retain his limited-partnership interest. Plaintiff alleged that, had defendants informed him of the truth, as they were required to do, he would have withdrawn from the limited partnership prior to its dissolution. The parties and the court treated the misrepresentation counts of the third amended complaint as a “holder” action. A “holder” action is one in which the plaintiff alleges that material misrepresentations or omissions caused him or her to retain ownership of securities that he or she acquired prior to the alleged wrongdoing. *In re Worldcom, Inc. Securities Litigation*, 336 F. Supp. 2d 310, 318-19 (S.D. N.Y. 2004). Illinois has not recognized “holder” claims. *Dloogatch v. Brincat*, 396 Ill. App. 3d 842, 847 (2009). Plaintiff requests that we do so.

¶ 24 The gist of a “holder” claim is that the plaintiff is the holder of certain corporate securities, the value of which the corporation fraudulently inflates; when the fraud is discovered, the price of the stock drops precipitously, causing injury to the stockholder. *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 170 (2003). The cause of action is limited to stockholders who can make a *bona fide* showing of actual reliance upon the misrepresentations. *Small*, 30 Cal. 4th at 171. Because of the danger of vexatious and meritless lawsuits and the difficulties of proof that arise when the issues depend entirely on oral testimony from the stockholder, heightened pleading requirements are justified to place limits on the cause of action. *Small*, 30 Cal. 4th at

183. For instance, the plaintiff must allege specific facts demonstrating: that he or she would have sold the stock had he or she read a truthful account of the corporation's financial status; how many shares would have been sold; and when the sale would have taken place. *Small*, 30 Cal. 4th at 184. The court in *Small* emphasized that the plaintiff "must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions that would indicate that the plaintiff actually relied on the misrepresentations." *Small*, 30 Cal. 4th at 184.

¶ 25 Here, plaintiff's action resembles a holder claim, in that the partnership held certain securities and plaintiff was misled as to the value of his share of the partnership's assets, causing him to refrain from withdrawing from the partnership. However, there is one critical difference. Defendants' actions did not cause plaintiff's share of the partnership's assets to plummet. As plaintiff acknowledges, the Great Recession caused the drop in value. In other words, while defendants misrepresented the value of plaintiff's share of the partnership's assets, his share itself was not fraudulently inflated. Plaintiff posits that he could have lessened the impact of the recession had he known the truth about the value of his share of the partnership's assets. In this respect, the instant action is distinguishable from a holder action, where the loss does not derive from the fraud *per se* but from the disclosure of the misrepresentations that causes the market price of the stock to fall. See *Dloogatch*, 396 Ill. App. 3d at 851. That said, however, the instant action raises some of the concerns posed by holder actions, notably, that proof will turn on an oral version of events that cannot be corroborated or discredited. For that reason, in reviewing the sufficiency of plaintiff's pleadings of the common law torts of fraudulent misrepresentation and negligent misrepresentation, we will scrutinize plaintiff's allegations. In particular, we will focus on the allegations of reliance and damages, which are the problematic elements in a holder action and in this case.

¶ 26 In Illinois, the elements of fraudulent misrepresentation are: (1) a false statement of material fact; (2) the defendant's knowledge or belief that the statement was false; (3) the defendant's intent that the statement induce the plaintiff to act or refrain from acting; (4) the plaintiff's justifiable reliance upon the truth of the statement; and (5) damages resulting from the plaintiff's reliance on the statement. *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, ¶ 37; *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 72 (2010). Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation, except that the defendant need not know that the statement is false. *Doe v. Dilling*, 371 Ill. App. 3d 151, 180 (2006). Illinois imposes heightened specificity requirements for pleading fraud. *Aasonn, LLC v. Delaney*, 2011 IL App (2d) 101125, ¶ 27.

¶ 27 The only elements in dispute are reliance and damages. We look at reliance first. Plaintiff pleaded reliance as follows: “[Plaintiff] relied on the statements of returns for the knowledge of the value of his share of the Partnership’s assets in making investment decisions, including his decision to remain in the Partnership in 2007 and 2008.” He further alleged: “[Plaintiff’s] reliance on the statements of returns was justified because [defendants] were obligated to generate and disseminate accurate statements of returns for [plaintiff’s] share of the Partnership’s assets.” For common law fraud, the plaintiff’s reliance must be justified in that he or she had a right to rely. *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 939 (2003). The same requirement applies to negligent misrepresentation. *Capiccioni*, 339 Ill. App. 3d at 939. Justifiable reliance is not adequately pleaded unless the plaintiff alleges that he or she took action in justifiable reliance on the truth of the defendant’s statement. *Simmons v. Champion*, 2013 IL App (3d) 120562, ¶ 36. Here, plaintiff alleges that he would have withdrawn from the partnership prior to its dissolution. However, the allegation of the proposed action is

vague, because, according to the chart contained in paragraph 93 of the third amended complaint, eight quarterly statements spanning the end of March 2007 to the end of December 2008 contained misrepresentations, and plaintiff does not allege which misrepresentation or misrepresentations would have caused him to withdraw had he known the truth. An allegation that is the equivalent of “I would have done something different” is not a factual allegation but a conclusion that does not meet the heightened specificity required to plead fraud.

