IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

GEORGE SCOTT PATERNO,
as duly appointed representative of the
ESTATE and FAMILY of JOSEPH PATERNO;

RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, PETER KHOURY, and
ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;

PETER BORDI, TERRY ENGELDER,
SPENCER NILES, and JOHN O'DONNELL,
members of the faculty of Pennsylvania State University;

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO,
former football coaches at Pennsylvania State University; and

ANTHONY ADAMS, GERALD CADOGAN,
SHAMAR FINNEY, JUSTIN KURPEIKIS,
RICHARD GRDNER, JOSH GAINES, PATRICK MAUTI,
ANWAR PHILLIPS, and MICHAEL ROBINSON,
former football players of Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),

MARK EMMERT, individually and as President of the NCAA, and

EDWARD RAY, individually and as former Chairman of the Executive committee of the NCAA,

Defendants.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
Addendum to Memorandum in Support of Preliminary Objections

Filed on Behalf of:

National Collegiate Athletic Association, Mark Emmert, Edward Ray

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PA I.D. Number: 15681

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

| | |
|---|---|
| GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; | Civil Division |
| RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, PETER KHOURY, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University; | Docket No.: 2013-2082 |
| PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University; | |
| WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and | |
| ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GRDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University, | |
| Plaintiffs, | |
| v. | |
| NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), | |
| MARK EMMERT, individually and as President of the NCAA, and | |
| EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, | |
| Defendants. | |

# ADDENDUM TO MEMORANDUM IN SUPPORT OF DEFENDANTS' PRELIMINARY OBJECTIONS

**MEMORANDUM IN SUPPORT OF DEFENDANTS' PRELIMINARY OBJECTIONS**

**ADDENDUM: UNPUBLISHED CASES**

**ABBADON CORPORATION, Plaintiff, v. CROZER-KEYSTONE HEALTH SYSTEM ET. AL., Defendants.**

**No. 4415, COMMERCE PROGRAM, Control Number 075168**

**COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION**

**2009 Phila. Ct. Com. Pl. LEXIS 233**

**November 13, 2009, Decided**

**JUDGES:** [*1] ARNOLD L. NEW, J.

**OPINION BY:** ARNOLD L. NEW

**OPINION**

**ORDER**

**AND NOW**, this 13TH day of November 2009, upon consideration of Defendant Deloitte Financial Advisory Services LLP and Louis R. Pichini's Motion for Summary Judgment, Plaintiff's response in opposition, all matters of record and in accord with the attached Opinion, it hereby is **ORDERED** that Defendants Deloitte Financial Advisory Services LLP and Louis R. Pichini's Motion for Summary Judgment is **granted in part and denied in part** as follows:

> 1. The Motion for Summary Judgment to Count V (defamation) is **granted** as to the contract overcharge statements and the insurance statements and **denied** as to the organized crime statements.
>
> 2. The Motion for Summary Judgment to Count VI (commercial disparagement) is **granted**.

**BY THE COURT,**

**ARNOLD L. NEW, J.**

COMMERCE PROGRAM

**OPINION**

Plaintiff Abbadon Corporation (hereinafter "Abbadon") initiated this action against defendant Crozer-Keystone Health System (hereinafter "Crozer") for breach of contract and unjust enrichment and against Deloitte Financial Advisory Services LLP and Louis R. Pichini (hereinafter "Deloitte defendants") for defamation and commercial disparagement.

Abbadon is a corporation engaged in the business of [*2] cleaning, construction, maintenance and repair and snow removal. Crozer is a non-profit healthcare system comprised of five hospitals, along with a comprehensive physician network of primary care and specialty practices. Deloitte Financial Advisory Services LLP (hereinafter "Deloitte") is a limited liability partnership. Louis R. Pichini (hereinafter "Pichini") is an employee of Deloitte with a title of Director of Financial Advisory Services LLP.

Beginning in 2001, Abbadon and Crozer entered into contracts wherein Abbadon would provide Crozer with cleaning services, emergency contract services and snow removal services for a fee. In November 2007, Crozer

retained Deloitte Financial Advisory Services, LLP to assist it in its efforts to ensure appropriate administration of its material management, purchasing, and environmental services activities, to investigate whether its employees were complying with federal, state and local laws and its own policies and procedures in selecting Abbadon as a vendor and to assist with an internal investigation related to Abbadon, including its billing practices and participation in contract bid processes. During the investigation, Deloitte personnel [*3] including Pichini interviewed Crozer employees in December, 2007 and January, 2008 [1] and conducted a review of documents including e-mail communications and purchasing records.

1 Some employees interviewed included Michael Ruskowksi, Daniel Gillin, John Sulecki, Stephen Gallagher, and Ed Gillespie.

In late December 2007 or January 2008, Deloitte made an oral presentation regarding the investigation to Crozer's senior management including Crozer CEO Joan Richards, Richard Bennett, Crozer's COO, Donald Legreid, Crozer's chief legal counsel, Gene Zegar, Crozer's vice president of human resources, Mr. Wilson and Mr. Boff. At this presentation, Pichini was asked whether he was aware of a connection between Abbadon and organized crime. Pichini stated he was not aware of such a connection. The Crozer executives requested that Pichini re-interview certain employees in this regard.

On January 10, 2008, Crozer terminated four employees Gillin, Ruskowski, Sulecki and Gallagher. On January 11, 2008, Crozer terminated its relations with Abbadon. Crozer released a statement to the press regarding the terminations wherein Crozer concluded that there had not been any theft, misappropriation of funds or [*4] other criminal activity.

On February 1, 2008, Abbadon filed this lawsuit against defendant Deloitte and Louis R. Pichini as well as Crozer. As to the Deloitte defendants, Abbadon alleges claims for defamation and commercial disparagement. The claims center upon contract overcharging statements and organized crime statements. After discovery, the defamatory statements regarding the contract overcharging have been identified as follows:

1. Abbadon received no bid work to convert a greenhouse and was paid $ 250,000.

2. Abbadon submitted duplicate invoices.

3. Abbadon submitted invoices with insufficient information to verify billed charges.

4. Abbadon billed for trucks used in snow removal and salting at $ 170 per hour when Crozer purchasing records disclose the contract rate was $ 100 an hour in 2006 and 2007.

5. Abbadon billed Crozer for using ATV snowplows at $ 145 per hour when Crozer purchasing records disclosed the contract rate was for $ 100 per hour.

6. Abbadon billed for bulk salt at $ 120 per ton when the purchasing records disclose the contract price was $ 80 per ton.

7. Abbadon submitted invoices for calcium chloride bags when they were delivered to Crozer and then billed for the [*5] same calcium chloride bags when the bags were used.

8. Abbadon billed $ 146,110 for snow removal from February 13, 2007 to February 15, 2007, the invoices were not verified, confirmed or questioned by Michael Ruskowski or Stephen Gallagher and that the charges included 11 plow trucks working continuously for 47 hours and that Internet historical weather service reports reported only minimal snow fall on the three days encompassed by the 47 hour period.

9. Abbadon was paid to clean buildings on the Crozer campus from 2004 through 2007 that were torn down in approximately 2003.

10. Abbadon was paid to clean buildings for six years which were cleaned by Belk Cleaning.

Abbadon also claims that Pichini made statements

connecting Abbadon to organized crime. The statements included the following:

> 1. Pichini asking if Gillin knew Faffy Iannarella.
>
> 2. Pichini telling Gillin that Pichini was the guy who put Nicky Scarfo away.
>
> 3. Pichini telling Gillin that Gillin was associated with Abbadon.
>
> 4. Pichini asking Gallagher if he knew Abbadon did business out of a row house in South Philadelphia and if he was afraid to question Abbadon's invoices.
>
> 5. Pichini accusing Abbadon of being the Mafia.
>
> 6. Pichini [*6] stating that Ivan and Joe Cohen, Abbadon, are all connected with the Mafia, they are in the Mafia.
>
> 7. Pichini telling Ruskowski that he was going to prove that Ivan and Joe Cohen were in the Mafia.
>
> 8. Pichini telling Gillin that Abbadon was mobbed up.

Presently before the court is the Deloitte defendants' motion for summary judgment. [2]

> 2 The Crozer defendants have also filed a motion for summary judgment which will be addressed in a separate order.

## DISCUSSION

**A. Abbadon's claims for defamation arising from the contract overcharge statements are dismissed while the claim for defamation arising from the organized crime statements continues.**

In a defamation case, a plaintiff must prove: (1) The defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditional privileged occasion. [3] Where the issue is properly raised, a defendant has the burden of proving: "(1) the truth of the defamatory communication; [*7] (2) the privileged character of the occasion on which it was published; and/or (3) the character of the subject matter of defamatory comment as of public concern. [4]

> 3 Moore v. Cobb-Nettleton, 2005 PA Super 426, 889 A.2d 1262, 1267 (Pa. Super. 2005)(*quoting* Porter v. Joy Realty, Inc., 2005 PA Super 129, 872 A.2d 846, 849 (Pa. Super. 2005).
>
> 4 42 Pa. C.S. A. section 8343 (b).

The publisher of defamatory matter is not liable if the publication was made subject to a privilege and the privilege was not abused. [5] Communications which are made on a proper occasion, from a proper motive, in a proper manner and which are based upon reasonable cause are privileged. [6] Abuse of a conditional privilege is indicated when the publication is actuated by malice or negligence [7], is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or included defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose. [8]

> 5 Elia v. Erie Ins. Exch., 430 Pa. Super. 384, 634 A.2d 657, 660 (Pa. Super. 1993).
>
> 6 Miketic v. Baron, 450 Pa. Super. 91, 675 A.2d 324, 327 (Pa. Super. 1996).
>
> 7 Cases that have held that a conditional [*8] privilege can be lost by negligence are restricted to matters which are not of a public concern. *See*, American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania, 2005 PA Super 103, 872 A.2d 1202 (Pa. Super. 2005). Here, the issue is a matter of public concern and therefore the conditional privilege cannot be lost by negligence.
>
> 8 Miketic v. Baron, 675 A.2d at 328.

Here, the statements attributed to the Deloitte defendants regarding contract overcharging are a matter of public concern and are conditionally privileged. The record clearly demonstrates that Deloitte was retained by Crozer to assist it in its efforts to ensure appropriate administration of its material management, purchasing, and environmental services activities and investigate

whether its employees were complying with federal, state and local laws and its own policies and procedures in selecting Abbadon as a vendor. Deloitte was advised by Crozer that it received a complaint on the compliance line in July, 2006, that an employee may have a conflict of interest in overseeing the Abbadon construction contract, that Abbadon received no bid contracts and charged Crozer exorbitant amounts of money. Crozer had a legitimate business [*9] interest in the information gathered by Deloitte and therefore Deloitte's statements regarding contract overcharging are privileged.

Abbadon argues that Deloitte abused the privilege by failing to interview Abbadon personnel about the over billing accusations and by showing hostility toward interviewees who did not provide satisfactory responses to Pichini. Abbadon must establish that Deloitte abused the conditional privilege. Upon review of the depositions and other materials submitted, there is no evidence of abuse by Deloitte. Deloitte, acting within the guidelines established by Crozer, over the course of several weeks, interviewed Crozer employees and reviewed records pertaining to the subject contracts. After conducting the interviews and reviewing the records Deloitte made its findings to Crozer. The findings were confined to the limits placed by Crozer to determine whether its employees were complying with federal, state and local laws and its own policies and procedures in selecting Abbadon as a vendor.

Since the record fails to establish that Deloitte's investigation was made with malice, was made for a purpose other than that for which the privilege was given, or to a person [*10] not reasonably believed to be necessary for the accomplishment of the purpose, the court finds that the conditional privilege was not abused. Accordingly, Deloitte's motion for summary judgment as it pertains to the contract overcharging statements is granted.

As it pertains to the organized crime statements however, Deloitte's motion for summary judgment is denied since a genuine issue of material fact exists as to whether Deloitte abused the conditional privilege and whether Abbadon suffered any damages as a result of Deloitte's statements. [9]

> 9 As it pertains to the insurance statements, the court finds that the Deloitte defendant's motion for summary judgment is granted since Abbadon admitted that it pays employees in cash to avoid paying federal and state payroll taxes and that it registered vehicles for the express purpose of reducing insurance rates. Abbadon also admitted some of the expenses may have been for salaries and that Abbadon would not have paid payroll taxes for those payments. (Plaintiff's response to Defendant Deloitte's Statement of Undisputed Facts PP 120-122).

**B. Abbadon's claim for commercial disparagement is dismissed.**

In count VI of the amended complaint, Abbadon [*11] purports to state a claim for commercial disparagement. In order to prove a claim for commercial disparagement, also known as injurious falsehood, the plaintiff must prove that: 1) the defendant published a disparaging statement concerning the business of the plaintiff, 2) the statement was false, 3) the defendant intended that the publication cause pecuniary loss or reasonably should have recognized that publication would result in pecuniary loss, 4) the publication caused actual pecuniary loss, and 5) the publisher knew the statement was false or acted in reckless disregard of its truth or falsity. [10] Although, the torts of commercial disparagement and defamation are similar, each protects different and distinct interests. The tort of defamation seeks to protect against damage to one's reputation, while the tort of commercial disparagement protects a vendor from pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability. [11] In Menefee v. Columbia Broadcasting Sys., Inc., 458 Pa. 46, 54, 329 A.2d 216 (1974), the Pennsylvania Supreme Court made the following observation:

> One of the most important purposes for which liability for the [*12] publication of matter derogatory to another's personal reputation is imposed is to enable the person defamed to force his accuser into open court so that the accusation, if untrue, may be branded as false by the verdict of a jury. The action for disparagement has no such purpose and cannot be used merely to vindicate one's title to or the quality of one's possessions. . . [12]

10 Pro Golf Mfg. v. Tribune Review Newspaper Co., 570 Pa. 242, 246, 809 A.2d 243, 246 (2002) (*citing* Restatement (Second) Torts § 623(A) (1977)); Restatement (Second) of Torts §§ 623A).

11 Menefee v. Columbia Broadcasting Sys., Inc., 458 Pa. 46, 54, 329 A.2d 216 (1974)

12 Id. (*quoting* Restatement of Torts introductory note to Chapter 28).

Notwithstanding this difference, any circumstances that would give rise to a conditional privilege for the publication of defamation, is likewise a conditional privilege for the publication of commercial disparagement. [13] As such, the claim for commercial disparagement based on the contract overcharge statements is dismissed for the same reason as the defamation based claim.

13 Restat 2d of Torts, § 646A.

As for the claim for commercial disparagement based on the organized crime statements, [*13] the claim is likewise dismissed. The organized crime statements are not directed to the quality of goods or services provided by Abbadon. Rather, the organized crime statements impugn Abbadon's reputation for honesty. Since Abbadon seeks damages for its reputation rather than for the pecuniary loss suffered because the statements attack the quality of its services, summary judgment is granted.

**CONCLUSION**

For the foregoing reasons, the Deloitte Defendants' motion for summary judgment to Count V (defamation) is granted as to the contract overcharging statements and the insurance statements and denied as to the organized crime statements. The motion for summary judgment to Count VI (commercial disparagement) is granted. An order consistent with this opinion is attached.

**BY THE COURT,**

**ARNOLD L. NEW, J.**

AMERICAN BUSINESS FINANCIAL SERVICES, INC., Plaintiff v. FIRST UNION NATIONAL BANK, FIRST UNION CAPITAL MARKETS, CORP., FIRST UNION SECURITIES, INC., ALAN DAVID BOYER and SAMUEL R. SHIREY, Defendants

No. 4955, COMMERCE PROGRAM, Control No. 061021

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2002 Phila. Ct. Com. Pl. LEXIS 93

March 5, 2002, Decided

JUDGES: [*1] JOHN W. HERRON, J.

OPINION BY: JOHN W. HERRON

OPINION

OPINION

Presently before this court are the Preliminary Objections of defendants, Alan David Boyer ("Boyer") and Samuel R. Shirey ("Shirey"), to the Amended Complaint of plaintiff, American Business Financial Services, Inc. ("ABFI"), moving to dismiss for lack of personal jurisdiction.

For the reasons set forth, the Preliminary Objections are sustained, as to defendant Shirey, and overruled, as to defendant Boyer.

BACKGROUND

The pertinent facts, as pled in the Amended Complaint, are as follows. [1] This action arises from an alleged breach of a confidential relationship with and/or fiduciary duty owed to ABFI and the alleged misuse of non-public information in violation of confidentiality agreements between the parties. Am.Compl., P 1.

1 Certain facts provided in this section derive from deposition testimony taken in response to this court's Order, dated September 20, 2001, to resolve the issue of personal jurisdiction.

[*2] ABFI is a publicly-held, diversified financial services company which sells and services loans to businesses secured by real estate and other business assets, as well as first and second home mortgages to consumers. Id. at PP 1-2. Defendant, First Union National Bank ("Bank"), with its principal place of business in North Carolina, is a national banking association which provides commercial and retail banking and trust services to various locations, including Pennsylvania. Id. at P 3. Defendant, First Union Capital Markets Corp. ("Capital Markets"), a Virginia corporation with its principal place of business in North Carolina, provides a full range of investment banking products and services to a variety of locations. Id. at P 4. Defendant, First Union Securities, Inc. ("Securities"), a Delaware corporation with its principal place of business in Virginia, is a registered broker/dealer and member of the NYSE and provides investment banking, financial advisory and brokerage services throughout the United States. Id. at P 5. Bank, Capital Markets and Securities are sometimes collectively referred to as "First Union". [2]

2 First Union did not join in the present motion but filed an Answer to the Complaint.

[*3] Defendant Boyer is an employee of Capital Markets and resides in North Carolina. Id. at P 6. See also, Boyer Dep. at 18-20. [3] Boyer does not have family in Pennsylvania and has never been to Pennsylvania. Boyer Dep. at 21. Defendant Shirey is also an employee of Capital Markets and resides in North Carolina. Am.Compl., P 7. See also, Shirey Dep. at 36, 235-36. [4] Shirey, who was born in Pennsylvania and lived in the Commonwealth until 1986, makes semi-annual visits to his parents who still reside in Pennsylvania and occasionally telephones or e-mails them. Shirey Dep. at 35-37, 42-45, 50-51, 54-56. Shirey also has an investment account with Vanguard Discount Brokerage ("Vanguard"), which is headquartered in Pennsylvania. Id. at 8. Shirey's transactions with Vanguard have been effected from Charlotte, North Carolina via telephone calls using an 800 number or on-line, using First Union bank accounts in Charlotte and in Delaware. Id. at 8, 32, 207. Through his Vanguard account, Shirey executes security transaction including selling of ABFI stock. Id. at 7, 207, 233.

3 Portions of Boyer's deposition transcript is attached at Exhibit A to Boyer's Supplemental Memorandum of Law in Support of the Preliminary Objections. Further, Boyer's full deposition transcript is attached at Exhibit E to Plaintiff's Supplemental Memorandum of Law in Opposition to the Preliminary Objections.

[*4]

4 Portions of Shirey's deposition is attached at Exhibit A to Shirey's Supplemental Memorandum of Law in Support of the Preliminary Objections. Further, Shirey's full deposition transcript is attached at Exhibit D to Plaintiff's Supplemental Memorandum of Law in Opposition to the Preliminary Objections.

In 1997 through 2000, First Union (or its predecessor) participated in a $ 150 million (increased later to $ 200 million) warehouse line of credit facility to ABFI, pursuant to which, First Union received substantial non-public information about ABFI.. Am.Compl., at P 9. Prior to the execution of any loan documents, First Union agreed that the information and data from ABFI would be kept confidential. Id., see also Am.Compl., Exhibit A. On October 1, 1998, First Union agreed to the terms of the line of credit transaction with ABFI whereby it agreed that no disclosure of non-public information about ABFI would be made to any third party without prior written consent from ABFI. Id. at P 10, see also Am.Compl., Exhibit B. Additionally, First Union provided direct credit to [*5] ABFI in the form of a $ 100 million Receivables Purchase Facility. Id. at P 11. In connection with this transaction, First Union agreed to keep information confidential. Id., see also Am.Compl., Exhibit C.