¶ 28 Even though we hold that the misrepresentation counts of the third amended complaint fail because plaintiff inadequately pleaded reliance, we also look at damages, because the two elements in this case are intertwined. Under the heading “Rathje’s Damages,” plaintiff alleged four things: (1) had he known the true value of his share of the partnership’s assets, he would have withdrawn his investment prior to April 2009; (2) based on his reasonable expectation, he is entitled to the difference between the value he would have received upon withdrawing prior to the partnership’s dissolution and the value he did receive in June 2009, after the dissolution; (3) because of his reliance on the false statements of returns, he did not withdraw his investment during the partnership’s existence and received only \$421,217.64 upon its dissolution; and (4) the amount in (2) is in addition to the \$27,733.29 that he was owed based upon the overpayment to some of the partners.

¶ 29 We have already determined that plaintiff could not pursue the \$27,733.29 in a direct action. We must now determine whether the first three allegations of damages are sufficient. We know with certainty the value that plaintiff received in June 2009. He did not plead with anything approximating certainty the value that he would have received had he withdrawn from the partnership prior to its dissolution, because he did not specify when he would have withdrawn and what the value would have been at that time. A legally sufficient fraud claim

must allege the existence of damages. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 546. In a fraud action, damages cannot be predicated on mere speculation. *Brown v. Broadway Perryville Lumber Co.*, 156 Ill. App. 3d 16, 25 (1987). The measure of damages for fraud is the amount that will compensate the plaintiff for the loss occasioned by the fraud or the amount that the plaintiff is actually out of pocket by reason of the transaction. *Brown*, 156 Ill. App. 3d at 25. For instance, in *Slade v. Slade*, 310 Ill. App. 77, 85-86 (1941), the plaintiff properly pleaded damages, where she pleaded that the defendant caused her stock to decrease in the specific amount of \$9,000.

¶ 30 Plaintiff now claims that the chart set forth in paragraph 93 of the third amended complaint, showing the inflated and actual values of his share of the partnership's assets on various dates, sets forth his damages. He now argues that he is entitled to the difference between \$525,622, which is the actual value of his share as of December 31, 2008, and \$421,217.64, which is the amount he received in June 2009 upon distribution. However he did not plead that number, or any number, in the third amended complaint. Nor did he plead when he would have withdrawn. Plaintiff employed the chart in the third amended complaint solely to illustrate that defendants misrepresented the actual value of his share of the partnership's assets. Accordingly, the trial court's dismissal of the misrepresentation counts was proper.

¶ 31 C. Whether the Remaining Causes of Action Were Adequately Pleaded

¶ 32 Remaining for discussion are the breach-of-contract, consumer fraud, and breach-of-fiduciary-duty counts of the third amended complaint. We will examine each in turn.

¶ 33 To succeed on a breach-of-contract claim, the plaintiff must plead and prove the existence of a contract, the plaintiff's performance of its conditions, a breach by the defendant, and damages that result from the breach. *Kopley Group V., L.P. v. Sheridan Edgewater*

*Properties, LTD.*, 376 Ill. App. 3d 1006, 1014 (2007). Here, plaintiff pleaded that the partnership agreement was a contract; that he performed all obligations required of him under the agreement; that HCM breached its obligations by (1) maintaining inaccurate books, records, and accounts with respect to the value of plaintiff's share of the partnership's assets, and (2) systematically misrepresenting the value of his share of the partnership's assets; and that he incurred "significant damages" as a result of the breach, including the difference between the value he would have received for his share upon withdrawing prior to dissolution and the value he received upon dissolution. The trial court ruled that plaintiff failed to sufficiently plead breach of contract, because the partnership agreement did not provide for a right to quarterly statements, and because the "essence" of plaintiff's claim was mismanagement, which is a derivative claim.

¶ 34 As we discussed above, the inflated values of plaintiff's share did not harm the partnership. Therefore, this was not a derivative claim, except to the extent that plaintiff sought to recover \$27,733.29, which was his share of the overpayment to the partners who withdrew. As to the breach, we agree with the trial court in part and with plaintiff in part. The partnership agreement did not obligate HCM to furnish plaintiff with the quarterly statements at issue. Therefore, HCM did not breach the agreement by making the misrepresentations. However, the allegation of breach was broader than the inflated quarterly statements. Plaintiff additionally alleged that HCM was obligated by the partnership agreement to maintain accurate records. Paragraph 14(b) of the partnership agreement required the partnership to maintain "accurate books, records, and accounts which shall reflect the Partnership's assets, liabilities, financial condition and the nature of its operation and transactions." Thus, plaintiff adequately pleaded a breach. The question is whether he sufficiently pleaded damages.