Defendants Boyer and Shirey allegedly received substantial non-public information concerning ABFI, and are bound, as employees of First Union, by the confidentiality agreements between ABFI and First Union. Id. at PP 14-15. As alleged, defendants Boyer and Shirey each engaged in purchases and sales of ABFI securities, including short sales. [5] Id. at P 17. Through July and August, 2000, Boyer allegedly commenced a scheme to defame and disparage ABFI and otherwise manipulate the stock price of ABFI for personal gain through various e-mails to ABFI's independent public auditors and others, who are located in Pennsylvania. Id. at PP 18-21. Specifically, on August 1, 2000, Boyer sent an e-mail to ABFI's independent public auditors, BDO Seidman ("BDO"), accusing ABFI of "fraudulent accounting policies" and engaging in "borderline criminal" conduct in order to injure its business reputation, cause it to lose good will with its business relations and to interfere [*6] with ABFI's contractual relationship with its auditors. Id. at P 19. See also, Pl. Supplemental Mem. of Law, Exhibit A. Boyer acknowledges sending this e-mail message from his office in Charlotte, North Carolina and that he understood that the independent auditors were situated in Pennsylvania, but he specifically denies sending any other e-mails to BDO. Boyer Dep. at 7-8, 12, 54, 90, 110, 130-32. The other e-mails sent to BDO do not contain an address from whom they were sent. Pl. Supplemental Mem. of Law, Exhibit A. Boyer also posted messages on the internet's Yahoo Message Board, which included negative statements about ABFI and/or its management. Pl. Supplemental Mem. of Law, Exhibit B. See also, Boyer Dep. at 85, 95, 100, 102. Shirey, in turn, allegedly joined Boyer in using the internet to spread false and negative information about ABFI with the intent to injure its business reputation and cause others to lose confidence in ABFI and/or to depress the market value of ABFI's stock. Am.Compl., P 21. Shirey also sent

approximately fifty to sixty messages on the Yahoo Message Board, referring to ABFI and its management in a negative manner. Shirey Dep. at 139-140, 193. [*7] In addition, Shirey participated in an investor conference call involving ABFI through a 1-800 number. Id. at 174-75. However, there is no testimonial or documentary evidence that Shirey sent e-mails to ABFI's independent auditors or others in Pennsylvania

> 5 "'Short-selling' takes place when a speculator sells stock he does not own, in anticipation of a fall in the price prior to his covering purchase of those shares." Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 1997 U.S. Dist. LEXIS 8808, 1997 WL 299430, at *1 n. 1 (S.D.N.Y. June 4, 1997).

With this background, ABFI filed its amended complaint, asserting counts for breach of fiduciary duty, breach of confidentiality agreements, breach of confidential relationship, interference with contractual relationship, and negligent supervision on the part of First Union. [6] First Union filed an Answer with New Matter. Defendants, Boyer and Shirey, filed Preliminary Objections, in the nature of a motion to dismiss for lack of personal [*8] jurisdiction. This court ordered the parties to conduct discovery and submit supplemental memoranda on the issue of personal jurisdiction.

> 6 The Amended Complaint does not contain a count for defamation or commercial disparagement, nor any alleged violation of securities laws, and this court cannot now infer that plaintiffs so intended to assert these claims.

This court must now resolve the issue of whether it has personal jurisdiction over Defendants Boyer and Shirey.

**DISCUSSION**

Rule 1028(a)(1) of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] allows for preliminary objections raising lack of jurisdiction over the person. "When preliminary objections, if sustained, would result in the dismissal of an action, such objections should be sustained only in the clearest of cases." Grimes v. Wetzler, 2000 PA Super 90, 749 A.2d 535, 538 (Pa.Super.Ct. 2000)(citing [*9] King v. Detroit Tool Co., 452 Pa. Super. 334, 337, 682 A.2d 313, 314 (1996). Initially, the objecting party bears the burden of proof and the court must consider the evidence in the light most favorable to the non-moving party. Barr v. Barr, 2000 PA Super 99, 749 A.2d 992, 996 (Pa.Super.Ct. 2000); Grimes, 749 A.2d at 538; King, 452 Pa.Super. at 337, 682 A. 2d at 314. However, "once the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it." Barr, 749 A.2d at 994. See also, Grimes, 749 A.2d at 538 ("once the movant has supported its jurisdictional objection, . . . the burden shifts to the party asserting jurisdiction to prove that there is statutory and constitutional support for the court's exercise of *in personam* jurisdiction.").

Pursuant to the Judiciary Act, 42 Pa.C.S.A. §§ 5301-5329, Pennsylvania courts may exercise two types of *in personam* jurisdiction over a non-resident defendant. One type of personal jurisdiction is general jurisdiction, which [*10] is based upon a defendant's general activities within the forum as evidenced by continuous and systematic contacts with the state. Fidelity Leasing, Inc. v. Limestone County Bd. of Educ., 2000 PA Super 244, 758 A.2d 1207, 1210 (Pa.Super.Ct. 2000) (citing GMAC v. Keller, 1999 PA Super 213, 737 A.2d 279, 281 (Pa.Super.Ct. 1999)). "General jurisdiction . . . exists regardless of whether the cause of action is related to the defendant's activities in Pennsylvania, as long as the [corporate] defendant's activities in the Commonwealth are 'continuous and substantial'." Garzone v. Kelly, 406 Pa.Super. 176, 183, 593 A.2d 1292, 1296 (1991)(holding that the grounds for general jurisdiction under § 5301, applying to individuals as opposed to corporate defendants, had not been met). The other type is specific jurisdiction, which has a more narrow scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action. [*11] Fidelity Leasing, at 1210.

Irrespective of whether general or specific *in personam* jurisdiction is asserted, the propriety of such an exercise must be tested against Pennsylvania's Long-Arm Statute, 42 Pa.C.S.A. § 5322, and constitutional standards of due process. Id. See also, Kubik v. Letteri, 532 Pa. 10, 14, 614 A.2d 1110, 1112 (1992)(citations omitted). The Long-Arm Statute's reach is co-extensive with that permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Maleski by Taylor v. DP Realty Trust, 653 A.2d 54, 62 (Pa.Commw.Ct. 1994). Therefore, any discussion of personal jurisdiction must focus on constitutional due

process constraints. Temtex Products, Inc. v. Kramer, 330 Pa. Super. 183, 194, 479 A.2d 500, 505-06 (1984).

Section 5301 of the Judiciary Act provides the rubric for exercising general *in personam* jurisdiction over both individuals and corporations. 42 Pa.C.S.A. § 5301. As to individuals, this section provides that a court [*12] can exercise general jurisdiction over non-resident individual defendants only if: (1) the individual is present in the Commonwealth at the time when process is served; (2) the defendant is domiciled in the Commonwealth at the time when process is served; or (3) the defendant consents. 42 Pa.C.S.A. § 5301(a)(1)(i)-(iii). On the other hand, general jurisdiction over corporations may be exercised if (1) the corporation is incorporated or qualifies as a foreign corporation under the laws of this Commonwealth; (2) the corporation consents; or (3) the corporation carries on a "continuous and systematic" part of its business in this Commonwealth. Id. at § 5301(a)(2)(i)-(iii).

Here, it is undisputed that Defendants Boyer and Shirey are domiciled in North Carolina. Am. Compl, PP 6-7. It cannot be asserted that either defendant consented to this court's exercise of jurisdiction over them because they filed Preliminary Objections on that issue. Moreover, the docket explicitly indicates that Shirey was served by certified mail and was not present in the Commonwealth when served. Boyer testified that he had never been in Pennsylvania. [*13] Boyer Dep. at 21. The totality of these circumstances clearly demonstrate that the grounds for general jurisdiction under 42 Pa.C.S.A. § 5301 over these two individuals have not been met.

This court must now determine whether it can exercise specific *in personam* jurisdiction over either Boyer or Shirey. Specific jurisdiction is governed by the provisions set forth in 42 Pa.C.S.A. § 5322(a). This section states, in pertinent part, that:

> A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . who acts directly or by an agent, as to cause of action or other matter arising from such person: . . .
>
> (3) Causing harm or tortious injury by an act or omission in this Commonwealth.
>
> (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth . . . .

42 Pa.C.S.A. § 5322(a). In addition, Section 5322(b) directs that jurisdiction over non-residents, who do not fall within the scope of Section 5301, is extended "to the fullest extent allowed under [*14] the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa.C.S.A. § 5322(b).

For a court to exercise specific jurisdiction, " (1) the non-resident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of in personam jurisdiction must comport with fair play and substantial justice." Kubik, 532 Pa. at 17, 614 A.2d at 1114 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)) (emphasis added). Determining "whether this standard has been met is not susceptible of any talismanic jurisdictional formula; [rather] the facts of each case must always be weighed in determining whether jurisdiction is proper." Id. at 17, 614 A.2d at 1114.

Finding whether sufficient minimum contacts exist is based on a determination that the "defendant's conduct and [his] connection with the forum state are such that he should reasonably anticipate being haled into court there." Id. The minimum contacts requirement [*15] is not satisfied by contacts "that are 'random', 'fortuitous' or 'attenuated'" or by "unilateral activity in the forum by others who claim some relationship with the defendant." Id. at 18, 614 A.2d at 1114 (citing Burger King, 471 U.S. at 475). Rather, the court must determine that "the defendant purposefully directed [its] activities at residents of the forum and purposefully availed [itself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." Id. Additionally, "the cause of action must arise from the defendant's activities within the forum state." Id. at 19, 614 A.2d at 1115 (citation omitted).

A court's exercise of specific jurisdiction must also conform to notions of fair play and substantial justice. In determining whether this requirement has been met, a court should consider the following:

> (1) the burden on the defendant, (2) the forum state's interest in adjudicating the

> dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient [*16] resolution of controversies and (5) the shared interest of several states in furthering fundamental substantive social policies.

Id. at 18, 614 A.2d at 1114.

Here, this court must determine whether the activities of Defendants Boyer and Shirey are sufficient for this court to exercise specific jurisdiction under the principles outlined above. The discovery taken on this issue indicates that these activities are primarily internet activities, which is a relatively new issue for determining personal jurisdiction. The only Pennsylvania case which this court found on the subject is Kubik v. Route 252, Inc., 2000 PA Super 349, 762 A.2d 1119 (Pa.Super.Ct. 2000), which addressed internet activity and postings on a website to determine whether venue was appropriate. While Kubik did not address a challenge to personal jurisdiction, it did cite to the test announced in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997) and reaffirmed in Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F.Supp. 636 (E.D.Pa. 1998) [*17] , which set forth a sliding scale to determine whether internet contacts were sufficient to have personal jurisdiction. 762 A.2d at 1124. This court does find that Zippo, Blackburn and other federal cases are helpful in determining whether the defendants' activities over the internet meet the minimum contacts requirement.

In Zippo, the court concluded that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet." 952 F.Supp. at 1124. The court ascertained three distinct types of internet contacts. Id. The first type of contact is where the defendant "clearly does business over the internet," which allows for personal jurisdiction over the defendant. Id. The second type involves interactive websites and occurs "where a user can exchange information with the host computer." Id. "In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and [the] commercial nature of the exchange of information that occurs." Id. The [*18] third type "involves the posting of information or advertisements on an internet web site which is accessible to users in foreign jurisdictions." Id. This "passive website" does not provide grounds for the exercise of personal jurisdiction. Id. See also, Blackburn, 999 F.Supp. at 638-39.

The majority of courts have found that personal jurisdiction clearly exists when the internet activity involves business over the internet, including on-line contracts with residents of a foreign jurisdiction or site. See, e.g., Zippo, 925 F.Supp. at 1125-26 (jurisdiction may be exercised because defendant contracted with approximately 3,000 individuals and seven internet access providers in Pennsylvania); Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328, 1333 (E.D.Mo.1996)(creating an online commercial mailing list by signing people up at their website for commercial purposes was purposeful availment); Gary Scott Int'l, Inc. v. Baroudi, 981 F.Supp. 714, 716-17 (D.Mass.1997)(personal jurisdiction could be exercised because defendant solicited and sold his product via his website to Massachusetts residents and [*19] had a major deal with a Massachusetts business); Superguide Corp. v. Kegan, 987 F.Supp. 481, 486-87 (W.D.N.C.1997)(personal jurisdiction may be exercised under the assumption that citizens of the forum state via the internet have utilized the commercial services and acquired products from the defendant); Thompson v. Handa-Lopez, Inc., 998 F.Supp. 738, 743-44 (W.D.Tex.1998)(personal jurisdiction could be exercised when defendant entered into on-line contracts for commercial purposes with residents of the forum state).

Beyond these type of cases, courts have differed in their determination of the level of interactivity and commercial nature of the information that occurs on the website required to trigger personal jurisdiction. Barrett v. Catacombs Press, 44 F.Supp.2d 717, 725 (E.D. Pa. 1999). The majority of courts have declined to exercise jurisdiction where the only contacts was through a passive website or mere advertisements were made through the website. See, e.g., [*20] Barrett, 44 F.Supp.2d at 728 (determining that the posting of messages on listservs and USENET discussion groups on a passive website is insufficient for jurisdictional purposes); Kane v. Coffman, 2001 Del. Super. LEXIS 298, 2001 WL 914016, *5 (Del.Super.Ct. Aug. 10, 2001)(determining that the posting of an electronic message on an internet bulletin board is insufficient to confer personal jurisdiction, as is an internet posting made from outside the state and received by a party

inside the state); Revell v. Lidov, 2001 U.S. Dist. LEXIS 3133, 2001 WL 285253, *8 (N.D.Tex. Mar. 20, 2001)(holding that posting of messages to internet bulletin board on college website is insufficient to establish personal jurisdiction or show purposeful availment); Bailey v. Turbine Design, Inc., 86 F.Supp.2d 790, 795 (W.D.Tenn. 2000)(holding that the posting of allegedly defamatory statements on a website, without more, was insufficient to confer jurisdiction); McDonough v. Fallon McElligott, Inc., 1996 U.S. Dist. LEXIS 15139, 1996 WL 753991, *3 (S.D.Cal. Aug. 5, 1996) [*21] ("because the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists.").

The last category of internet contacts usually involves both internet contacts and non-internet contacts and courts have found that the exercise of personal jurisdiction is proper in certain circumstances. See, e.g., Blumenthal v. Drudge, 992 F.Supp. 44, 54-56 (D.D.C. 1998)(holding that the exercise of personal jurisdiction was proper because of defendant's interactive website, travel to the District of Columbia to promote the website, and defendant's contacts and solicitations of forum residents via e-mail, telephone and regular mail); Cody v. Ward, 954 F.Supp. 43, 46-47 (D.Conn. 1997)(finding sufficient minimum contacts where defendant made fraudulent misrepresentations about a stock purchase through a series of e-mails and telephone calls); Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F.Supp. 456, 462 (D.Mass. 1997)(minimum contacts test satisfied because of a contract agreement to apply [*22] Massachusetts law, solicitation of Massachusetts business, and sales to some Massachusetts residents).

Here, Defendant Shirey's semi-annual visits to his parents are unrelated to this action and are of no moment for satisfying the minimum contacts requirement or exercising specific personal jurisdiction. See id. at 35-37, 42-45, 50-51, 54-56. Further, Shirey's participation in one investor conference call via a 1-800 number is also insufficient to demonstrate purposeful availment. See id. at 174-75. Moreover, the fact that Shirey has an account with Vanguard, which is headquartered in Pennsylvania, and from which he executes trades of stock including ABFI stock does not mean that he purposefully directed his conduct toward Pennsylvania since he executed these trades from North Carolina and from accounts in North Carolina and/or Delaware. [7] See id. at 8, 32, 207, 233. Rather, the only contacts of Defendant Shirey that are related to the causes of action lodged against him are his internet postings on the Yahoo bulletin board, which included negative information regarding ABFI. See Shirey Dep. at 139-140, 193. Under the internet cases cited above, [*23] such contacts on a passive website are insufficient to exercise specific personal jurisdiction over Shirey.

7 Plaintiff had served notices of subpoenas *duces tecum* upon Vanguard and America Online, Inc. ("AOL"), seeking information regarding the securities trading, financial and internet activities of Defendants Shirey and Boyer. See Pl. Supplemental Mem. of Law, at 7. Defendants Shirey and Boyer moved to quash these subpoenas as being unrelated to the personal jurisdiction issues. Id. Plaintiff maintains that this additional discovery is necessary to bolster that Shirey and Boyer are subject to personal jurisdiction in Pennsylvania, as well as showing other short-selling schemes in other companies, proving defendants' intent and *modus operandi.* Id. at 8 n.5. It now appears that such discovery is beyond the scope of that needed to establish personal jurisdiction.

Boyer also posted internet messages on the Yahoo bulletin board, which included negative information regarding ABFI. [*24] See, Boyer Dep. at 85, 95, 100, 102. Unlike Shirey, however, Boyer also sent an e-mail to ABFI's independent auditors, accusing ABFI of "fraudulent accounting practices" and "borderline criminal conduct". Pl. Supplemental Mem. of Law, Exhibit A. Boyer, admittedly, sent this e-mail with the understanding that the independent auditors were situated in Pennsylvania. Boyer Dep. at 7-8, 12, 54, 90, 110, 130-32. Though he denies sending other e-mails, this single e-mail, together with the Yahoo postings, may come under the "effects test" of Calder v. Jones, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984), which is relied on by Plaintiff.

In Calder, entertainer Shirley Jones brought a libel action in California against the National Enquirer which had published an article alleging that Jones had an alcohol problem which prevented her from fulfilling her professional duties. 465 U.S. at 785. The Enquirer, a Florida corporation with its principal place of business in

Florida, is distributed nationally, but it had it largest circulation in Florida. Id. Defendant South, the reporter, did most of his research in Florida and relied [*25] on telephone calls to California for information. Id. at 785-86. Defendant Calder, the president and editor of the Enquirer, had no such contacts with California. Id. at 786. Both defendants, residents of Florida, moved to dismiss the suit for lack of personal jurisdiction. Id. The United States Supreme Court found that the exercise of personal jurisdiction was proper. Id. at 789. It stated:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

Id. This language gave rise to what the courts have deemed the Calder "effects test".

The Court of Appeals for the Third [*26] Circuit determined that the Calder "effects test" required the plaintiff to show the following to allow for specific jurisdiction over a non-resident defendant:

> (1) the defendant committed an intentional tort;
>
> (2) the forum was the focal point of the harm suffered by the plaintiff as a result of the tort;
>
> (3) the forum was the focal point of the tortious activity in the sense that the tort was "expressly aimed" at the forum.

IMO Industries, Inc. v. Kiekert, 155 F.3d 254, 261 (3d Cir. 1998). As a corollary, the defendants know that the "brunt" of the injury caused by their tortious acts would be felt by the plaintiff in the forum. Id. at 261. In IMO Industries, the court held that New Jersey did not have jurisdiction over a German corporation for tortiously interfering with the plaintiff's attempt to sell its Italian subsidiary to a French corporation because New Jersey was not the focus of the dispute. Id. at 267-68. While the defendant's knowledge that the plaintiff is located in the forum is essential under Calder, such knowledge alone is insufficient to show that the defendant specifically targeted [*27] its conduct toward the forum. Id. at 267. The letters in that case were not sent to New Jersey, even though defendant knew they would ultimately be sent to New Jersey. Id. at 260. Further, the meetings occurred outside of the United States and the bid solicitation was done in New York. Id. at 268. But see, Remick v. Manfredy, 238 F.3d 248, 260 (3d Cir. 2001)(holding that Pennsylvania could exercise specific jurisdiction over defendants for a tortious interference claim where the majority of the negotiation, consultations and advice took place in Philadelphia and the allegedly tortious conduct was expressly aimed at injuring plaintiff in Pennsylvania where he lives and works). Here, it appears that the Calder "effects test" is applicable. Plaintiff's claim against Defendant Boyer is for tortious interference with contract, which is an intentional tort. [8] Boyer sent the e-mail to BDO, making negative accusations of ABFI, with knowledge that ABFI's auditors were located in Pennsylvania and possibly to damage ABFI's relationship with BDO. If damage to ABFI's reputation and/or relationship did [*28] in fact result from this e-mail, then the focal point of the harm would be in Pennsylvania. Moreover, this e-mail falls under the parameter of 42 Pa.C.S.A. § 5322(a)(4) , allowing for specific jurisdiction where an act or omission outside the Commonwealth causes harm or tortious injury inside the Commonwealth. Naturally, plaintiff will ultimately have to prove that its business relationships in Pennsylvania have in fact been harmed by Defendant Boyer's conduct, but this determination is not presently before this court.

> 8 A claim for tortious interference with contract requires the plaintiff to plead (1) the existence of a contractual relationship, (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship, (3) the absence of a privilege or justification for such interference, and (4) damages resulting from the defendant's conduct. Hennessy v. Santiago, 708 A.2d 1269, 1278 (1998)(citations omitted)

[*29] Moreover, this court finds that its exercise of jurisdiction over Defendant Boyer would not necessarily violate traditional notions of fair play and substantial justice. It is true that as a non-resident individual, Boyer will be burdened in being forced to defend himself in Pennsylvania. However, his conduct appears to be directed towards Pennsylvania where Plaintiff is located and where Plaintiff's auditors are located. Plaintiff's interest in adjudicating its dispute and vindicating its reputation in Pennsylvania appears to be self-evident. Further, Defendant First Union filed an Answer to the Complaint and allowing the action to proceed in Pennsylvania would be more efficient than dismissing Defendant Boyer, who seems integral to the action. While it is problematic that this court cannot exercise jurisdiction over Defendant Shirey which may result in duplicative actions in two jurisdictions, this factor is outweighed by Plaintiff's interest in protecting its reputation. In addition, it does seem reasonable and fair to require Boyer to conduct his defense in Pennsylvania since that is where he sent the negative e-mail.

**CONCLUSION**

For the reasons set forth above, [*30] Defendant Shirey's Preliminary Objections, asserting lack of personal jurisdiction, are sustained. However, Defendant Boyer's Preliminary Objections are overruled. The court will enter a contemporaneous Order in accordance with this Opinion.

**BY THE COURT:**

**JOHN W. HERRON, J.**

**Dated: March 5, 2002**

**ORDER**

AND NOW, this 5th day of March, 2002, upon consideration of the Preliminary Objections of Defendants Alan David Boyer ("Boyer") and Samuel R. Shirey ("Shirey"), in the nature of a motion to dismiss for lack of personal jurisdiction, Plaintiff's response thereto, the respective memoranda, all other matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that Boyer's Preliminary Objections are **Overruled,** but Shirey's Preliminary Objections are **Sustained** and the complaint against Shirey is **Dismissed.**

**BY THE COURT:**

**JOHN W. HERRON, J.**

AMERICAN INTERNATIONAL AIRWAYS, INC. v. AMERICAN INTERNATIONAL GROUP, INC. and WAYLAND MEAD

Civil Action No. 90-7135

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1991 U.S. Dist. LEXIS 6888

May 21, 1991, Decided
May 21, 1991, Filed

COUNSEL: [*1] ROBERT H. MORSE, GALLAND, KHARASCH, MORSE & GARFINKLE, P.C., WASHINGTON, DC.

JOHN W. FRAZIER, IV, MONTGOMERY, MC CRACKEN, WALTER & RHOADS, PHILADELPHIA, PENNSYLVANIA, RICHARD G. PLACEY, MONTGOMERY, MC CRACKEN, WALKER & RHOADS, PHILADELPHIA, PENNSYLVANIA, STEVEN M. DIXON, NEW YORK, NEW YORK.

JUDGES: Jay C. Waldman, United States District Judge.

OPINION BY: WALDMAN

OPINION

*MEMORANDUM*

This action arises from the case of *American International Group, Inc. v. American International Airways, Inc.*, No. 88-8242, in which plaintiff therein ("AIG") brought claims under the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a), Pennsylvania Anti-Dilution statute, 54 Pa. Cons. Stat. Ann. § 1124 and Pennsylvania common law to prevent defendant therein ("Airways") from using the name "American International", in providing commercial aviation transportation services. On April 4, 1990, after a two day trial, the Court denied plaintiff's motion for a permanent injunction, finding that the plaintiff failed to show secondary meaning in the relevant market or a likelihood of confusion. In the present action, Airways seeks damages for malicious prosecution under the Pennsylvania Dragonetti Act, 42 Pa. Cons. Stat. Ann. § 8351.

Presently [*2] before the Court is defendants' motion to dismiss for failure to state a claim and the motion of defendant Wayland head, AIG's Senior Vice President and General Counsel, to dismiss for lack of personal jurisdiction.

I. FAILURE TO STATE A CLAIM

In deciding a motion to dismiss for failure to state a cognizable claim, the court must accept as true all of plaintiff's factual allegations and draw from them all reasonable inferences favorable to the plaintiff. *D.P. Enterprises, Inc. v. Bucks County Community College,* 725 F.2d 943, 944 (3d Cir. 1984). A case should be not dismissed for failure to state a claim unless it appears that no relief can be granted under any set of facts that could be proved consistent with plaintiff's allegations. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984).

To set forth a claim for wrongful initiation of a civil

proceeding, a plaintiff must allege that: (1) the defendant procured, initiated or continued civil proceedings against him; (2) the defendant acted with gross negligence or without probable cause; (3) the defendant's primary purpose for pursuing the proceedings was other than that of securing proper discovery, [*3] joinder or adjudication of his claim; and, (4) the proceedings were terminated in plaintiff's favor, that is, in favor of the person against whom the earlier action was brought. 42 Pa. Cons. Stat. Ann. § 8351 (Purdon 1982).

Airways alleges that AIG, under Mr. Mead's direction, initiated and pursued the earlier action against Airways. *See* Complaint, at para. 10. Airways alleges that Mr. Mead's actions were grossly negligent and/or without probable cause in that he failed to investigate the factual and legal bases of AIG's claims and pursued the claims despite his lack of a reasonable belief that AIG's mark had acquired secondary meaning in the relevant market. *Id.* at 26-29. Airways alleges that Mr. Mead's purpose was not that of securing the proper adjudication of AIG's purported claims, but rather to deprive Airways of the beneficial use of its lawfully registered service mark and to extract a settlement despite the meritless nature of AIG's claims. *Id.* at 31. Finally, Airways alleges that the prior action was terminated in its favor. *Id.* at 32. Plaintiff incorporates these allegations against AIG, alleging that Mr. Mead acted at all times as its agent. *Id.* at [*4] 35-38. The Court finds that plaintiff adequately has stated a claim under the Pennsylvania Dragonetti Act.

Defendants contend that plaintiff's claims are preempted by Fed. R. Civ. P. 11 and by the attorneys' fee provision of the Lanham Act, 15 U.S.C. § 1117(a). Generally, Congressional intent to pre-empt will not be inferred lightly. Preemption must either be explicit, or compelled due to an unavoidable conflict between the state and federal laws. Penn *Terra Limited v. Department of Environmental Resources, Commonwealth of Pennsylvania,* 733 F.2d 267, 272 (3d Cir. 1984). Defendants have failed to cite any authority directly supporting their position. Indeed, courts have allowed an award of attorneys fees under state law in federal trademark cases. *See Tonka Corporation v. Tonk-A-Phone, Inc.,* 805 F.2d 793 (8th Cir. 1986) (award of attorney's fees under Minnesota Deceptive Trade Practices Act did not conflict with the federal scheme of trademark regulation under the Lanham Act); *Salton Incorporated v. Cornwall Corporation,* 477 F. Supp. 975 (D.N.J. 1975) (court allowed attorney's fees under New Jersey state law). The Court is [*5] not persuaded that the Dragonetti Act is preempted.

Defendants also contend that plaintiff's claims are barred by the doctrine of res judicata or claim preclusion because the court denied petitions for sanctions under Rule 11 and attorneys fees under § 1117(a). In the earlier action, Airways sought sanctions only in regard to AIG's last minute attempt to dismiss its complaint. It does not appear that Airways sought Rule 11 sanctions at any other time. The Court is not persuaded that the issues underlying a Lanham Act attorney's fee request and a Dragonetti claim are equivalent. In *Salton,* the court allowed recovery under state law which did not require a showing of bad faith. The Court noted that:

> The result is not inconsistent with declining to award fees under the Lanham Act. Costs may be given there only if the conduct of the losing party sinks to the level of being fraudulent or in bad faith. New Jersey law permits the awarding of fees without the need to show such inappropriate conduct.

477 F. Supp. at 992 n.11. This same analysis applies here. *See* 42 Pa. Cons. Stat. Ann. § 8351; *Catania v. Hanover Insurance Co.,* 389 Pa. Super. 144 (1989) [*6] (Dragonetti Act does not require showing of malice), *appeal denied,* Pa. , 581 A.2d 567 (1990).

Accordingly, plaintiff's claims will not be dismissed for failure to state a claim.

II. LACK OF PERSONAL JURISDICTION

In deciding a motion to dismiss for lack of personal jurisdiction the allegations of the complaint are taken as true, however, the burden of proof is with the plaintiff to demonstrate a jurisdictional predicate by competent proof. *Bucks County Playhouse v. Bradshaw,* 577 F. Supp. 1203, 1206 (E.D. Pa. 1983).

Defendants' motion must be assessed in light of Pennsylvania's long-arm statute, 42 Pa. Cons. Stat. Ann. § 5301 *et seq. See Strick Corp. v. A.J.F. Warehouse Distrib., Inc.,* 532 F. Supp. 951, 953 (E.D. Pa. 1982). The Pennsylvania statute contemplates that a court may exercise in personam jurisdiction on two bases -- general jurisdiction or specific jurisdiction.

Specific jurisdiction is "invoked when the claim is related to or arises out of the defendant's contacts with

the forum." *Dollar Savings Bank v. First Security Bank of Utah, N.A.*, 746 F.2d 208, 211 (3d Cir. 1984). Thus, a court [*7] asked to assert specific jurisdiction over a non-resident defendant looks to a specific act to determine "whether there are enough contacts with the forum arising out of that transaction in order to justify the assertion of jurisdiction over the out-of-state defendant." *Reliance Steel Products Co. v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587, 588 (3d Cir. 1982).

The modern analysis in specific jurisdiction cases derives from the Supreme Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the Supreme Court held that to satisfy due process, a nonresident defendant must have sufficient contacts with the forum state such "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* at 316.

A plaintiff must show that a defendant's activities reasonably should have made him aware that he could be haled into court in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The defendant must have purposefully availed himself of the privilege of conducting activities in the forum [*8] state, thus invoking the benefit and protection of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The cause of action, in turn, must arise from the defendant's activities within the forum state. *Helicopteros Nationales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *Gehling v. Saint George's School of Medicine, Ltd.*, 773 F.2d 539, 541 (3d Cir. 1985).

In the present case, plaintiff alleges that defendant Mead acted with gross negligence in authorizing the initiation of a civil action against Airways. Uncontroverted evidence of record indicates that Mr. Mead had no other contacts with Pennsylvania.

In *Donner v. Tams-Witmark Music Library*, 480 F. Supp. 1229 (E.D. Pa. 1979), the court held that a corporate officer's tortious conduct performed in his corporate capacity could be considered in determining whether the court had jurisdiction over him as an individual. *Id.* at 1234. In *Simkins Corporation v. Gourmet Resources International, Inc.*, 601 F. Supp. 1336 (E.D. Pa. 1985), [*9] however, the Court held that "a plaintiff seeking to establish personal jurisdiction over an individual corporate officer or director on the basis of tortious conduct committed in the exercise of his corporate duties must prove, by a preponderance of the evidence, that the non-resident officer or director *independently* has sufficient forum-related contacts." *Id.* at 1345 (emphasis added). In *Feld v. Tele-View, Inc.*, 422 F. Supp. 1100 (E.D. Pa 1976), following the same approach, the court declined to exercise jurisdiction over the defendant officer and legal counsel of the defendant corporation who allegedly made fraudulent misrepresentations to the Pennsylvania plaintiff during contract negotiations. *Id.* at 1103-04. Other decisions in this circuit are split as to whether in personam jurisdiction may be asserted over a non-resident corporate officer or director for his role in tortious corporate conduct occurring in Pennsylvania. [1]

1 *Compare Hough/Lowe Associates, Inc. v. CLX Realty Company*, No. 90-5859 (E.D. Pa. Mar. 29, 1991); *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 398, 421 N.34 (E.D. Pa. 1981); *Donner v. Tams-Witmark Music Library*, 480 F. Supp. 1229, 1234 (E.D. Pa. 1979); *Lightning Systems v. International Merchandising Assoc., Inc.*, 464 F. Supp. 601 (W.D. Pa. 1979); *Vespe Contracting Company v. Anvan Corporation*, 433 F. Supp 1226 (E.D. Pa. 1979) (personal involvement in tortious conduct is sufficient) *and Simkins, supra; Simpson v. Lifespring, Inc.*, 572 F. Supp. 12651 (E.D. Pa. 1983); *PSC Professional Serv. Group, Inc. v. American Digital Systems*, Inc. 555 F. Supp. 788 (E.D. Pa. 1983) (additional independent contacts are necessary).

[*10] Some of the more recent decisions have followed a flexible approach. *See* e.g. *Moran v. Metropolitan Dist. Council of Philadelphia and Vicinity*, 640 F. Supp. 430, 434 (E.D. Pa. 1986), wherein the court declined to follow any "hard and fast" rule and concluded that consideration of an individual's corporate contacts for jurisdictional purposes may be appropriate under certain circumstances, such as where he personally engaged in egregious activity on behalf of the corporation.

The court adopted this flexible approach in *Rittenhouse & Lee v. Dollars & Sense, Inc.*, No. 83-5996 (E.D. Pa. April 15, 1987) (1987 Westlaw 9665) and *Minigraph, Inc. v. Qualitech Computer Centers, Inc.*, No. 86-5869 (E.D. Pa. July 1, 1987) (1987 Lexis 5951). The

court therein held that under certain circumstances, jurisdiction over corporate officers in their personal capacities may be based on acts performed in their corporate capacity and set forth a number of factors to be considered including the officer's role in the corporate structure, the nature and quality of the officer's forum contacts and the extent and nature of the officer's personal participation in the tortious conduct. [*11] *Minigraph*, 1987 Lexis 5951, at 7; *Rittenhouse & Lee*, 1987 Westlaw 9665, at 5 n.6. The court imposed a further limitation, however, holding that when personal jurisdiction is based on an officer's corporate activities, only those actions taken within the forum state are to be considered in the jurisdictional analysis. *Minigraph, supra*, at 7.

In the present case, Mr. Mead allegedly caused AIG, a Delaware corporation with its principal place of business in New York, to maintain legal proceedings against Airways, a Delaware corporation which has been defunct since the Fall of 1984 and whose name was purchased in December 1986 by Connie Kalitta Services, a Michigan corporation. [2] Plaintiff contends that Mr. Mead "actively inserted himself and AIG into Pennsylvania, thereby purposefully availing himself and AIG of the privilege of doing business there." It appears, however, that Mr. Mead's actions were taken solely in his capacity as an officer of a foreign corporation and were undertaken almost exclusively outside of the forum. [3] In an uncontradicted affidavit, Mr. Mead states that the only time he entered this jurisdiction in the last five years, other than incidentally [*12] during the course of interstate travel, was to attend the preliminary injunction hearing and trial in the earlier action.

2 AIG also initiate overlapping claim against Kalitta in the Eastern District of Michigan, the United States Patent and Trademark Office and the United States Department of Transportation.

3 AIG was represents by New York counsel.

Plaintiff also contends that Mr. Mead's conduct was intended to have consequences in Pennsylvania. As noted, Airways was a defunct foreign corporation whose name was purchased by another foreign corporation. That Mr. Mead authorized counsel for AIG to proceed in a federal court sitting in Pennsylvania, is not alone sufficient to justify the Court's exercise of jurisdiction. To find otherwise could subject wholesale corporate officers and counsel to individual law suits in numerous far flung jurisdictions with which they have no contact whenever they authorize the maintenance of corporate litigation which is unsuccessful.

Appropriate orders will be entered.

*ORDER*

[*13] AND NOW, this 21st day of May, 1991, upon consideration of defendants' Motion to Dismiss for failure to state a claim and plaintiff's response thereto, IT IS HEREBY ORDERED that said Motion is DENIED.

*ORDER*

AND NOW, this 21st day of May, 1991, upon consideration of defendant Wayland Mead's Motion to Dismiss for lack of personal jurisdiction and plaintiff's response thereto, IT IS HEREBY ORDERED that said Motion is GRANTED and the above action as to defendant Mead is dismissed.

*ORDER*

AND NOW, this 21st day of May, 1991, IT IS HEREBY ORDERED that the Stay on Discovery, imposed on March 28, 1991, is lifted.

**BRISTOL TOWNSHIP Plaintiff, v. INDEPENDENCE BLUE CROSS et al. Defendants.**

**CIVIL ACTION, NO. 01-4323**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**2001 U.S. Dist. LEXIS 16594**

**October 10, 2001, Decided**
**October 11, 2001, Filed; October 12, 2001, Entered**

**DISPOSITION:** Defendants' motions to dismiss were granted in part and denied in part.

**COUNSEL:** [*1] For BRISTOL TOWNSHIP, PLAINTIFF, LARRY HAFT, TIMBY & HAFT, P.C., NEWTOWN, PA USA.

For INDEPENDENCE BLUE CROSS, DEFENDANT: ERIC KRAEUTLER, MORGAN, LEWIS & BOCKIUS LLP, PHILADELPHIA, PA USA.

For DAVID N. BANET & ASSOCIATES, DEFENDANT: JEFFREY S. FELDMAN, MONTGOMERY MC CRACKEN WALKER & RHOADS, PHILA, PA USA

For ERIC VACCA, DEFENDANT: STEPHEN R. BOLDEN, FELL & SPALDING, PHILADELPHIA, PA USA.

TIMBY & DILLON, P.C., THOMAS E. TIMBY, FRANCIS X. DILLON, RESPONDENTS: JOSEPH GOLDBERG, PHILA, PA USA.

**JUDGES:** Clarence C. Newcomer, S.J.

**OPINION BY:** Clarence C. Newcomer

**OPINION**

*MEMORANDUM*

Newcomer, S.J.

Defendants Independence Blue Cross and David N. Banet & Associates have each filed motions to dismiss plaintiff's Amended Complaint. Those motions, and plaintiff's responses thereto are presently before the Court.

*I. BACKGROUND*

Plaintiff Bristol Township ("Bristol") his filed a sixteen count Amended Complaint against Independence Blue Cross ("IBC"), David N. Banet & Associates ("Banet"), and Eric Vacca ("Vacca"). IBC now asks the Court to dismiss three causes of action Bristol asserts against it: 1) a claim for an accounting (Count I); 2) fraud (Count VII); [*2] and 3) a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO") (Count XVI). Banet also asks the Court to dismiss the causes of action Bristol has asserted against it: 1) a claim for accounting (Count I); 2) breach of contract (Count X); 3) fraud (Count XI); 4) breach of fiduciary duty (Count XII); 5) conversion (Count XIII); 6) civil conspiracy (Count XIV); 7) negligence (Count

XV); and 7) RICO (Count XVI).

Bristol is a Pennsylvania township with its offices located at 2501 Bath Road, Bristol, Pennsylvania, 19007. IBC is a Pennsylvania corporation that provides health and medical insurance coverage under individual and group insurance policies with its offices at 1901 Market Street, Philadelphia, Pennsylvania. Banet is a corporation engaged in the insurance brokerage business with offices located at 5 Frame Avenue, Malvern, Pennsylvania. Defendant Vacca is an individual whose address is 224 West Mt. Airy Avenue, Philadelphia, Pennsylvania.

Bristol alleges that it provided health insurance to its employees through IBC over a six year period ending in 2000. Vacca was appointed as Bristol's insurance broker in January [*3] 1994, but Bristol alleges that Vacca did not negotiate, service, place, renew, manage, originate, solicit, purchase or sell the health insurance Bristol provided its employees through IBC. However, Bristol claims that from 1994 to 2000 IBC paid Vacca commissions from money added to Bristol's insurance premiums without Bristol's authorization. Although it concedes it has no means of calculating the alleged commissions, Bristol believes IBC paid Vacca over $ 400,000 in commissions.

Bristol also alleges that IBC continued to pay Vacca these commissions after Vacca became an employee of Banet sometime before February 1999. Bristol further alleges that IBC paid Vacca these commissions after February 19, 1999, the day Vacca's insurance broker's license was suspended after Vacca pled guilty or no contest to charges of conflict of interest, bribery and tampering with public records or information. Because Vacca's license was suspended, Bristol contends Vacca was not legally entitled to collect the commissions.

In light of these facts, the Court turns to the IBC and Banet's Motions to Dismiss.

## II. *DISCUSSION*

Both IBC and Banet move the Court to dismiss pursuant to Federal Rule [*4] of Civil Procedure 12(b)(6). When evaluating a Motion to Dismiss pursuant to Rule 12(b)(6), the Court must accept each allegation in a well pleaded complaint as true. *Albright v. Oliver*, 510 U.S. 266, 268, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994). Additionally, a Motion to Dismiss should only be granted if the Court finds that no proven set of facts would entitle the plaintiff to recovery under the filed pleadings. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

It is also firmly established that in reviewing a Federal Rule of Civil Procedure 12(b)(6) motion, the Court must draw all reasonable inferences in the plaintiff's favor. *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3rd Cir. 1991).

### A. IBC and Bristol's Motions to Dismiss

#### 1. Bristol's Claim for Breach of Contract Against Banet (Count X)

Banet moves to dismiss Bristol's breach of contract claim against Banet. To plead a breach of contract, a plaintiff must allege: 1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract and (3) resultant damages. *Williams v. Nationwide Mut. Ins. Co.*, 2000 PA Super 110, 750 A.2d 881, 884 (Pa. Super. Ct.2000). [*5] After reviewing Bristol's Amended Complaint, the Court finds that Bristol fails to allege the existence of a contract with Banet, its essential terms, and fails to explain how Banet breached the contract if it did exist. The Court will therefore dismiss Bristol's breach of contract claim against Banet.