¶ 35 The measure of damages for breach of contract is the amount that will compensate the aggrieved party for the loss that either fulfillment of the contract would have prevented or that the breach of it has entailed. *Santorini Cab Corp. v. Banco Popular North America*, 2013 IL App (1st) 122070, ¶ 26. The purpose of damages is to put the nonbreaching party into the position he or she would have been in had the contract been performed.” *Santorini*, 2013 IL App (1st) 122070, ¶ 26. Compensation awarded in a breach of contract claim should not provide the plaintiff with a windfall. *Santorini*, 2013 IL App (1) 122070, ¶ 26. The basic theory of damages in a breach of contract action requires the plaintiff to establish an actual loss or measurable damages resulting from the breach.” *In re Illinois Bell Telephone Link-up II*, 2013 IL App (1st) 113349, ¶ 19. Damages that are not proximately caused by the breach are not allowed. *Illinois Bell*, 2013 IL App (1st) 113349, ¶ 19. HCM’s failure to keep accurate books and records did not cause the value of plaintiff’s share of the partnership’s assets to drop. The recession caused the drop, as plaintiff acknowledges. Nor did keeping inaccurate books and records cause plaintiff to hold onto his investment. Even assuming it did, plaintiff did not allege when he would have withdrawn from the partnership. Consequently, plaintiff cannot plead or prove damages that resulted from HCM’s breach of the partnership agreement.

¶ 36 Next, we consider whether plaintiff adequately pleaded a cause of action for violation of the Act. The Act prohibits any misrepresentation of any material fact with the intent that others rely on the misrepresentation in the conduct of trade or commerce. 815 ILCS 505/2 (West 2010). Section 10(a) of the Act provides for a private cause of action by any person who suffers actual damage as a result of violation of the Act. 815 ILCS 505/10(a) (West 2010). To plead a cause of action under the Act, the plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) the defendant’s intent that the plaintiff rely on the deception; (3) the deception

occurred in the course of conduct involving trade or commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception. *Pappas v. Pella Corp.*, 363 Ill. App. 3d 795, 798-99 (2006). A complaint alleging a violation of the Act must be pleaded with the particularity and specificity as that required for common law fraud. *Pappas*, 363 Ill. App. 3d at 799. Actual damages must be calculable and measured by the plaintiff's loss. *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009).

¶ 37 Plaintiff pleaded that HCM and the partnership violated the Act by generating and disseminating the inaccurate quarterly statements for 2007-2008. Plaintiff pleaded damages in the same manner as in the common law fraud counts. The trial court dismissed the consumer fraud counts on the basis that plaintiff was not a "purchaser" as defined by the Act. Under the Act, a "consumer" is "any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household." 815 ILCS 505/1(e) (West 2010). "Merchandise" includes "services." 815 ILCS 505/1(b) (West 2010). Plaintiff asserts that he is a purchaser within the Act's meaning, because he purchased defendants' hedge fund management services every year that he held onto his investment. We need not decide whether plaintiff was a purchaser, because his damages claim fails for the reason that it failed in the common law fraud counts. The failure to allege specific, actual damages precludes a claim brought pursuant to the Act. *Morris*, 392 Ill. App. 3d at 402.

¶ 38 Lastly, we consider the breach-of-fiduciary-duty counts against HCM and Horlbeck. To state a claim for breach of fiduciary duty, the plaintiff must allege that a fiduciary duty exists, that the fiduciary duty was breached, and that such breach proximately caused damages. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). Defendants did not specifically argue these counts in the motion to dismiss but generally included them in their contention that plaintiff failed to allege

damages. Further, defendants included them generally in their argument that plaintiff's claims are derivative. The trial court treated them the same way as defendants in dismissing the entire third amended complaint. As we pointed out above, only plaintiff's claim for \$27,733.29 was derivative.

¶ 39 Plaintiff argues that he alleged sufficient facts to establish the existence of a fiduciary relationship. He alleged that Horlbeck was the sole manager of the partnership and was responsible for calculating the account value of the hedge fund. He also alleged that Horlbeck and HCM breached their fiduciary duties by (1) maintaining inaccurate books, records, and accounts with respect to the value of plaintiff's share of the partnership's assets, and (2) systematically misrepresenting the value of his share of the partnership's assets. Assuming the truth of the fiduciary relationship and the breach, plaintiff must prove that his damages were proximately caused by the breach. However, as we explained above, maintaining inaccurate books, records, and accounts, and misrepresenting the value of plaintiff's share of the partnership's assets, did not cause the value of his share to drop. Rather, the recession caused the drop. Furthermore, plaintiff did not allege when he would have withdrawn from the partnership had defendants kept accurate books, which was essential to plead proximate cause, because the direct-injury test, applicable in a breach-of-fiduciary-duty action, requires some "direct relation" between the injury asserted and the injurious conduct alleged. See *Prodromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 171 (2009). Consequently, the court properly dismissed the breach-of-fiduciary-duty claim.

¶ 40

### III. CONCLUSION

¶ 41 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 42 Affirmed.