#### 2. Bristol's Claim for Breach of Fiduciary Duty Against Banet (Count XII)

Banet also contends that Bristol fails to state a valid claim for breach of fiduciary duty against it because Banet was not Bristol's fiduciary. In response, Bristol argues that because Banet employed Vacca, Bristol Township's insurance broker, and collected commissions from IBC through Vacca, Banet acted as Bristol's agent, and therefore fiduciary. It is true that an agent's duty to his principal is the same as that of a fiduciary. *Garbish v. Malvern Federal Sav. and Loan Assn.*, 358 Pa. Super. 282, 517 A.2d 547, 554 (Pa. Super. Ct. 1986). A fiduciary has the duty to act for the benefit of another as to matters within the scope of the relation. *Id.*

In support of its contention that Banet was Bristol's agent and fiduciary through Banet's employment of Vacca, Bristol cites [*6] the Restatement (Second) of

Agency, § 15 cmt. e:

> One acting for the benefit of another without a manifestation of consent by the other may subject himself to the liabilities of an agent at the election of the principal. Thus, one who purports to act on behalf of another but without the authority to do so is subject to liability to the other as if he were a disobedient agent if he affects the principal's interests either by binding the principal to a third person where he has apparent authority, or by disposing of or meddling with the principal's assets.

Assuming this Court were to adopt the Restatement's view of the law, Bristol fails to claim that Banet employed Vacca while Vacca still served as Bristol's broker. To the contrary, Bristol's Amended Complaint explains that "plaintiff does not have knowledge of the. . . specific nature of the relationship between Vacca and Banet." Amended Complaint P 19. Further, Bristol's Amended Complaint states that "Banet was never appointed or retained by Bristol as its insurance broker." Amended Complaint P 21. Because Bristol has failed to allege that Vacca served as its broker while Banet employed him, it has not stated a claim for [*7] breach of fiduciary duty against Bristol.

**3. Bristol's Claim for an Accounting (Count I)**

IBC moves to dismiss Count I of plaintiff's Complaint where Bristol demands that IBC provide Bristol with a full and complete accounting of the commissions IBC allegedly paid Vacca at Bristol's expense.

Some courts have explained that accounting is an equitable remedy which is available only when there is no adequate remedy at law. *Benefit Control Methods v. Health Care Services, Inc.*, 1998 U.S. Dist. LEXIS 376, 1998 WL 22080, at *2 (E.D.Pa. Jan 16, 1998); *Taylor v. Wachtler*, 825 F. Supp. 95, 104 (E.D.Pa.1993). Other courts recognize that an action for an accounting also exists at law and is proper where:

> (1) there was a valid contract, express or implied, between the parties whereby the defendant
>
> (a) received monies as agent, trustee or in any other capacity whereby the relationship created by the contract imposed a legal obligation upon the defendant to account to the plaintiff for the monies received by the defendant, or
>
> (b) if the relationship created by the contract between the plaintiff and defendant created a legal duty upon the defendant to [*8] account and the defendant failed to account and the plaintiff is unable, by reason of the defendant's failure to account, to state the exact amount due him, and
>
> (2) that the defendant breached or was in dereliction of his duty under the contract.

*Haft v. U.S. Steel Corp.*, 346 Pa. Super. 404, 499 A.2d 676, 677-78 (Pa. Super. Ct. Oct 18, 1985; *see also Berger & Montague, P.C. v. Scott & Scott, LLC*, 153 F. Supp. 2d 750, 754 (E.D.Pa. 2001)(recognizing that a claim of accounting may exist both in equity and at law.

Here, IBC only argues that Bristol cannot state an equitable claim for accounting, but fails to address whether Bristol can state a cause of action for an accounting at law. Moreover, IBC does not move to dismiss Bristol's breach of contract claim against it, nor has IBC argued that it was not under a legal obligation to account to Bristol. Consequently, the Court will not dismiss plaintiff's claim for an accounting against IBC.

Banet also moves to dismiss Bristol's claim for an accounting. However, unlike IBC, Banet argues that Bristol has failed to state a claim for legal or equitable

accounting. The Court agrees. To the extent [*9] Bristol seeks an accounting against Banet on equitable grounds, Bristol has an adequate remedy at law: discovery. *Benefit Control Methods v. Health Care Svcs., Inc.*, 1998 U.S. Dist. LEXIS 376, 1998 WL 22080, at *2 (E.D.Pa. Jan. 16, 1998). To the extent Bristol seeks an accounting at law against Banet, as explained above, Bristol has failed to allege the existence of a contract between it and Banet, and has failed to allege that Banet was Bristol's agent. Thus, Bristol has failed to state a claim for accounting against Banet.

**4. Bristol's Claims for Fraud (Count VII and XI)**

IBC also moves to dismiss Bristol's fraud claim. IBC first argues that the economic loss doctrine bars Bristol's fraud claim. The economic loss doctrine "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995). "The rationale of the economic loss rule is that tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." *Sun Co., Inc. (R & M) v. Badger Design & Constructors, Inc.*, 939 F. Supp. 365, 372 (E.D.Pa. 1996) [*10] (quoting *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1271 (M.D.Pa. 1990)). Thus, to determine whether the economic loss doctrine precludes recovery, the court must consider whether the damages plaintiff seeks to recover "were in the contemplation of the parties at the origination of the agreement." *Cortez v. Keystone Bank, Inc.*, 2000 U.S. Dist. LEXIS 5705, 2000 WL 536666, at *8 (E.D.Pa. May 03, 2000)(quoting *Duquesne Light Co.*, 66 F.3d at 618).

However, there is a split of authority among Pennsylvania district courts as to whether the economic loss doctrine applies to intentional fraud claims. *Compare KNK Medical-Dental Specialities, Ltd. v. Tamex Corp.*, 2000 U.S. Dist. LEXIS 14536, 2000 WL 1470665 (E.D.Pa. Sep 28, 2000)(Van Antwerpin, J.)(unwilling to dismiss plaintiff's fraud claim on the economic loss rule because of the lack of clarity from either Pennsylvania state courts or the Third Circuit); *Sunquest Info. Systems v. Dean Witter Reynolds*, 40 F. Supp. 2d 644, 658 (W.D.Pa. 2000)(finding economic loss rule inapplicable to tort claim based on intentionally false representation); *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1271 (M.D.Pa. 1990) [*11] (noting the exception to the economic loss rule but not relying on it); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 535 (W.D.Pa.2000)(same); *with Montgomery County v. Microvote Corp.*, 2000 U.S. Dist. LEXIS 983, 2000 WL 134708, at *7 (E.D.Pa. Feb. 3, 2000)(Kelly, J.)(concluding economic loss rule bars recovery for both negligent and intentional misrepresentation); *Werwinski v. Ford Motor Co.*, 2000 U.S. Dist. LEXIS 11977, 2000 WL 1291576, at *5 (E.D.Pa. Aug. 15, 2000)(Buckwalter, J.)("This Court finds more persuasive the reasoning of courts that do bar fraud claims that are intertwined with contract claims and the only resulting loss has been economic.").

Nevertheless, this Court does not need to reconcile the differing opinions of courts in this Circuit. At this early stage of the litigation, the Court is unconvinced that plaintiff has not stated a claim for fraud separate and distinct from its breach of contract claim. Plaintiff's fraud claim involves parties who were not parties to the contract between IBC and Bristol, and IBC's alleged payment of the commissions were not contemplated in the contract between IBC [*12] and Bristol. Moreover, it would be of no consequence if plaintiff's case did rely on the same set of facts because those facts can give rise to both causes of action. *KNK Medical-Dental Specialities, Ltd.*, 2000 U.S. Dist. LEXIS 14536, 2000 WL 1470665, at 6. Additionally, if plaintiff's allegations are true, this case involves more than negligent misrepresentation. Indeed, plaintiff alleges that IBC actively concealed the commissions it paid Vacca both in its invoices and throughout their six year relationship. Thus, the Court will not dismiss plaintiff's fraud claim based upon the economic loss doctrine.

Alternatively, IBC argues the Bristol's fraud claim should be dismissed because there is no confidential relationship between Bristol and IBC, and therefore, IBC had no duty to tell Bristol that its invoices included inflated premiums to conceal the commissions IBC allegedly paid Vacca.

It is true that there is no liability for fraudulent concealment absent some duty to speak. *Duquesne Light Co. v. Westinghouse Electric Corp.*, 66 F.3d 604, 611-12 (3d Cir. 1995); *City of Rome v. Glanton*, 958 F. Supp. 1026, 1038 (E.D.Pa. 1997). While a duty to speak does arise [*13] in fiduciary and confidential relationships, a "duty to speak may also arise as a consequence of an

agreement between parties, or as a result of one party's reliance on the other's representations, if one party is the only source of information to the other party, or the problems are not discoverable by other reasonable means." *City of Rome*, 958 F. Supp. at 1038. Additionally, a duty to speak may also occur when disclosure is necessary to prevent an ambiguous or partial statement from being misleading. *Id.*; *see also Duquesne*, 66 F.3d at 612- 13.

Assuming, as this Court must, that plaintiff's allegations are true, IBC and Bristol not only had an agreement, but IBC and not Bristol knew that IBC was paying Vacca commissions. Further, Bristol relied on IBC invoices when paying IBC for the premiums Bristol owed IBC. According to Bristol though, those premiums were inflated to hide the commissions IBC paid Vacca. Thus, IBC has not persuaded the Court that Bristol has failed to state a claim for fraud.

Banet has also moved to dismiss Bristol's claim of fraud against it. Banet first argues that Bristol's Amended Complaint fails to state a claim for fraud. [*14] Upon a review of plaintiff's Amended Complaint and the relevant law, the Court disagrees at this juncture.

Banet further contends that Bristol's Complaint fails to allege fraudulent misrepresentation with sufficient particularity. Claims for fraud must be pleaded with adequate particularity to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). However, "in applying Rule 9(b), 'focusing exclusively on its "particularity language" is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'" *Id.* (citations omitted). The rule's purpose is to give notice to the defendant of the precise misconduct with which she is charged, and to protect her from any spurious charges of fraudulent or immoral behavior. *In Re Meridian Securities Litigation*, 772 F. Supp. 223, 229 (E.D.Pa. 1991). As long as there is some precision and some measure of substantiation in the pleadings, the rule will be satisfied. *Id.*

Here, Bristol has adequately plead its claims of fraud. Bristol alleges that Banet approved and [*15] furthered IBC's alleged scheme to charge Bristol for commissions Bristol did not approve. The Complaint alleges the time frame of the alleged fraud, the means used to perpetrate the fraud, and each defendant's conduct. Consequently, the Court will not dismiss plaintiff's fraud claims against Banet.

**5. Bristol's Claims for Conversion, Civil Conspiracy and Negligence (Counts XIII, XIV and XV)**

Banet argues that Bristol's claim for conversion against it should be dismissed. Under Pennsylvania law conversion is the "deprivation of another's right of property in, or use or possession of a chattel, or other interference therewith, without the owner's consent and without lawful justification." *Cennav. United States*, 402 F.2d 168, 170 (3d Cir. 1968). Banet argues that Bristol fails to allege that Banet interfered with Bristol's property, and at worst, it only accepted commissions from IBC.

Bristol argues that it has alleged that Banet and IBC agreed to charge Bristol for commissions for which Banet was not entitled, and disguised the overcharges as premiums. Thus, Bristol contends it has properly alleged conversion. If Bristol's allegations are true, then [*16] Banet has interfered with Bristol's property, and may be liable for conversion. The Court will not dismiss Bristol's conversion claim at this time.

Banet further argues that the Court should dismiss Bristol's claim of civil conspiracy. To prove a civil conspiracy under Pennsylvania law, a plaintiff must show the following elements: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. *SNA, Inc. v. Array*, 51 F. Supp. 2d 554, 561 (E.D.Pa. 1999). Proof of malice or an intent to injure is essential to the proof of a conspiracy. *Strickland v. University of Scranton*, 700 A.2d 979, 987-88 (Pa. Super. Ct. 1997). An action will lie only where the sole purpose of the conspiracy is to cause harm to the party who claims to be injured. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 472 (Pa. 1979). Thus, where the facts show that a person acted to advance his own business interests, those facts constitute justification and negate any alleged [*17] intent to injure. *Id.*

Banet argues that because Bristol's Complaint alleges that one purpose of the conspiracy was to further defendants' business dealings and obtain money for

Vacca and/or Banet, Bristol failed to allege that Banet has acted with malice. The Court agrees. That it may have been necessary to deceive plaintiff to carry out their scheme does not indicate that the defendants acted with malice solely to injure plaintiff. *Spitzer v. Abdelhak*, 1999 U.S. Dist. LEXIS 19110, 1999 WL 1204352, at *9 (E.D.Pa. Dec 15, 1999). The Court will dismiss plaintiff's claim of civil conspiracy.

In addition, Banet asks this Court to dismiss Bristol's negligence claim. However, after reviewing plaintiff's Complaint, and the parties briefs, Banet has not persuaded the Court that it should dismiss Bristol's negligence claim at this juncture.

**6. Bristol's RICO Claim (Count XVI)**

IBC and Banet argue that Bristol's RICO claim should be dismissed. First Banet claims that Bristol's RICO claim fails to allege that defendants engaged in interstate commerce. More specifically, Banet argues that Bristol's Complaint concedes that all defendants here are located and conduct business in Pennsylvania, [*18] and fails to allege that defendants conduct business outside of Pennsylvania.

18 U.S.C. 1962(a) makes it unlawful:

> for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The requirement that RICO affect interstate commerce is satisfied by "minimal" effects. *Rose v. Bartle*, 871 F.2d 331, 357 (3d Cir. 1989).

Here, even if Bristol has failed to expressly plead the interstate aspect of defendants activities, the interstate requirement may be reasonably inferred from the nature of defendants' activities in the field of employee benefits. *See Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989)(explaining that the interstate requirement may [*19] be reasonably inferred from the nature of a defendant's activities). Indeed, Congress has expressly found that:

> employee benefit plans. . . have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce. .

29 U.S.C. § 1001. Moreover, plaintiff has alleged that the defendants carried out their unlawful scheme through the United States mails. Thus, given the low threshold of activity that satisfies the interstate requirement, and defendants interstate activities, the Court will not dismiss plaintiff's RICO claim on this ground.

IBC and Banet then argue that Bristol has failed to allege that defendants exist as an enterprise within the meaning of RICO. To support that contention, they urge the Court to apply the Supreme Court's decision in *United States v. Turkette*, 452 U.S. 576, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981), [*20] and the Third Circuit's decision in *United States v. Riccobene*, 709 F.2d 214, 221 (3d Cir. 1983). IBC and Banet therefore invite this Court to commit reversible error.

In *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 789-90 (3d Cir. 1984), the Third Circuit explained:

> In so ruling, the district court confused what must be pleaded with what must be proved. *Riccobene* and *Turkette* certainly stand for the proposition that a plaintiff, to recover, must prove that an alleged enterprise possesses the three described attributes. But neither case speaks to what must be pleaded in order to state a cause of action. The district court erred in applying the *Riccobene-Turkette* proof analysis to the allegations in Seville's complaint.

> We need cite no authority for the proposition that the Federal Rules of Civil Procedure were designed to eliminate the vagaries of technical pleading that once plagued complainants, and to replace them with the considerably more liberal requirements of so-called "notice" pleading. Under the modern federal rules, it is enough that a complaint put the defendant on notice of the claims [*21] against him. It is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action.
>
> In the present case, Seville identified the four entities it believed were the enterprises that had been marshalled against it. The rules of pleading require nothing more at this early juncture than that bare allegation.

742 F.2d at 789-90 (citations omitted). Like the plaintiff in *Seville*, Bristol has alleged that the defendants were an enterprise, and the Court will not dismiss plaintiff's RICO claim.

An appropriate Order follows.

Clarence C. Newcomer, S.J.

***ORDER***

AND NOW, this 10th day of October, 2001, the Court hereby ORDERS as follows:

1. Upon consideration of IBC's Motion to Dismiss, said Motion is DENIED.

2. Upon consideration of Banet's Motion to Dismiss, said Motion is GRANTED in part and DENIED in part. Said Motion is GRANTED to the extent the Court hereby DISMISSES Count I (Accounting) against Banet, but not the other defendants. The Court further GRANTS said Motion to the extent the Court hereby DISMISSES Counts X (Breach of Contract), XII (Breach of Fiduciary Duty), and XIV (Civil Conspiracy). [*22] Nevertheless, the Court grants plaintiff ten (10) days to properly amend its Complaint. Defendant Banet's Motion is DENIED in all other respects.

AND IT IS SO ORDERED

Clarence C. Newcomer, S.J.

Not Reported in F.Supp.2d, 2010 WL 4290059 (E.D.Pa.)
**(Cite as: 2010 WL 4290059 (E.D.Pa.))**

**H**

Only the Westlaw citation is currently available.

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,
E.D. Pennsylvania.
CAPITOL INSURANCE COMPANY, Plaintiff,
v.
Charles DVORAK, et al., Defendants.

Civil Action No. 10--CV--1195.
Oct. 29, 2010.

Lambros Z. Economides, Economides & Economides, Media, PA, for Plaintiff.

Charles Dvorak, Palm Harbor, FL, pro se.

Douglas N. Menchise, Clearwater, FL, Andrew N. Schwartz, Marshall Dennehey Warner Coleman & Goggin, Philadelphia, PA, Michael J. Strenk, Pro Hac, Vice, Commack, NY, for Defendants.

Doreen Dvorak, Palm Harbor, FL, pro se.

Alison Dvorak, Dayville, CT, pro se.

Richard Dvorak, Dayville, CT, pro se.

Aldrostar, Inc., Palm Harbor, FL, pro se.

Rampage Marketing Services, Inc., Palm Harbor, FL, pro se.

Newport Resources Management, Inc., Palm Harbor, FL, pro se.

*MEMORANDUM AND ORDER*

JOYNER, District Judge.

*1 Before this Court are the Revised Motions to Dismiss of Defendants Alison Dvorak (Doc. No. 34) and Richard Dvorak (Doc. No. 37) and Plaintiff's response in opposition thereto (Docs.Nos.42, 43). For the reasons set forth in this Memorandum, the Court grants the Motions.

*I. BACKGROUND*

Plaintiff Capitol Insurance Co. has sued a host of individuals and corporations, including Richard and Alison Dvorak, for alleged losses arising from a re-insurance agreement Plaintiff entered into with Aldrostar, S.A. The Defendants include Rampage Marketing Services, Inc., and Newport Resources Management, Inc., two corporations that allegedly represented themselves as the licensed U .S. agent for Aldrostar, S.A.; Aldrostar, Inc., the alleged successor corporation to Aldrostar, S.A.; Charles Dvorak, Doreen Dvorak, Richard Dvorak, and Alison Dvorak, who allegedly represented themselves as officers, shareholders, employees, agents, or servants of the corporate Defendants; and Daniel Samela, CPA, PC, an independent accounting firm that audited Aldrostar, S.A. Plaintiff has asserted claims of fraud, negligent misrepresentation, RICO violation, conspiracy to violate RICO, breach of contract, and professional negligence.

Problematically, Plaintiff's Complaint and responsive brief speak in very broad language (even though more specific pertinent facts should already be known to Plaintiff), repeatedly conflate the alleged actions of the many Defendants (e.g., by using the ambiguous term "Defendants," even though the information to separate the actions should again be in Plaintiff's possession), and seemingly change which

causes of action Plaintiff is bringing. It best appears that Plaintiff is suing Alison and Richard Dvorak on all claims except professional negligence.[FN1]

> FN1. For purposes of the pending Revised Motions to Dismiss, however, it is irrelevant which of the claims are in fact being asserted against Alison and Richard Dvorak, because this Court finds that Plaintiff has failed to prove personal jurisdiction for any of them.

Alison and Richard Dvorak have filed identical pro se Revised Motions to Dismiss, providing four grounds for dismissing them from this suit: (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, (3) improper venue, and (4) failure to state a claim upon which relief can be granted. [FN2]

> FN2. Defendants appear to misconstrue the nature of subject matter jurisdiction, basing their subject matter jurisdiction challenge on the ground that they are "individual[s] with no ownership ... control, responsibility or obligation" as to Aldrostar, S.A., and that they are without "any interests in any company involved in this case." (Rev. Mot. to Dismiss of Alison Dvorak, para. 1.; Rev. Mot. to Dismiss of Richard Dvorak, para. 1.) This Court liberally construes pro se Defendants' argument as either a "corporate shield" challenge to personal jurisdiction or a Rule 12(b)(6) challenge for failure to state a claim upon which relief can be granted, and addresses this argument *infra*.
>
> This Court has subject matter jurisdiction pursuant to both 28 U.S.C. § 1331 (federal question jurisdiction, as Plaintiff has asserted a violation of a federal statute, 18 U.S.C. § 1962) and 28 U.S.C. § 1332 (diversity jurisdiction, as no Defendant is a citizen of the same State as Plaintiff and the amount in controversy exceeds $75,000).
>
> Because this Court concludes that Plaintiff has failed to prove personal jurisdiction, *see infra*, it need not address the issues of venue or failure to state a claim.

### *II. STANDARD OF REVIEW*

It is well-established that, "once the defendant raises the question of personal jurisdiction, the plaintiff bears the burden to prove, by a preponderance of the evidence, facts sufficient to establish personal jurisdiction." *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 146 (3d Cir.1992). While "courts reviewing a motion to dismiss a case for lack of in personam jurisdiction must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff," *id.* at 142 n. 1, "the plaintiff must sustain its burden ... through sworn affidavits or other competent evidence." *Patterson v. FBI*, 893 F.2d 595, 604 (3d Cir.1990) (internal quotation marks omitted). "[A]t no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion to dismiss for lack of in personam jurisdiction." *Id.* (internal quotation marks omitted).

### *III. DISCUSSION*

***2** "Rule 4(e) of the Federal Rules of Civil Procedure is the starting point [of a personal jurisdiction analysis]. This rule authorizes personal jurisdiction over non-resident defendants to the extent permissible under the law of the state where the district court sits." *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 200 (3d Cir.1998) (internal quotation marks omitted). Pennsylvania's long-arm statute "permits Pennsylvania courts to exercise personal jurisdiction over nonresident defendants 'to the constitutional limits of the Due Process Clause of the Fourteenth Amendment.' " *Id.* (citation omitted). "A district court's exercise of personal jurisdiction pursuant to Pennsylvania's long-arm statute is therefore valid as long as it is constitutional." *Id.*

Plaintiff fails to address the constitutional test, instead focusing on the statutory grant of jurisdiction pursuant to 42 Pa. Cons.Stat. § 5322. Clearly, however, a court "cannot presume that jurisdiction is proper simply because the requirements of a long-arm statute have been met." *Id.* at 202.

The constitutional test may be satisfied through the existence of general or specific jurisdiction. "General jurisdiction is based upon the defendant's 'continuous and systematic contacts' with the forum and exists even if the plaintiff's cause of action arises from the defendant's non-forum related activities." *Remick v. Manfredy*, 238 F.2d 248, 255 (3d Cir.2001). "Specific jurisdiction exists when the plaintiff's claim is related to or arises out of the defendant's contacts with the forum." *Pennzoil*, 149 F.3d at 201 (internal quotation marks omitted).

Under the traditional test for specific jurisdiction, "a court must determine whether the defendant had the minimum contacts with the forum necessary for the defendant to have 'reasonably anticipated being haled into court there.' " *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). "A finding of minimum contacts demands the demonstration of 'some act by which the defendant purposely availed itself of the privilege of conducting business within the forum State, thus invoking the protection and benefits of its laws.' " *Id.* at 203 (first citation omitted) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). If "minimum contacts have been established, a court may [then] inquire whether 'the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' ' " *Id.* at 201 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). That is, "even if a defendant has the requisite minimum contacts with the forum state, other factors may militate against exercising jurisdiction." *Id.* at 205.

When an out-of-state defendant has been accused of an intentional tort, however, the specific jurisdiction analysis is slightly different, as the Third Circuit uses the *Calder* "effects test." To establish jurisdiction in this way,

> *3 the plaintiff must allege facts sufficient to meet a three-prong test. First, the defendant must have committed an intentional tort. Second, the plaintiff must have felt the brunt of the harm caused by that tort in the forum, such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort. Third, the defendant must have expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity.

IMO *Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 256 (3d Cir.1998). Additionally, the Third Circuit has warned that "[s]imply asserting that the defendant knew that the plaintiff's principal place of business was located in the forum would be insufficient in itself to meet this requirement." *Id.* at 265. "In the typical case, [satisfaction of the test] will require some type of 'entry' into the forum state by the defendant." *Id.* Thus, "[j]ust as the standard test prevents a defendant from 'be[ing] haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts,' the effects test prevents a defendant from being haled into a jurisdiction solely because the defendant intentionally caused harm that was felt in the forum state if the defendant did not expressly aim his conduct at that state." *Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir.2007) (citation omitted).

Regardless of the test, specific jurisdiction is generally evaluated on a "claim-by-claim basis," *id.* at 296, and "the due process standard must be applied to each defendant" separately. *Carteret*, 954 F.2d at 145 n. 6. This separation is especially important in the present case, where there are numerous Defendants

and Plaintiff has sued the individual Defendants not in their individual capacity but in their capacity as agents of the corporate Defendants. This is because, "[g]enerally, individuals performing acts in a state in their corporate capacity are not subject to the personal jurisdiction of the courts of that state for those acts." *Elbeco Inc. v. Estrella de Plato, Corp.*, 989 F.Supp. 669, 675 (E.D.Pa.1997) (internal quotation marks omitted).[FN3]

> FN3. "The courts have carved out two exceptions to the 'corporate shield' doctrine, refusing to allow a corporate officer to invoke its protections where the officer was involved in tortious conduct for which he or she could be held personally liable, or when a corporate officer 'has been charged with violating a statutory scheme that provides for personal, as well as corporate, liability.' " *Johnson v. Phelps*, No. 05-5555, 2007 U.S. Dist. LEXIS 24212, *11 (E.D.Pa. Apr. 2, 2007) (citations omitted); *see also Elbeco Inc. v. Estrella de Plato, Corp.*, 989 F.Supp. 669, 675 (E.D.Pa.1997) ("[A] recognized exception to this general rule is that a corporate agent may be held personally liable for torts committed in their corporate capacity." (internal quotation marks omitted)).
>
> > "In order to determine whether the corporate officer will be subject to personal jurisdiction, the following factors should be examined: 'the officer's role in the corporate structure, the quality of the officers' [ ] contacts, and the extent and nature of the officer's participation in the alleged tortious conduct.' " *Elbeco*, 989 F.Supp. at 675 (quoting *Maleski v. DP Realty Trust*, 653 A.2d 54, 63 (Pa.Commw.Ct.1994)).

Plaintiff has submitted an "Affidavit of Counsel in Support of Plaintiff's Opposition to Defendants, Richard and Alison Dovrak's [sic] Revised Motion to Dismiss" [hereinafter "Pl. Aff."] with several exhibits (Doc. No. 42). Defendants Richard and Alison Dvorak have each submitted an affidavit. Though Plaintiff cannot rely on its pleadings because it bears the burden of proving jurisdiction through affidavits or other competent evidence, Plaintiff's affidavit avers only a small portion of the facts alleged in the Complaint (omitting, for example, any reference to the "alter ego" theory raised in the Complaint). Moreover, Plaintiff attempts to present additional facts in its responsive brief. This is clearly inappropriate. The facts must be presented through affidavits, exhibits, or other competent evidence for this Court to consider them. Considering the evidence properly submitted, this Court finds insufficient proof of personal jurisdiction over both Defendants.

*1. Alison Dvorak*

***4** Plaintiff has fallen far short of proving that this Court has personal jurisdiction over Alison Dvorak. As an initial matter, Plaintiff fails to show why this Court should even consider any actions Alison Dvorak may have taken in her corporate capacity-that is, why the "corporate shield" does not apply. *See, e.g., Schiller-Pfeiffer, Inc. v. Country Home Prods., Inc.*, No. 04-1444, 2004 U.S. Dist. LEXIS 24180, *15-27, 2004 WL 2755585 (E.D.Pa. Dec. 1, 2004)* (concluding that personal jurisdiction over two directors who played "major roles" in the corporation would be "problematic at best" when their only direct contact with Pennsylvania was their signature on an agreement sent to the plaintiff's Pennsylvania office); *D & S Screen Fund II v. Ferrari*, 174 F.Supp.2d 343, 347-48 (E.D.Pa.2001) (holding the corporate shield applicable when the contacts of the defendant company president with Pennsylvania consisted of several telephone calls and facsimile transmissions but his allegedly tortious activity did not appear to have occurred in Pennsylvania).

As for the relationship, if any, between Alison Dvorak and Pennsylvania, Plaintiff's affidavit only makes the bare assertion that "[t]he Dvorak Defend-

ants transacted business in the Commonwealth of Pennsylvania throughout the entire period of time from 2002–2007 when they presented themselves as the registered agent for Aldrostar, SA." (Pl.Aff.para.10.) There is no evidence that Alison Dvorak's alleged transaction of business in Pennsylvania was "continuous and systematic;" thus, general jurisdiction is nonexistent. Nor has Plaintiff supplied evidence to show how the claims at issue arose from any business Alison Dvorak transacted in Pennsylvania; thus, specific jurisdiction is not proven. *See, e.g., Regan v. Loewenstein*, 292 Fed. App'x 200, 205 n. 3 (3d Cir.2008) (affirming the finding of no personal jurisdiction when the plaintiffs "allege[d] that [one plaintiff] met with [the defendants] in Pennsylvania to discuss her book, but they [did] not provide any details" of the meeting).

*2. Richard Dvorak*

Plaintiff has also failed to prove that this Court has personal jurisdiction over Richard Dvorak. As with Alison Dvorak, Plaintiff does not address why this Court should even consider any actions Richard Dvorak may have taken in his corporate capacity. Unlike with Alison Dvorak, there is more specific evidence of a relationship with Pennsylvania than just the broad assertion that "[t]he Dvorak Defendants transacted business in the Commonwealth of Pennsylvania throughout the entire period of time from 2002–2007 when they presented themselves as the registered agent for Aldrostar, SA." (Pl.Aff.para.10.) Richard Dvorak's affidavit acknowledges that,

> Representing Rampage Marketing Services for Aldrostar SA, I attended a meeting in Harrisburg, Pennsylvania with the Department of Insurance and Capitol Insurance Company on July 7, 2004 where I conveyed Aldrostar SA's opinion regarding unearned premium as a receivable that becomes earned when collected and other concerns related to the IBNR. I agreed to convey the information from the meeting to Aldrostar SA.

*5 (Richard Dvorak Aff. at unnumbered pg. 2.) "This was after Capitol's auditors claimed there was a shortfall of $2,232,000.00 in the Funds Withheld Account as of 2004 for Unearned Premium 'UEP' and Incurred But Not Reported 'IBNR' funds." (*Id.*) *See also* Pl. Aff. para. 11 ("Richard Dvorak admits in his revised motion that he made an appearance and presentation to the Pennsylvania Department of Insurance in Harrisburg, Pennsylvania regarding the reinsurance company's capacity to fulfill its obligation under the reinsurance agreement."). [FN4]

> FN4. Richard Dvorak refers to several other contacts between the corporations and Pennsylvania, but it is unclear whether he was personally involved. *See* Richard Dvorak Aff. at unnumbered pg. 1 ("[R]einsurance contracts were approved by the Pennsylvania DOI and signed in June 2002."); *id.* at 2 ("Aldrostar SA's plan for funding the account through a letter of credit was approved by the [Pennsylvania] Department of Insurance ("DOI"). This was the second time the Department of Insurance approved Aldrostar SA and its contract (2005)."); *see also id.* (stating that Capitol Insurance controlled all accounts and calculated all commissions due to Aldrostar SA, but not clarifying where these accounts and commissions originated).

Plaintiff has woefully failed, however, to show whether or how this contact with Pennsylvania, rather than any actions outside the forum, gave rise to the claims of fraud, negligent misrepresentation, RICO violation, conspiracy to violate RICO, and breach of contract. In fact, the only specific evidence of Richard Dvorak's participation in acts forming the basis of this suit is limited to other years and circumstances, such as his involvement with the auditor's report in 2002, (Pl.Aff.paras.7, 8), well before his visit to Pennsylvania. *See Regan*, 292 Fed. App'x 200 at 205 n. 3. Accordingly, this Court finds that Plaintiff has not met its burden of showing that its claims arise from Richard

Dvorak's contact with Pennsylvania.

### *IV. CONCLUSION*

Because Plaintiff has failed to establish minimum contacts between Defendant Alison Dvorak and Pennsylvania or express aiming by Defendant Alison Dvorak at Pennsylvania, and because Plaintiff has failed to establish that the claims against Defendant Richard Dvorak arise from any contact he had with Pennsylvania, the Motions are granted and Defendants are dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).

E.D.Pa.,2010.
Capitol Ins. Co. v. Dvorak
Not Reported in F.Supp.2d, 2010 WL 4290059 (E.D.Pa.)

END OF DOCUMENT

CBG OCCUPATIONAL THERAPY INC. d/b/a CGB, and DECOR UNLIMITED, Plaintiffs v. BALA NURSING AND RETIREMENT CENTER, LTD. PARTNERSHIP MDC ASSET MANAGEMENT CORPORATION PHILIP R. MILLER, and CENTER FOR REHABILITATIVE THERAPIES, INC.

No. 1758, Commerce Program, Control No. 010592

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2005 Phila. Ct. Com. Pl. LEXIS 19

January 27, 2005, Decided

JUDGES: [*1] ALBERT W. SHEPPARD, JR., J.

OPINION BY: ALBERT W. SHEPPARD, JR.

OPINION

OPINION

Albert W. Sheppard, Jr., J.

Defendants, Bala Nursing and Retirement Center, Ltd. Partnership ("Bala"), MDC Asset Management Corporation ("MDC"), Philip R. Miller ("Miller") and Center for Rehabilitative Therapies, Inc. ("CRT"), have filed a Motion for Reconsideration of this court's denial of their Motion for Summary Judgment.

Upon reflection and a complete review of the submissions filed in support of and in opposition to that original Motion for Summary Judgment, the court has concluded that its denial of the Motion was improvidently entered and in error. Accordingly, the Order of April 8, 2004 will be vacated. Further, Summary Judgment will be entered in favor of defendants on Counts II through VI for the reasons discussed below.

In summary, Counts II through V are dismissed based on application of the statute of limitations. [1] Further, Counts V and VI are dismissed for failure to provide evidence sufficient to sustain these claims. The Motion is denied as to Count I (Contract) of the Complaint.

1 Counts II and IV should be dismissed for the additional reason of the "gist of the action doctrine".

[*2] BACKGROUND

On December 3, 1997, defendant CRT and plaintiff CGB entered into a Rehabilitation Management Services Agreement ("Agreement"). Section 6 of the Agreement provided that: "The term of the Agreement shall be for a period of two year(s) from the date of the execution." The Agreement also called for at least 60 days notice (after the initial two years) in the event that a party chose not to renew. CGB agreed to manage rehabilitation services, which CRT agreed to provide to defendant Bala. CGB was responsible for hiring therapists who would become CRT's employees working at Bala under CGB's management. Plaintiffs allege that the recruitment fees were to be paid by CRT to CGB for hiring and recruiting therapists.

On July 1, 1998, CRT assigned to Bala all of its rights, interest and obligations in the Agreement. On March 22, 1999, Gordon Nedwed, Bala's administrator, gave notice to CGB that Bala was terminating the Agreement. CGB took the position that this notice was in violation of the Agreement.

On January 29, 1998, CGB had sent to Bala a copy of the "Equipment Procedure and Policy," which provided that after the equipment was delivered by CGB to Bala [*3] and the therapist checked in the equipment, Bala and CRT were responsible for any losses due to the theft, destruction, or use which rendered the equipment unusable for future patients. [2] On May 27, 1999, a representative of CGB went to Bala to pick up equipment that was to be returned to CGB. Plaintiffs allege that, when they inspected the equipment that was to be returned, they discovered that "much of the equipment . . . was used and was unacceptable for reuse." Compl. at P 129. Plaintiffs allege that Mr. Nedwed refused to compensate plaintiff for the "missing" equipment. [3] Plaintiffs further allege that CGB was asked by Bala to provide Polaroid cameras and film, for which Bala has refused to pay. Id. at P 136.

2 The therapy equipment belonged to CGB and plaintiff Decor Unlimited.

3 Plaintiffs allege that the "old and dirty equipment had been substituted for much of the equipment inventoried on May 14, 1999." Id. at P 130.

**DISCUSSION**

[*4] Rule 1035.2 of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows a court to enter summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action." A court must grant a motion for summary judgment when a nonmoving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in its favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-102, 674 A. 2d 1038, 1042 (1996). A motion for summary judgment must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Pennsylvania State University v. County of Centre, 532 Pa. 142, 145, 615 A.2d 303, 304 (1992). Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered. [*5] Skipworth v. Lead Industries Ass'n., Inc., 547 Pa. 224, 230, 690 A.2d 169, 171 (1997).

Here, defendants argue that: (1) plaintiffs knew or should have known of the alleged breach of the Agreement on or about March 22, 1999, barring plaintiffs' "Breach of Contract" claim based on the applicable statute of limitations, (2) Counts II, III, IV, V and VI [4] are time barred, (3) the claims of alleged tortious misconduct violates the "gist of the action" doctrine, (4) the allegations in the Complaint of fraud were not sufficiently pled, (5) plaintiffs have produced no documentary or other evidence to support the allegations of conspiracy, or the allegation that Bala, MDC and CRT "acted with malice and with specific intent to injure Plaintiff CGB", (6) there is no allegation in the Complaint of actions by a third party, which is a necessary element of the tortious interference claim, and (7) plaintiffs have produced no documentary or other evidence to support the allegations of Piercing the Corporate Veil. [5]

4 These are for Fraud and Misrepresentation against Bala, MDC, Miller, and CRT (Count II), Conversion of therapy equipment against Bala, MDC and CRT (Count III); Civil Conspiracy against Bala, MDC, CRT and Miller (Count IV); Tortious Interference against Miller (Count V), and "Breaching the Corporate Veil" against Bala, MDC, CRT and Miller, respectively (Count VI).

[*6]

5 Plaintiffs have misnamed Count VI. For the purposes of this Opinion, "Breaching the Corporate Veil" will be referred to as "Piercing the Corporate Veil".

The parties disagree as to which event constituted a breach of the Agreement. Plaintiffs argue that May 20, 1999 was the date of breach, since that was the date by which defendants terminated their services in violation of the Agreement. Defendants argue that March 22, 1999, was the date of the breach because on that date defendant Bala's Administrator sent notice to plaintiff CGB terminating the Agreement, violating the notice provision of the two year Agreement entered into on December 3, 1997.

The notice sent on March 22, 1999 was a breach by anticipatory repudiation. "An anticipatory breach of contract by a promisor is a repudiation of his contractual duty before the time fixed in the contract for his performance has arrived. Such a repudiation may be made either by word or by act. If the promisor makes a definite statement to the promisee that he either will not or can not perform his contract, this is a repudiation and [*7] will operate as an anticipatory breach unless the promisor had some justifying cause for his statement." Corbin on Contracts, § 959 (1993).

In 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies, 507 Pa. 166, 489 A.2d 733 (1985), the court set out the elements for an anticipatory breach as "an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so." citing McClelland v. New Amsterdam Casualty Co., 322 Pa. 429, 433, 185 A. 198, 200. The McClelland standard is still the rule of law in Pennsylvania. See William B. Tanner v. WIOO, Inc., 528 F.2d 262 (3d Cir.1975); McCloskey v. Minweld Steel Co., 220 F.2d 101 (3d Cir.1955); Alabama Football, Inc. v. Greenwood, 452 F. Supp. 1191 (W.D.Pa.1978); Wolgin v. Atlas United Financial Corp., 397 F.Supp. 1003 (E.D.Pa.1975), aff'd. *mem.*, 530 F.2d 966 (3d Cir.1976); Shafer v. A.I.T.S., Inc., 285 Pa. Super. 490, 428 A.2d 152 (1981).

Defendant Bala's March 22, 1999 correspondence to plaintiffs was an unambiguous notice of termination of the Agreement [*8] between CRT and CGB. Upon receiving this notice, plaintiffs could have regarded defendants' anticipatory repudiation as the breach of their Agreement. However, "there is no necessity for making the statutory period of limitations begin to run against the plaintiff until the day fixed by the contract for the rendition of performance." Corbin on Contract, § 989 (1993). "For the purpose of determining when the period of limitation begins to run, the defendant's non-performance at the day specified may be regarded as a breach of duty as well as the anticipatory repudiation. The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately." Id.

May 20, 1999 was, therefore, the date when defendants terminated their services, thus triggering the limitations period. Plaintiffs filed this lawsuit in April 2003, within the applicable four year statute of limitations. As a result, plaintiffs' claim for Breach of Contract (Count I) is not barred.

However, defendants argue that Counts II through V, which all sound [*9] in tort, should be barred by the statute of limitations. Plaintiffs contend that all of the defendants' conduct complained of in these Counts constitutes continuing violations and that, therefore, they are not time barred.

A continuous tort is "one inflicted over a period of time; it involves wrongful conduct that is repeated until desisted . . . A continuing tort sufficient to toll the statute of limitations is occasioned by continual unlawful acts, *not by continual ill effects from an original violation.*" David E. Poplar, Comment, *Tolling the Statute of Limitations for Battered Women After Giovine v. Giovine: Creating Equitable Exceptions for Victims of Domestic Abuse,* 101 Dick. L. Rev. 161, 186 (1993), *See* Curtis v. Firth, 123 Idaho 598, 603, 850 P.2d 749, 754 (1993) (quoting 54 C.J.S. Limitations of Actions 177, at 231 (1987)). (Emphasis added.)

Plaintiffs allege that the defendants committed fraud and misrepresentation by making assurances to coerce plaintiff CGB into hiring professionals for use at the defendants' facility, while having no intention of paying recruiting fees and conspiring to steal these people away by prematurely [*10] terminating the defendants' contract and keeping these individuals for the defendants' permanent use and benefit. Compl. at PP 85-115, 138-145. The Complaint states that fraud and conspiracy were ongoing because the individuals that were hired continued to work for defendants. Id. at PP 83, 98 and 102. The Complaint goes on to state that the defendants engaged in this conduct with an intent to deprive plaintiffs of the use of these personnel for placement by the plaintiffs at other facilities, up to and including the date of filing the Complaint. Id. at PP 100-102. While the fact that two of the three individuals that were hired continued to work for defendants may be an ill effect of the defendants' alleged violation, it does not circumvent the applicable two year statute of limitations period.

As noted, the statute of limitations began to toll on May 20, 1999, the date by which plaintiff knew or had reason to know that the Agreement at issue in this case had been breached. Therefore, Counts II through V are dismissed as being time barred by virtue of the two year tort limitations period.

Counts II and IV are also dismissed under the gist of the action doctrine.

[*11] The gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims . . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." eToll, Inc. v. Elias/Savon Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002). A tort claim is barred "where the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." Id. at 19.

Count II of plaintiffs' Complaint alleges fraud and misrepresentation. More specifically, plaintiffs allege an intentional failure of the defendants to pay certain fees in accordance with the Agreement, after representing that they would pay those fees. The fact that defendants may have intentionally breached a contractual duty does not give rise to a tort claim, but instead provides a basis for a breach of contract claim. Therefore, plaintiffs' [*12] claim for fraud and misrepresentation is barred by the gist of the action doctrine.

Similarly, Count IV of plaintiffs' Complaint alleges that defendants conspired and acted in concert with a common purpose to defraud plaintiff CGB of the money due to CGB under the Agreement. Compl. at P 139. This claim is firmly rooted in the Agreement. Accordingly, plaintiffs' claim for conspiracy is also barred by the gist of the action doctrine.

As to plaintiffs' conversion claim, generally, "courts are cautious about permitting tort recovery based on contractual breaches." Pittsburgh Construction Company v. Paul Griffith and Saundra Griffith, 2003 Pa. Super. 374, *20, 834 A.2d 572, 581. However, "a breach of contract may give rise to an actionable tort where the wrong ascribed to the defendant is the gist of the action, the contract being collateral." The Insurance Adjustment Bureau, Inc. v. Allstate Insurance Company, 2004 Pa. Super. 381, *14, 860 A.2d 1038, 1043. Count III of plaintiffs' Complaint alleges conversion of the plaintiffs' therapy equipment. Plaintiffs allege that Bala's administrator refused to pay for the converted equipment after the [*13] Agreement had been breached. Compl. at 46. Thus, plaintiffs' conversion claim is a tort claim collateral to the contract and must be allowed to stand.

Plaintiffs assert a claim against defendant Philip Miller for his intentional interference with the relationship between CRT and plaintiff CGB and his intentional interference between plaintiff CGB and "its skilled professionals."

The Restatement (Second) of Torts § 766 provides in pertinent part: ". . . One who, without a privilege to do so, induces or otherwise purposefully causes a third person not to a) perform a contract with another, or b) enter into or continue a business relation with another is liable to the other for the harm caused thereby." [6]

> 6 The Restatement (Second) of Torts § 766 was adopted by Pennsylvania in Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895 (1971).

Essential to the right of recovery on this theory is the existence of a contractual [*14] relationship between the plaintiff and a party other than the defendant. Nix v. Temple University, 408 Pa. Super. 369, 379, 596 A.2d 1132, 1137 (1991). A corporation cannot tortiously interfere with a contract to which it is a party. Id., (citing Menefee v. Columbia Broadcasting System, Inc., 458 Pa. 46, 329 A.2d 216 (1974)). Because a corporation acts through its agents and officers, such agents or officers cannot be regarded as third parties when they are acting in their official capacities. Id.

Concerning the alleged interference between CRT and CGB, Philip Miller was a registered agent of defendant CRT [7]. In order to determine that Miller could have tortiously interfered with the Agreement between CRT and CGB, plaintiffs must allege facts that show he was without a privilege -- that is, performing the acts alleged under this Count outside of the scope of his agency relationship with CRT. Plaintiffs, in paragraphs 87 and 88 of their Complaint, allege that Philip Miller had the ability to veto any decision made by Mr. Nedwed, Bala's administrator, and that Philip Miller was aware of the alleged issues relating to [*15] non-payment for service and therapy fees and theft of equipment. In paragraph 89, plaintiffs allege that Philip Miller, by not responding to phone calls or letters, approved the decisions made by Mr. Nedwed. These allegations do not demonstrate or imply that Philip Miller was acting outside of the scope of his agency relationship with CRT when he allegedly tortiously interfered with the relationship between CRT and CGB.

7 According to Defendants' Motion for Summary Judgment, Philip Miller was the CEO of CRT.

Similarly, with respect to plaintiffs' allegation that Philip Miller tortiously interfered with the relationship between CGB and "its skilled professionals", plaintiffs have not alleged facts that would explain how he interfered with these relationships. Plaintiffs do not allege facts sufficient to establish that Mr. Miller, without a privilege, tortiously interfered with the relationship between CGB's and "its skilled professionals". Therefore, plaintiffs' claim for tortious interference [*16] is dismissed.

In Count VI, plaintiffs allege that: "upon information and belief", defendants Bala, CRT and MDC are grossly undercapitalized for their business purpose, have failed to observe corporate formalities, have not regularly paid dividends to their owner or owners, have been siphoning funds of the corporations, have no functioning officers or directors, have not maintained adequate corporate records, and are merely facades for the operations of Philip Miller and Robert Miller. Plaintiffs ask that this court hold Philip Miller personally liable for his own acts and the alleged acts of CRT, MDC and Bala.

Plaintiffs, in their response, rely on the affidavit of Philip Miller, which states that he is/was either the CEO or the President of all of the defendant entities. From there, they leap to the conclusion that these businesses were merely an instrumentality of Miller.

In Pennsylvania, there is a strong presumption against piercing the corporate veil. Lumax Industries, Inc. v. Aultman, 543 Pa. 38, 41-42, 669 A.2d, 893, 894 (Pa. 1995). "Piercing the corporate veil is an exception, and courts should start from the general rule that the corporate entity [*17] should be upheld unless specific, unusual circumstances call for [such] an exception." JK Roller Architects, LLC v. Tower Investments, Inc., 2003 Phila. Ct. Com. Pl. LEXIS 40, 2003 WL 1848101, *1 (2003)(Jones)(quoting First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 577-578, 600 A.2d 601, 604 (Pa. Super. 1991). Under Pennsylvania law, the following factors are to be considered in determining whether to pierce the corporate veil: 1) undercapitalization; 2) failure to adhere to corporate formalities; 3) substantial intermingling of corporate and personal affairs; and 4) use of the corporate from to perpetuate a fraud. Id. (quoting Lumax Indus. v. Aultman, 543 Pa. 38, 669 A.2d 893 (Pa. 1995)).

In order to withstand defendants' motion for summary judgment, plaintiffs must set forth the conduct which Philip Miller allegedly engaged in that would bring his actions within those parameters enumerated. Id.

Here plaintiffs rely solely on the affidavit of Philip Miller to show that Mr. Miller engaged in conduct that would subject him to liability on the theory of piercing the corporate veil. [*18] The affidavit of Mr. Miller merely states that he was either the President or the CEO of the defendant business entities. In sum, the plaintiffs have failed to present sufficient evidence to support Philip Miller's personal liability. Accordingly, this Count must be dismissed.

**CONCLUSION**

For all of the foregoing reasons, defendants' Motion for Summary Judgment is granted in part and denied in part. A contemporaneous Order consistent with this Opinion will be entered of record.

**BY THE COURT,**

**ALBERT W. SHEPPARD, JR., J.**

**ORDER**

AND NOW, this 27th day of January 2005, upon consideration of defendants' Motion for Reconsideration of this court's denial of defendants' Motion for Summary Judgment and a complete reevaluation of the issue presented in the Summary Judgment Motion, including a review and analysis of the original memoranda submitted in support and opposition of that Motion, all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that:

(1) This court's Order of April 8, 2004 is **Vacated.**

(2) Summary Judgment in favor of defendants is **Granted** as [*19] to Counts II through VI, and

(3) Counts II through VI of the Complaint are **Dismissed.**

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

WILLIAM HYNDMAN, Plaintiff, v. STANLEY JOHNSON and BACK IN TIME CLASSIC, STREET & MUSCLE CARS, INC., Defendants.

CIVIL ACTION NO. 10-7131

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2011 U.S. Dist. LEXIS 14871

February 14, 2011, Decided
February 15, 2011, Filed

**COUNSEL:** [*1] For WILLIAM HYNDMAN, Plaintiff: BRUCE SHAW, LEAD ATTORNEY, WILLOW GROVE, PA; STEPHEN F. GEHRINGER, LEAD ATTORNEY, HEENEY & ASSOCIATES PC, PIPERSVILLE, PA.

For STANLEY JOHNSON, BACK IN TIME CLASSIC, STREET & MUSCLE CARS, INC., Defendants: STEPHEN V. YARNELL, LEAD ATTORNEY, LAW OFFICES OF STEPEHN V. YARNELL, NARBERTH, PA; MICHAEL S. REEVES, FRIEND HUDAK & HARRIS LLP, ATLANTA, GA.

**JUDGES:** RONALD L. BUCKWALTER, S.J.

**OPINION BY:** RONALD L. BUCKWALTER

**OPINION**

**MEMORANDUM**

BUCKWALTER, S.J.

Currently pending before the Court is the Motion of Defendants Back In Time Classic, Street & Muscle Cars, Inc. ("Back In Time") and Stanley Johnson (collectively "Defendants") to Dismiss Plaintiff William Hyndman's ("Plaintiff") Complaint for lack of personal jurisdiction pursuant Federal Rule of Civil Procedure 12(b)(2) and improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). For the following reasons, the Motion is granted in part and denied in part.

## I. FACTUAL AND PROCEDURAL HISTORY

In August of 2010, Defendants, residents of Georgia, sold a 1957 Ford Thunderbird to Plaintiff, who resides in Doylestown, Pennsylvania. (Compl. ¶¶ 1-4.; Pl.'s Resp. Opp'n at 3-4.) Plaintiff alleges that the vehicle is a counterfeit, and filed [*2] this suit against Defendants to recover damages. (Pl.'s Resp. Opp'n at 2.) According to Plaintiff, Defendants advertised the Thunderbird in Hemmings Motor News, a publication to which Plaintiff subscribes. (Id. at 3-4.) Upon reading the advertisement, Plaintiff contacted Defendants to discuss purchasing the vehicle. (Id. at 4; Defs.' Mot. Dismiss at 2.) Plaintiff and Defendants negotiated the transaction over the course of a month, until they agreed on a purchase price of $125,000. (Pl.'s Resp. Opp'n at 4.) Prior to the sale, Plaintiff had the vehicle examined by an automobile inspector recommended by Defendants, who assured him that the car was authentic. (Id.) Plaintiff then arranged for the shipment of the Thunderbird from Georgia to Pennsylvania, electronically transferred his payment to Defendants on August 19, 2010, and took possession of the vehicle the following day. (Id.; Defs.' Mot. Dismiss at 2.)

After receiving the car, Plaintiff had it inspected by a Pennsylvania-licensed automotive appraisal company, which concluded that the Thunderbird was a counterfeit. (Pl.'s Resp. Opp'n at 5.) [1] Plaintiff filed suit in the Court of Common Pleas of Bucks County, Pennsylvania, alleging [*3] breach of contract, intentional misrepresentation, negligent misrepresentation, unfair/deceptive trade practices under 73 P.S. 201-1, *et. seq.* of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and conversion. (Compl. ¶¶ 25-94.) Defendants filed a Notice of Removal [2] and the present Motion to Dismiss in this Court on December 8, 2010. Plaintiff filed a Response in Opposition on December 28, 2010.

1 Specifically, the appraiser discovered that the Thunderbird contained the following defects:

> (1) [the] trim tag is a counterfeit; (2) the original factory VIN number stampings have been tampered with and removed in several locations; (3) a counterfeit foil VIN label has been glued to the side of the right rear frame rail; (4) all visible components of the engine have had casting numbers and dates ground off; and (5) . . . the entire engine assembly is from a standard D-Code 1956 Thunderbird and not part of a F-Code vehicle.

(Pl.'s Resp. Opp'n at 5.)

2 This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a).

## II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(2), a defendant bears the initial burden of raising the lack [*4] of personal jurisdiction defense. Nat'l Paintball Supply, Inc. v. Cossio, 996 F. Supp. 459, 460 (E.D. Pa. 1998) (citing Clark v. Matsushita Elec. Indus. Co., Ltd., 811 F. Supp. 1061, 1064 (M.D. Pa. 1993)). Once the defense has been raised, the burden shifts to the plaintiff to demonstrate that jurisdiction exists. Poole v. Sasson, 122 F. Supp. 2d 556, 557 (E.D. Pa. 2000) (citations omitted). Although the court is required to accept as true the allegations of the pleadings and all reasonable inferences therefrom, "a plaintiff may not solely rely on bare pleadings to satisfy his jurisdictional burden. Rather, the plaintiff must offer evidence that establishes with reasonable particularity sufficient contact between the defendant and the forum state to support jurisdiction." Id. If the plaintiff meets this burden, the defendant must then establish the presence of other considerations that would render jurisdiction unreasonable. De Lage Landen Fin. Servs., Inc. v. Rasa Floors, LP, No. CIV.A.08-00533, 2008 U.S. Dist. LEXIS 91427, 2008 WL 4822033, at *3 (E.D. Pa. Nov. 4, 2008) (citing Carteret Sav. Bank v. Shushan, 954 F.2d 141, 150 (3d Cir. 1992)).

## III. DISCUSSION

### A. Personal Jurisdiction

Pursuant to Federal Rule of Civil Procedure 4(k)(1)(A), [*5] a federal court may exercise personal jurisdiction over a non-resident defendant to the extent provided by the law of the state in which the federal court sits. FED. R. CIV. P. 4(k)(1)(A); see also Martin v. Citizens Fin. Group, Inc., No. CIV.A.10-260, 2010 U.S. Dist. LEXIS 83474, 2010 WL 3239187, at *3 (E.D. Pa. Aug. 13, 2010). In Pennsylvania, personal jurisdiction over nonresident defendants is permitted "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 PA. CONS. STAT. § 5322(b); see also Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992) ("The Pennsylvania statute permits the courts of that state to exercise personal jurisdiction over nonresident defendants to the constitutional limits of the due process clause of the fourteenth amendment.").

The Due Process Clause "requires that nonresident defendants have 'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Kehm Oil Co. v. Texaco, Inc., 537 F.3d 290, 299-300 (3d Cir. 2008) [*6] (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). Two types of personal jurisdiction have been recognized by federal courts: "general and specific jurisdiction. General jurisdiction exists when a defendant has maintained systematic and continuous contacts with the forum state." Id. at 300 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15, 104 S. Ct. 1868, 80 L. Ed. 2d 404 & n.9 (1984)).

Specific jurisdiction is present "when the claim arises from or relates to conduct purposely directed at the forum state." Id. (citing Helicopteros, 466 U.S. at 414-15 & n.8).

Plaintiff has not presented any evidence that Defendants have maintained systematic and continuous contacts with Pennsylvania, which would create general jurisdiction in this case. The Court's inquiry is therefore limited to whether it can exercise specific jurisdiction over Defendants. In deciding whether specific jurisdiction exists, a district court conducts a three-part analysis. First, the defendant's activities must have been "purposefully directed" at the forum. Marten v. Godwin, 499 F.3d 290, 296 (3d Cir. 2007) (quoting Burger King v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). Next, "the plaintiff's claim must 'arise [*7] out of or relate to' at least one of those specific activities." Id. (quoting Helicopteros, 466 U.S. at 414). Finally, "courts may consider additional factors to ensure that the assertion of jurisdiction otherwise 'comport[s] with "fair play and substantial justice."'" Id. (quoting Burger King, 471 U.S. at 476.)

When a plaintiff has alleged an intentional tort, courts should consider the impact of the "effects test" ? announced in Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) -- on their minimum contacts analysis. Vector Sec., Inc. v. Corum, No. CIV.A.03-741, 2003 U.S. Dist. LEXIS 6573, 2003 WL 21293767, at *3 (E.D. Pa. Mar. 21, 2003). The Calder effects test, as described by the Third Circuit, requires a plaintiff to demonstrate the following:

> (1) The defendant committed an intentional tort;
>
> (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort;
>
> (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity;

IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir. 1998) (footnote omitted). In order to satisfy the third [*8] prong of this analysis, "the plaintiff must show that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum." Id. at 266.

In support of their argument that the Court lacks personal jurisdiction in this case, both Defendants contend that they do not reside or do business in Pennsylvania, that Plaintiff was the one who initiated the contract negotiations, and that they never met with Plaintiff in Pennsylvania. (Defs.' Mot. Dismiss at 4.) In addition, they argue that minimum contacts do not exist merely because Defendants exchanged phone calls with Plaintiff, entered into a contractual relationship with him, and accepted funds from a Pennsylvania bank. (Id. at 4-5.) Defendants also contend that exercising jurisdiction in this case would conflict with notions of fair play and substantial justice. They state that the geographic distance between Georgia and Pennsylvania would make litigating in Pennsylvania "an unnecessary hardship," that Pennsylvania has only a minimal interest in this litigation, and that "the resolution [*9] of the case will almost certainly require significant amounts of time in Georgia." (Id. at 6.)

In response, Plaintiff argues that this Court has personal jurisdiction over both Defendants pursuant to 42 Pa.C.S. § 5322. (Pl.'s Resp. Opp'n at 7-12.) Pennsylvania authorizes its courts to exercise jurisdiction over those who cause "harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth." 42 PA. CONS. STAT. § 5322(a)(4). Plaintiff contends that the harm he suffered in connection with the counterfeit Thunderbird "began with the Defendants outside of Pennsylvania . . . [but] the Commonwealth is where the Plaintiff suffered damages." (Pl.'s Resp. Opp'n at 8.) As such, Plaintiff believes Defendants' activities satisfy Pennsylvania's personal jurisdiction statute.

In the alternative, Plaintiff also argues that Defendants' contacts with Pennsylvania establish jurisdiction pursuant to the Calder effects test. (Id. at 12.) He states that: (1) Defendants committed the tort of intentional misrepresentation; (2) he felt the brunt of the harm in Pennsylvania, where he took possession of the vehicle and discovered it was counterfeit; and (3) this tortious conduct [*10] was aimed at Plaintiff in Pennsylvania. (Id. at 14-15.)

Though both Defendants make similar arguments as

to why this Court lacks personal jurisdiction over them, there are slightly different considerations for each Defendant, and so the Court analyzes each separately.

**1. Defendant Back In Time**

The Court finds that the alleged facts of this case establish personal jurisdiction over Defendant Back In Time. Back In Time initially reached out beyond its home forum of Georgia when it advertised the Thunderbird in Hemmings Motor News, a national publication. Back In Time was or should have been aware that this periodical would be read by individuals residing outside of Georgia and, indeed, this is how Plaintiff became aware of the vehicle.

Of course, the advertisement alone would not subject Back In Time to jurisdiction in Pennsylvania, but its subsequent business dealings with Plaintiff indicate that exercising specific jurisdiction is proper in this case. After Plaintiff initially contacted Back In Time to express his interest in the Thunderbird, the parties exchanged multiple telephone calls and e-mails in an attempt to work out a deal. Back In Time was aware during the course of these negotiations [*11] that Plaintiff was a Pennsylvania resident, and mailed the vehicle's title to Plaintiff in Pennsylvania once the sale was made. If Plaintiff's allegations are accepted as true, which they must be for the purposes of this Motion, Back In Time knew that the Thunderbird was counterfeit when it sold the vehicle and sent the defective title to Plaintiff, thereby directing its tortious activity at Pennsylvania. It therefore follows that Back In Time could have reasonably foreseen being hailed into court in Pennsylvania when Plaintiff, a resident of this forum, took possession of the car and discovered the fraud. Defendant Back In Time's Motion to Dismiss for lack of personal jurisdiction is denied.

**2. Defendant Johnson**

In certain situations, "jurisdiction over corporate officers in their personal capacities may be based on acts performed in their corporate capacity . . . ." American Int'l Airways, Inc. v. American Int'l Group, Inc., No. CIV.A.90-7135, 1991 U.S. Dist. LEXIS 6888, 1991 WL 87276, at *4 (E.D. Pa. May 21, 1991). In deciding whether personal jurisdiction exists, courts should consider "the officer's role in the corporate structure, the nature and quality of the officer's forum contacts and the extent and nature [*12] of the officer's personal participation in the tortious conduct." Id. (citations omitted). However, "when personal jurisdiction is based on an officer's corporate activities, only those actions taken within the forum state are to be considered in the jurisdictional analysis." Id. (citation omitted). Otherwise, "an individual's transaction of business solely as an officer or agent of a corporation does not create personal jurisdiction over that individual." Feld v. Tele-View, Inc., 422 F. Supp. 1100, 1104 (E.D. Pa. 1976) (citing Miller v. AT&T, 394 F. Supp. 58, 62-63 (E.D. Pa.1975)).

Here, Plaintiff alleges Defendant Johnson "trades and does business under the name of Back In Time Classic, Street & Muscle Cars." (Compl. ¶ 3.) Defendant Johnson identifies himself as "a shareholder" of Back In Time. (Defs.' Mot. Dismiss, Ex. A., Decl. of Stanley Johnson ¶ 8.) Based upon this information, Defendant Johnson's precise role in the corporate structure of Back In Time is not entirely clear.

Even without a more thorough understanding of Defendant Johnson's corporate position, however, the Court is able to conclude that it lacks personal jurisdiction over him in this case. Plaintiff [*13] has not alleged that Defendant Johnson has any contacts with Pennsylvania in his personal capacity, or that any of his activities as a corporate officer or agent of Back In Time took place in Pennsylvania. Indeed, as Defendants note, the telephone calls between Plaintiff and Defendant Johnson "were clearly made on behalf of Defendant Back In Time, not Johnson individually. Johnson could not reasonably foresee being subjected to litigation against him as an individual in a foreign forum in such circumstances." (Defs.' Mot. Dismiss at 5.) The Motion to Dismiss Plaintiff's claims against Defendant Johnson is granted.

**B. Venue**

Pursuant to 28 U.S.C. § 1391, a civil action founded upon diversity of citizenship may be brought only in

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal

> jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise [*14] be brought.

28 U.S.C. § 1391(a). Because the Court finds that it lacks personal jurisdiction over Defendant Johnson, it necessarily follows that the Eastern District of Pennsylvania is an improper venue for Plaintiff's claims against him. Therefore, this analysis is limited to whether venue is proper with respect to Defendant Back In Time.

Back In Time argues that the Eastern District of Pennsylvania is not the appropriate venue for this case because it resides in Georgia, which is also where the events giving rise to Plaintiff's claims occurred. (Defs.' Mot. Dismiss at 6-7.) Clearly, venue cannot be predicated on § 1391(a)(1) or (3), and Back In Time is correct in noting that certain actions associated with this lawsuit occurred in Georgia. Nevertheless, the Court finds that Plaintiff has alleged facts sufficient to establish venue pursuant to § 1391(a)(2). The Thunderbird, which is the subject of this litigation, was shipped to and is currently located in the Eastern District of Pennsylvania. Plaintiff had the vehicle inspected in the Eastern District, and it was this inspection that led to the discovery of the alleged fraud. Furthermore, because of the defects associated with the [*15] Thunderbird's title, Plaintiff argues that he "cannot apply for a Pennsylvania Certificate of Title and, therefore, cannot register the vehicle in the Commonwealth of Pennsylvania." (Pl.'s Resp. Opp'n at 6.) In short, a substantial part of the events giving rise to Plaintiff's claims occurred in the Eastern District of Pennsylvania, and the Court finds this is the proper venue in which to hear Plaintiff's claims against Defendant Back In Time.

## IV. CONCLUSION

For all of the foregoing reasons, the Court finds that sufficient minimum contacts exist to establish specific personal jurisdiction over Defendant Back In Time. The Eastern District of Pennsylvania is a proper venue for this case because it is here that the 1957 Ford Thunderbird is located and where a significant portion of the events leading up to this litigation occurred. With regard to Defendant Johnson, however, Plaintiff's allegations refer only to activities he undertook as an agent or officer of Defendant Back In Time. As such, the Court lacks personal jurisdiction over Defendant Johnson and the claims against him are dismissed.

## ORDER

**AND NOW**, this *14th* day of *February, 2011*, upon consideration of Defendants Stanley Johnson [*16] and Back In Time Classic, Street & Muscle Cars, Inc.'s Motion to Dismiss Plaintiff William Hyndman's Complaint (Docket No. 4) and Plaintiff's Response (Docket No. 6), it is hereby **ORDERED** that the Motion is granted in part and denied in part as follows:

> 1. Moving Defendants' Motion to Dismiss Plaintiff's claims against Defendant Back In Time Classic, Street & Muscle Cars, Inc. for lack of personal jurisdiction and improper venue is **DENIED**.
>
> 2. Moving Defendants' Motion to Dismiss Plaintiff's claims against Defendant Stanley Johnson for lack of personal jurisdiction and improper venue is **GRANTED**. All claims against Defendant Johnson are **DISMISSED**.

It is so **ORDERED**.

BY THE COURT:

***/s/ Ronald L. Buckwalter***

RONALD L. BUCKWALTER, S.J.

MICHAEL A. LOWE, Plaintiff, v. TUFF JEW PRODUCTIONS, et al., Defendants.

No. 1112

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2006 Phila. Ct. Com. Pl. LEXIS 241

March 6, 2006, Decided

**PRIOR HISTORY:** [*1] Commerce Program. Lowe v. Tuff Jew Prods., 2006 Phila. Ct. Com. Pl. LEXIS 129 (2006)

**JUDGES:** MARK I. BERNSTEIN, J.

**OPINION BY:** MARK I. BERNSTEIN

**OPINION**

*MARK I. BERNSTEIN, J.*

On March 6, 2006, this court sustained the separate Preliminary Objections of Defendant Scott Storch and Tuff Jew Productions, Andre Young, Aftermath Entertainment, Alvin Nathanial Joiner, Hennesy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music, Loud Records and Sony Music Entertainment. Plaintiff's appeal followed. For the reasons fully set forth below, this court's March 6, 2006 Order should be affirmed.

**BACKGROUND**

Plaintiff Michael Lowe has brought the instant action for damages claiming that Defendants recorded, published and distributed a song he composed without permission or compensation. According to the Amended Complaint, Plaintiff brought several songs, including one titled "West Coast," to Storch, who is alleged to be the CEO and Managing Member of Defendant Tuff Jew Productions ("Tuff Jew"). Plaintiff contends that he and Storch had a "long standing agreement" pursuant [*2] to which Plaintiff was to receive producer credit as well as monetary compensation if any of Plaintiff's musical compositions were used by Storch. Plaintiff claims that Storch brought the song "West Coast" to Defendant Andre Young (a.k.a. "Dr. Dre"), which was eventually recorded under the title "X" by Defendant Alvin Nathanial Joiner (a.k.a. "Xzibit"), with Young as executive producer. The various other Defendants were allegedly involved in the production, distribution and promotion of the album, titled "Restless." The album was released in December 2000 and sold millions of copies.

In 2002, Plaintiff filed an action in the United States District Court for the Eastern District of Pennsylvania asserting federal copyright infringement and state common law claims in connection with the same song and actions at issue in this case (the "Federal Action"). On November 20, 2003, the Hon. Robert F. Kelly, Sr., granted summary judgment in favor of the Defendants on the copyright infringement claim. Judge Kelly found that Plaintiff's own deposition testimony and affidavit established that he had granted Storch a nonexclusive license to use "West Coast" exactly as it had been used by [*3] Young. [1] Judge Kelly also dismissed the state law claims and granted attorneys' fees and costs to Defendants. Judge Kelly's decision was affirmed by the United States Court of Appeals For the Third Circuit,

with opinion, on March 23, 2005.

1 *See* Federal Action Opinions, attached to Recording Defendants' Memorandum as Exhibits 2 and 3.

Thereafter, Plaintiff filed the instant action asserting the following claims against all Defendants: 1) conversion; 2) breach of contract; 3) tortious breach of contract; and 4) conspiracy. Defendants have filed Preliminary Objections to all claims; each will be addressed in turn.

## DISCUSSION

### A. This Court Lacks Jurisdiction over the Recording Defendants (Other Than Sony)

Defendants Andre Young, Aftermath Entertainment, Alvin Nathanial Joiner, Hennesy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music and Loud Music (the "Recording Defendants") have filed Preliminary Objections pursuant Pa.R.C.P. 1028(a)(1) [*4] asserting lack of personal jurisdiction. [2] This court finds that Plaintiff has failed to demonstrate sufficient facts to establish personal jurisdiction over the Recording Defendants.

2 Defendant Sony Music Entertainment ("Sony") admits that this court has jurisdiction over it, as it has offices in Philadelphia, Pennsylvania. Sony Ans. at P15. The specific claims against Sony are discussed in further detail, *infra* at pp. 7-10.

Where a party objects to a court's exercise of personal jurisdiction, the non-moving party bears the burden of demonstrating contacts with the forum state sufficient to justify the assertion of personal jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945); Barr v. Barr, 2000 Pa. Super. 99, 749 A.2d 992 (2000). Pursuant to the Judiciary Act, 42 Pa.C.S.A. § 5301, *et seq.*, Pennsylvania courts may exercise two types of *in personam* jurisdiction over a [*5] non-resident defendant. One type of personal jurisdiction is general jurisdiction, which is founded upon a defendant's general activities within the forum as evidenced by continuous and systematic contacts with the state. The other type is specific jurisdiction, which has a more defined scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action. Mar-Eco, Inc. v. T & R & Sons Towing & Recovery, Inc., 2003 Pa. Super. 444, 837 A.2d 512 (2003). Regardless of whether general or specific *in personam* jurisdiction is asserted, the propriety of such an exercise must be tested against the Pennsylvania Long Arm Statute, 42 Pa.C.S.A. § 5322, and the Due Process Clause of the Fourteenth Amendment.

At bar, this court finds that Plaintiff has failed to demonstrate sufficient facts to establish either general or specific jurisdiction over the Recording Defendants, despite the fact that he was given the opportunity to conduct jurisdictional discovery by the court. With respect to individuals, general jurisdiction only exists if there is a presence or domicile [*6] in Pennsylvania when process is served, or if there is consent. 42 Pa.C.S.A. § 5301(a)(1). There is no consent here. According to the Amended Complaint, Andre Young and Alvin Nathanial Joiner are residents of California. These Defendants have declared that they do not do business, reside, have offices or own property in Pennsylvania. [3] Plaintiff has offered no evidence to the contrary and has not established personal jurisdiction over Young or Joiner.

3 *See* Declarations of Defendants Andre Young, Alvin Nathanial Joiner and Rich Isaacson, attached to Recording Defendants' Preliminary Objections as Exhs. 4-6.

With respect to the corporate defendants, Pennsylvania courts may exercise general personal jurisdiction where the corporation carries on "a continuous and systematic" part of its general business within Pennsylvania. 42 Pa. C.S. § 5301(a)(2)(iii). Since there is no established legal test to determine whether a corporation's activities [*7] are sufficiently continuous and systematic to warrant the exercise of general jurisdiction, a court must engage in a factual analysis that focuses on the overall nature of the activity, rather than its quantitative character. Bizarre Foods, Inc. v. Premium Foods, Inc., 2003 U.S. Dist. LEXIS 8166 (E.D. Pa. May 16, 2003). In order to meet constitutional muster, a defendant's contacts with the forum state must be such that the defendant could "reasonably anticipate being called to defend itself in the forum." Taylor v. Fedra Int'l, Ltd., 2003 Pa. Super 233, 828 A.2d 378 (2003). The facts must demonstrate that defendant "purposefully directed its activities to the forum and conducted itself in a manner indicating that it has availed itself to the forum's

privileges and benefits such that it should also be subjected to the forum state's laws and regulations." Id.

Plaintiff has likewise failed to produce specific facts to demonstrate the corporate defendants have the necessary contacts with Pennsylvania, Defendants Hennesy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music and Loud Records are each [*8] described with a business address of either New York or California. These Defendants have likewise declared that they do not do business, reside, have offices or own property in Pennsylvania. [4] Plaintiff has produced no evidence to support his claims of jurisdiction. Plaintiff's general allegations that Young and Joiner have performed concerts in Philadelphia and that records have been promoted and sold in Pennsylvania from which each of the Recording Defendants allegedly received royalties, is insufficient to demonstrate sufficient minimum contacts. Only Sony (which does not contest jurisdiction) and Loud Records are even alleged to have actually distributed the album in Pennsylvania. Even if accepted as true, without any proof, such allegations alone are insufficient form the basis for general jurisdiction. "[T]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Kachur v. Yugo Am., 534 Pa. 316, 324-325, 632 A.2d 1297 (1993)(*citing* [*9] Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). Without specific evidence of conduct by the Defendants which demonstrates an intent or purpose to serve the market in Pennsylvania, Plaintiff has not established general jurisdiction.

> 4 *See* Declarations of Defendants Andre Young, Alvin Nathanial Joiner and Rich Isaacson on behalf of corporate defendants Hennesy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music and Loud Records, attached to Recording Defendants' Preliminary Objections as Exhs. 4-6.

Plaintiff has also failed to demonstrate specific jurisdiction, which focuses upon the particular acts giving rise to the underlying cause of action. The activity that Plaintiff alleges as the basis of his claims against the Recording Defendants -- the unauthorized recording of "West Coast" -- is alleged to have taken place in either New York or Los Angeles, not Pennsylvania. [*10] Aside from general allegations that the album was marketed and sold in Pennsylvania, Plaintiff has identified no other specific contacts with this forum state by any of the Defendants which would establish jurisdiction. Accordingly, this court finds that Plaintiff has offered no proof that the Recording Defendants have availed themselves of the privilege of conducting activities in Pennsylvania. The minimum contacts that would justify specific jurisdiction do not exist here.

As Plaintiff has failed to demonstrate sufficient facts to establish either general or specific *in personam* jurisdiction over the Recording Defendants, all claims against these Defendants are dismissed pursuant to Pa.R.C.P. 1028(a)(1).

**B. Plaintiff's Claims Against Storch and Tuff Jew Are Dismissed For Improper Service**

Defendants Storch and Tuff Jew have filed Preliminary Objections to the Amended Complaint alleging, *inter alia,* that they were not properly served. This action was commenced on January 9, 2004 by writ of summons, which was reissued on March 17, 2004. A complaint was filed on May 24, 2004, and amended on April 28, 2005. In the Amended [*11] Complaint, Storch is alleged to reside in Florida. As per the Amended Complaint, Tuff Jew was headquartered in Philadelphia "until Storch learned of the imminent institution of this suit..."; no other address is listed for Tuff Jew in the Amended Complaint. In his response to Defendants' Preliminary Objections, Plaintiff contends that Tuff Jew is a Pennsylvania limited liability company with a registered office address and current business address in Philadelphia, Pennsylvania.

Plaintiff made various attempts, but was unable to make personal service upon either Tuff Jew or Storch in Philadelphia. Plaintiff's affidavits of service state that these parties "moved". [5] Plaintiff then attempted to serve both Storch and Tuff Jew by certified mail in Florida. [6] On March 4, 2004, an affidavit of service was filed by Plaintiff which stated:

> On or about 1-23-04 attempted service by mailing a copy of plaintiffs writ of summons by registered mail RRR addressed to Defendant Scott Storch. On or about 1-30-04 mailed a copy of plaintiff's complaint by ordinary mail addressed to the defendant with the return

address of the sender appearing thereon. The certified letter was returned [*12] and marked "unknown 2-24-04". Also, the regular mail was returned and marked "unable to forward file."

5 *See* Plaintiff's Affidavits of Service, attached to the Memorandum of Storch and Tuff Jew as Exhs. D and E.

6 Plaintiff has even failed to demonstrate that Tuff Jew could be served in this manner. However, since service was ultimately unsuccessful, this court need not address the issue.

When the defendant is located within the Commonwealth, Pa.R.C.P. 402 provides that service may be made "at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof." Since Storch was alleged to reside outside the Commonwealth, Pa.R.C.P. 404 permits service by mail in accordance with Pa.R.C.P. 403 which allows for such service. However, Rule 403 specifically states:

> (1) [*13] If the mail is returned with notation by the postal authorities that the defendant refused to accept the mail, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by ordinary mail with the return address of the sender appearing thereon. Service by ordinary mail is complete if the mail is not returned to the sender within fifteen days after mailing.
>
> (2) If the mail is returned with notation by the postal authorities that it was unclaimed, the plaintiff shall make service by another means pursuant to these rules.

Since the attempted service by mail was unclaimed, Plaintiff was required by the rules to "make service by another means pursuant to these Rules." Plaintiff did not. Plaintiff's affidavits of service contain no information which demonstrates that the mail was refused by Lowe. Even if Tuff Jew and Storch were attempting to avoid service, as Plaintiff contends, Plaintiff's recourse is to file a Petition for Alternative Service in accordance with Pa.R.C.P. 430. No such petition has been filed. Since Plaintiff has failed to make proper service on either Storch or Tuff Jew, their said [*14] Preliminary Objections are sustained and the complaint against them dismissed.

**C. The Remaining Claims Against Sony**

Plaintiff's claims against Sony are as follows: 1) conversion; 2) breach of contract; 3) tortious breach of contract; 4) and conspiracy. Sony has demurred to each.

**1. Plaintiff's Conversion Claim (Count I) Fails As A Matter of Law**

Count I purports to state a claim for conversion. Conversion is the deprivation of another's right of property in, or use or possession of, chattel, or other interference therewith, without the owner's consent and without lawful justification." McKeeman v. Corestates Bank, N.A., 2000 Pa. Super. 117, 751 A.2d 655, 659 n. 3 (2000). Plaintiff's conversion claim fails for several reasons. First, intangible property is not chattel that may be converted, unless merged into a tangible document. Id.; Northcraft v. Edward C. Michener Assoc., Inc., 319 Pa. Super. 432, 466 A.2d 620 (1983). The subject of Plaintiff's conversion claim is the song "West Coast," which is an intangible piece of music and therefore not the proper subject of a conversion claim.

[*15] Defendants also argue that Plaintiff's claim is barred under principles of collateral estoppel, as a result of the Federal Action. [7] Collateral estoppel, also known as issue preclusion, may be asserted by a party to bar a claim based on an issue litigated in a previous action if: 1) the issue underlying the claim is identical to the one previously litigated; 2) final judgment in the previous action was rendered on the merits of the issue; 3) the party against whom the estoppel is asserted was party to the previous action, or in privity with such a party; and 4) the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the previous action. City of Pittsburgh v. Zoning Board of Adjustment of Pittsburgh, 522 Pa. 44, 559 A.2d 896 (1989).

7 Tuff Jew was not a party to the Federal Action.

As previously stated, in the Federal Action, Judge Kelly found that Plaintiff had consented to the of "West

Coast", specifically stating:

> Through [*16] his own words, Lowe acknowledges that he created "West Coast Beat," and gave it to Storch, with the intention and desire that it be incorporated into a musical composition by Dr. Dre, which is precisely the way in which it was allegedly used...Lowe's version of the facts directly contradicts the basis of a copyright infringement claim, that the Defendants used "West Coast Beat" without his knowledge or permission... [8]

8 *See* District Court Opinion, attached to Recording Defendants' Memorandum as Exhibits 2 at 12-13.

The basis of Storch's current conversion claim is that "West Coast" was used without his consent. However, faced with identical facts, both the District Court and the Third Circuit found that, by his own admission, Plaintiff consented to Storch's use of "West Coast." As previously stated, conversion is the deprivation of another's right of property *without the owner's consent.* Plaintiff is estopped from claiming lack of consent as a result of the Federal Court Action, so his [*17] conversion claim necessarily fails as a matter of law. Accordingly, Count I is dismissed.

**2. Plaintiff's Contractual Claims Fails As to Sony (Counts II and III)**

Counts II and III purport to state claims for breach of contract [9] against all Defendants. To set forth a valid claim for breach of contract, Plaintiff must demonstrate: 1) the existence of a contract, including its essential terms; 2) breach of a duty imposed by the contract; and 3) resultant damages. Corestates Bank, N.A. v. Cutillo, 1999 PA Super 14, 723 A.2d 1053 (1999). Plaintiff has failed to demonstrate the existence of any contract between itself and Sony. Accordingly, Counts II and III are dismissed.

9 Count III purports to state a claim for "tortious breach of contract." However, whether Defendant breached its alleged contract as a result of "nonfeasance" or "misfeasance" is irrelevant. Intent is not an element of a breach of contract (or even quasi-contractual claim). Pennsylvania does not recognize a separate claim for "tortious breach of contract."

[*18]

**3. Plaintiff Has Failed To State A Claim For Conspiracy (Count IV)**

Count IV purports to state a claim for conspiracy. To properly present a claim of conspiracy, Plaintiff must demonstrate that each Defendant entered into an unlawful agreement for the express purpose of committing either a criminal act or an intentional tort. Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 278, 505 A.2d 973 (1981). Proof of malice, or an intent to injure, is an "essential part" of this cause of action. GMH Assocs. v. Prudential Realty Group, 2000 PA Super 59, 752 A.2d 889 (2000). Plaintiff has failed to pled any facts against Sony. In fact, Plaintiff does not allege any direct conduct by Sony whatsoever. Bald, conclusory allegations are insufficient to support a claim for conspiracy. Count IV is dismissed.

**CONCLUSION**

For the foregoing reasons, this court's Order of March 6, 2006 should be affirmed.

**BY THE COURT:**

**MARK I. BERNSTEIN, J.**

**ROSEMARIE LUKE and THOMAS LUKE, husband and wife, Plaintiffs v. AMERICAN HOME PRODUCTS CORPORATION, a Delaware Corporation; WYETH-AYERST LABORATORIES COMPANY, a Delaware Corporation and subsidiary of American Home Products Corporation; INTERNEURON PHARMACEUTICALS, INC., a Delaware Corporation; RICHARD J. WURTMAN, Ph.D.; JUDITH WURTMAN, Ph.D.; and MASSACHUSETTS INSTITUTE OF TECHNOLOGY; CHARLES R. GRUBB', D.O., and WARREN MEDICAL ASSOCIATES, P.A., Defendants**

**No. 1998-C-1977**

**COMMON PLEAS COURT OF NORTHAMPTON COUNTY, PENNSYLVANIA, CIVIL DIVISION**

**1998 Pa. Dist. & Cnty. Dec. LEXIS 201**

**November 18, 1998, Decided**

**SUBSEQUENT HISTORY:** Related proceeding at Wish v. Interneuron Pharm., Inc. (In re Diet Drugs Prods. Liab. Litig.), 1999 U.S. Dist. LEXIS 14881 (E.D. Pa., Sept. 27, 1999)

**JUDGES:** [*1] JAMES C. HOGAN, JUDGE.

**OPINION BY:** JAMES C. HOGAN

**OPINION**

**OPINION OF THE COURT**

**I. FACTUAL AND PROCEDURAL HISTORY**

Defendants Richard J. Wurtman, M.D., and Judith Wurtman, Ph.D., began investigating dexfenfluramine hydrochloride for possible approval by the Food and Drug Administration in the early 1970's. In 1980, after discovering that dexfenfluramine hydrochloride suppressed one's appetite for carbohydrates, Defendant Massachusetts Institute of Technology (hereinafter "MIT") was issued a "use" patent. In 1988, Defendants Richard J. Wurtman, Judith Wurtman and MIT founded Defendant Interneuron Pharmaceuticals, Inc. to market dexfenfluramine hydrochloride as a weight loss treatment drug. The Food and Drug Administration approved the use of dexfenfluramine hydrochloride in 1995.

Defendants American Home Products Corporation (hereinafter "AHP") and Wyeth-Ayerst Laboratories Company, a subsidiary of Defendant AHP, manufactured, promoted, marketed and distributed dexfenfluramine hydrochloride in Pennsylvania under the trade name "Redux."

Plaintiffs Rosemarie and Thomas Luke instituted this action by Complaint on March 19, 1998. Plaintiffs' claims arise out of Plaintiff Rosemarie Luke's use of the prescription drug [*2] dexfenfluramine hydrochloride, commonly known as "Redux." Rosemarie Luke consulted with Defendant Charles R. Grubb, D.O., an associate of Defendant Warren Medical Associates, P.A., for weight loss treatment. Defendant Grubb subsequently prescribed Redux to Mrs. Luke. After taking Redux for several months, Mrs. Luke began having difficulty breathing. She was subsequently diagnosed with primary pulmonary

hypertension. Because of the debilitating effects of primary pulmonary hypertension, she is currently on a waiting list for a double lung transplant.

Defendants AHP, Wyeth-Ayerst Laboratories Company, Interneuron Pharmaceuticals, Inc., Richard J. Wurtman, Judith Wurtman, and Massachusetts Institute of Technology filed preliminary objections. Plaintiffs replied to the preliminary objections. Oral arguments were held and briefs were submitted. The matter is now ready for disposition.

## II. DISCUSSION

### A. Preliminary Objections of Defendants Massachusetts Institute of Technology, Richard J. Wurtman, M.D., and Judith Wurtman, Ph.D.

Defendants Massachusetts Institute of Technology, Richard J. Wurtman, M.D., and Judith Wurtman, Ph.D., contend that they are not subject to the personal jurisdiction [*3] of this Court.

Standard of Review and Burden of Proof

Personal jurisdiction refers to the authority of a court over the parties. See Encelewski v. Associated-East Mortgage Co., 262 Pa. Super. 205, 396 A.2d 717 (Pa. Super. Ct. 1978). Attacks on personal jurisdiction must be raised by preliminary objection; if such objection is not made, it is deemed to be waived. See Pa.R.C.P. 1006(e).

When sustaining a preliminary objection that would dismiss an action, the objection should only be sustained in the clearest of cases. See Hall-Woolford Tank Co., Inc. v. R.F. Kilns, Inc., 698 A.2d 80 (Pa. Super. Ct. 1997). The evidence must be considered in the light most favorable to the non-moving party. See id.

The party challenging a court's jurisdiction has the initial burden of supporting the jurisdictional objection. See id. The challenging party may not rest on a mere allegation of lack of personal jurisdiction; the party must affirmatively present evidence in support of their objection. See Maleski by Taylor v. D.P. Realty Trust, 653 A.2d 54 (Pa. Commw. Ct. 1994). Once that burden is established, the party asserting jurisdiction assumes the burden of establishing both statutory and constitutional support for a court's [*4] exercise of *in personam* jurisdiction. See Hall-Woolford, 698 A.2d at 82.

A court may exercise two forms of personal jurisdiction -- general or specific. See Derman v. Wilair Services, Inc., 404 Pa. Super. 136, 590 A.2d 317 (Pa. Super. Ct. 1991). A court's choice of jurisdiction will set the stage for its jurisdictional analysis.

General jurisdiction arises out of a defendant's continued and systematic contacts with the forum state. See id. This basis for jurisdiction is used when a claim does not arise out of or is unrelated to the defendant's contact with the forum. See Leonard A. Feinberg, Inc. v. Cent. Asia Capital Corp., Ltd., 936 F. Supp. 250 (E.D. Pa. 1996).

Specific jurisdiction exists when the claim arises out of the defendant's contacts with the forum state. See id. Unlike general' jurisdiction, specific jurisdiction requires a nexus between the suit and the contacts with the forum state; this basis for jurisdiction arises when plaintiff's claim is related to or arises out of defendant's contacts with the forum. See id.

For a court to exercise jurisdiction under either theory, there must be a legally recognized relationship between the state and the person over whom the state seeks to exercise jurisdiction. [*5] See In re Huck, 435 Pa. 325, 257 A.2d 522 (Pa. 1969). Pennsylvania courts have the power to exercise jurisdiction over a non-resident defendant if (1) the jurisdiction is authorized by statute and (2) the exercise of jurisdiction comports with constitutional principles of due process. See Graham v. Mach. Distribution, Inc., 410 Pa. Super. 267, 599 A.2d 984 (Pa. Super. Ct. 1991). Pennsylvania's long-arm statute authorizes a court to exercise jurisdiction over non-residents "'to the fullest extent allowed under the Constitution of the United States' and jurisdiction may be based 'on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.'" Kenneth H. Oaks, Ltd. v. Josephson, 390 Pa. Super. 103, 568 A.2d 215, 216 (Pa. Super. Ct. 1989) (quoting 42 Pa.C.S. § 5322 (b)).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a non-resident defendant to have "certain *minimum* contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Kubik v. Letteri, 532 Pa. 10, 614 A.2d 1110, 1113 (Pa. 1992) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)) (emphasis in original). Adjudicating [*6] this

standard involves a two-part analysis: (1) a determination of whether sufficient minimum contacts exist; and (2) a determination of whether the assertion of personal jurisdiction is fair and reasonable. See Kubik, 614 A.2d at 1115 (adopting the approach established in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

A determination of minimum contacts depends upon the court finding that the non-resident defendant could reasonably expect to be haled into the courts of the forum state. See Kubik, 614 A.2d at 1115. The mere foreseeability of contacts with the forum state is insufficient by itself to create minimum contacts. See id. "[T]he defendant must have purposefully directed its activities to the forum and conducted itself in a manner indicating that it has availed itself of the forum's privileges and benefits such that it should also be subject to the forum state's laws and regulations." Hall-Woolford, 698 A.2d at 82-83. Accordingly, contacts with the forum state cannot be random, fortuitous, or attenuated. See id.

Next, a court must determine whether it is reasonable and fair for a defendant to be brought into its jurisdiction. The United States Supreme Court listed several [*7] factors to be considered in this regard:

> (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Kubik, 614 A.2d at 1114 (citing Burger King, 471 U.S. at 474).

When considering whether, notwithstanding the fact that sufficient minimum contacts exist, the assertion of personal jurisdiction is fair and reasonable, a court must carefully evaluate the facts because there are occasions when the assertion of jurisdiction is fair based on a "lesser showing of minimum contacts than would otherwise be required." Burger King, 471 U.S. at 477.

Although a court is guided by the foregoing standards, no precise formula exists for determining whether the standard as set forth by the United States Supreme Court in International Shoe and the Pennsylvania Supreme Court in Kubik has been satisfied. A court must examine the facts of each case to determine if jurisdiction is proper. See Kubik, 614 A.2d at 1114.

Defendants [*8] MIT and the Wurtmans challenge the personal jurisdiction of this Court by establishing the following uncontradicted facts and arguing the following in their sworn Preliminary Objections:

> a. As to Defendant Massachusetts Institute of Technology: (1) MIT is not incorporated in Pennsylvania or qualified as a foreign corporation of this state; (2) MIT does not conduct continuous and systematic business within Pennsylvania; (3) MIT was not present or domiciled when process was served in this case; (4) the alleged causes of action in Plaintiffs' Complaint do not arise from any act or omission on MIT's part within or outside Pennsylvania; (5) MIT has no minimum contact with Pennsylvania which are sufficient to establish jurisdiction; (6) MIT has no office or other place of business in Pennsylvania; (7) MIT does not have any license or business certificate issued by any Pennsylvania government entity or political subdivision; (8) MIT has no financial assets in Pennsylvania; (9) MIT has no real property or other physical assets in Pennsylvania; (10) MIT has no employees who work in Pennsylvania; and (11) MIT does not contract to supply services or other things in Pennsylvania. See Preliminary [*9] Objections of Defendant Massachusetts Institute of Technology.
>
> b. As to Defendant Richard J. Wurtman, M.D., and Judith Wurtman, Ph.D.: (1) neither party was present in Pennsylvania when process was served; (2) neither party is a Pennsylvania citizen or was domiciled in Pennsylvania when process was served; (3) neither consents to the exercise of jurisdiction; (4) Plaintiffs' cause of action do not arise from any act or omission by Doctors Wurtman within or outside Pennsylvania; (5) neither party

has minimum contacts with Pennsylvania sufficient to establish jurisdiction; (6) neither party owns, uses, or possesses real property or other physical assets in Pennsylvania; and (7) neither party has bank accounts or financial assets in Pennsylvania. See Preliminary Objections of Dr. Richard J. Wurtman and Preliminary Objections of Dr. Judith Wurtman.

Defendants' assertion, in sworn preliminary objections, that this Court has no personal jurisdiction over them remains unrebutted by Plaintiffs. Plaintiffs made no record or attempt to establish circumstances by which personal jurisdiction can be conferred over Defendants MIT and the Wurtmans by this Court. In their sworn Reply to the respective [*10] Preliminary Objections submitted by Defendants Massachusetts Institute of Technology, Richard J. Wurtman, M.D., and Judith Wurtman, Ph.D., Plaintiffs either generally denied Defendants' preliminary objections or asserted in a general denial that they lacked sufficient information or knowledge upon which to form a belief as to the truth of the allegations asserted. Plaintiffs made no affirmative allegation in their reply, nor did they produce an independent record of circumstances which our Supreme Court requires upon which personal jurisdiction over Defendants MIT and the Wurtmans could be based. Plaintiffs submitted a brief in support of their objection to Defendants' Preliminary Objections alleging grounds on which jurisdiction could be conferred. However, it is a rule too often repeated that unsworn facts asserted in brief form are not part of the record. See Erie Indem. Co. v. Coal Operators Cas. Co., 441 Pa. 261, 272 A.2d 465 (Pa. 1971). Facts must appear in the record, otherwise a court is not permitted to consider them. See id. [1]

1 See also Cooper v. Commonwealth, 700 A.2d 553, 554 (Pa. Commw. Ct. 1997); Larson v. Diveglia, 549 Pa. 118, 700 A.2d 931, 935 (Pa. 1997); Otterson v. Jones, 456 Pa. Super. 388, 690 A.2d 1166, 1170 (Pa. Super. 1997); [*11] South Whitford Assocs. Inc. v. Zoning Hearing Bd. of W. Whiteland Township, 157 Pa. Commw. 387, 630 A.2d 903, 907 (Pa. Commw. Ct. 1993); Dwight v. Girard Med. Ctr., 154 Pa. Commw. 326, 623 A.2d 913, 917 (Pa. Commw. Ct. 1993); Van Mastrigt v. Delta Tau Delta, 393 Pa. Super. 142, 573 A.2d 1128, 1132 n.3 (Pa. Super. Ct. 1990).

Based on the record, this Court is unprepared to exercise personal jurisdiction over Defendants MIT and the Wurtmans because there are insufficient facts to meet the standards required for general and specific jurisdiction. [2] In view of this ruling, we do not consider the additional preliminary objections and demurrer presented by MIT and the Wurtmans.

2 Had this Court considered the allegations asserted by Plaintiffs in their brief in opposition to Defendants MIT and the Wurtmans' preliminary objections, there appears, nevertheless, to be no basis for our jurisdiction. The only contact MIT and the Wurtman's have to, or within, Pennsylvania is through their corporation, Interneuron Pharmaceuticals. Such contact with the forum is insufficient to establish jurisdiction because a defendant is generally not individually subject to personal jurisdiction under Pennsylvania's long-arm statute merely based on actions conducted in a [*12] corporate capacity. See Aircraft Guar. Corp. v. Strato-Lift, Inc., 974 F. Supp. 468 (E.D. Pa. 1997). See also Nat'l Precast Crypt Co. v. Dy-Core of Pennsylvania, Inc., 785 F. Supp. 1186 (W.D. Pa. 1992).

The balance of the preliminary objections raised by Defendants American Home Products Corporation, Wyeth-Ayerst and Interneuron Pharmaceuticals are discussed below.

**B. Preliminary Objections of Defendants American Home Products Corporation, Wyeth-Ayerst and Interneuron Pharmaceuticals**

1. Count III - Demurrer to Plaintiffs' Claim of Implied Warranty of Merchantability and Fitness for a Particular Purpose

Defendants American Home Products, Wyeth-Ayerst and Interneuron Pharmaceuticals individually argue that a demurrer should be granted dismissing Count III of Plaintiffs' Complaint which alleges that defendants breached the implied warranty of merchantability and fitness for a particular purpose.

The controlling standard of review when examining a preliminary objection in the nature of a demurrer is well

established. The moving party must admit as true all material facts set forth in the complaint, as well as all inferences reasonably deductible therefrom. See Powers v. Dept. of Health, 121 Pa. Commw. 321, 550 A.2d 857 (Pa. Commw. Ct. 1988). [*13] The question presented by the demurrer is whether on the facts averred the law says with certainty that no recovery is possible. See Balsbaugh v. Rowland, 447 Pa. 423, 290 A.2d 85 (Pa. 1972). Where doubt exists as to whether a demurrer should be sustained this doubt should be resolved in favor or overruling it. See Gekas v. Shapp, 469 Pa. 1, 364 A.2d 691 (Pa. 1976).

Defendants argue that there is no cause of action for a breach of implied warranty in prescription drug cases, citing Makripodis by Makripodis v. Merrel-Dow Pharms, Inc., 361 Pa. Super. 589, 523 A.2d 374 (Pa. Super. Ct. 1987), in support of its position. The essence of the warranty of merchantability is that the item sold is fit for the ordinary purposes for which such goods are used. See Wisniewski v. Great Atlantic & Pacific Tea Co.., 226 Pa. Super. 574, 323 A.2d 744, 746-47 (Pa. Super. Ct. 1974).

Although the Makripodis decision is not directly on point, it is instructive. In Makripodis, the Superior Court directly addressed the issue of whether a pharmacist who dispenses a prescription drug pursuant to the prescription of a licensed physician impliedly warrants that the drug is safe for ordinary purposes. See Makripodis, 523 A.2d at 375. The Superior Court held that a pharmacist who dispenses [*14] a prescription drug warrants only that (1) he compounded the drug prescribed with due care in the strength and quantity prescribed; (2) he used proper methods in compounding process; (3) the drug is pure and unadulterated; and (4) he labeled the drug in accordance with the directives of the physician's prescription. See id. at 377. In its discussion the Superior Court stated, *inter alia*:

> Prescription drugs may pose a threat to the safety of certain identifiable segments of the public, or may be dangerous when used in conjunction with other drugs or substances, or may be harmful if taken by persons suffering from certain diseases or conditions. 'There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . .many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician.' Restatement (Second) of Torts § 402A, comment (k). . . .*Thus, we find that the very nature of prescription drugs themselves precludes the imposition of a warranty of fitness for 'ordinary purposes'. . .*

Id. at 376-77 (emphasis [*15] added).

The discussion in Makripodis analyzing the nature of prescription drugs applies in the instant action. Dexfenfluramine hydrochloride, like most prescription drugs, may never be able to be manufactured so that it is safe for every user. Nonetheless, the public utility of the drug may outweigh the potentially dangerous risk dexfenfluramine hydrochloride poses to some individuals. Therefore, the Makripodis holding that prescription drugs preclude the imposition of a warranty of fitness for ordinary purposes in cases against pharmacists would reasonably appear to apply in this case against the drug manufacturer. Accordingly, we find that there is no cause of action for a breach of implied warranty in prescription drug cases involving drug manufacturers and Defendants demurrer to Count III of Plaintiffs' Complaint will be granted.

2. Count IV - Preliminary Objection to Plaintiffs' Claim of Breach of Express Warranty

Defendants preliminarily object to Count IV of Plaintiffs' Complaint on the ground that that count fails to aver any material facts on which a claim for breach of express warranty can be based.

Rule 1019(a) of the Rules of Civil Procedure states that "[t]he material facts [*16] on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. 1019(a). The theory of pleading is that the essential facts will be pleaded so prolonged and expensive deposition are unnecessary. See Driefer v. Hershey Estates, Inc., 81 Pa. D & C 302 (1951). A Plaintiff's complaint should notify the defendant of the claims by stating the grounds upon which those claims are based and identifying the issues in dispute. See Dickerson v. Brind Truck leasing, 362 Pa. Super. 341, 524 A.2d 908 (Pa. Super. Ct. 1987).

Count IV of the Complaint does no more than state:

"Defendants' communication to the consumer who would use the drug and physicians who would purchase it, made without reference to the drug's potential for harm, amounted to an express warranty of the safety of the drug for use in aiding in weight loss and weight loss maintenance." Plaintiffs' Complaint, P 135.

Plaintiffs' allegations pertaining to Count IV generally and broadly aver that an express warranty existed. However, the Count fails to state what the warranty allegedly covered, when it was made, by whom it was made and to whom it was directed. Defendants' preliminary objection is granted and Plaintiffs [*17] will be granted leave to amend Count IV of the Complaint within thirty (30) days of the filing hereof. Further, if the express warranty is written, a copy of the material part of the writing must be attached to the complaint pursuant to Rule 1019(h) of the Pennsylvania Rules of Civil Procedure.

3. Count V - Preliminary Objection to Plaintiff's Claim of Strict Liability

Count V of Plaintiffs' Complaint alleges that Defendants are strictly liable for Plaintiffs' injuries because they violated the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 352, by misbranding dexfenfluramine hydrochloride by failing to give adequate warnings. See Count V of Plaintiffs' Complaint.

Count V must be dismissed because the Federal Food, Drug and Cosmetic Act does not provide a basis for recovery for private plaintiffs. See Mellon v. Barre-Nat'l Drug Co., 431 Pa. Super. 175, 636 A.2d 187, 189 (Pa. Super. Ct. 1993) ("it has uniformly been held that there are no private causes of action under the Food, Drug and Cosmetics Act 21 U.S.C. §§ 301 *et seq.*").

4. Count VI - Preliminary Objection to Plaintiffs' Claim of "Strict Liability in Tort"

Plaintiffs allege in Count VI [3] that Defendants are strictly liable because they promoted and [*18] maintained dexfenfluramine hydrochloride on the market with knowledge of the unreasonable risk the drug posed to the public in general, and the Plaintiff specifically.

> 3 In view of the imprecision of Plaintiffs' allegations in Count VI, and difficulty in ferreting out the theory espoused, the term "Strict Liability in Tort" is an unfortunate caption which leads to an inference Plaintiff is suggesting that negligence principles apply in strict liability cases. The absence of fault concepts in strict liability cases is too well known to discuss further.

Defendants, in their brief, characterize Count VI as a claim in strict liability, based on Defendants' alleged mislabeling of dexfenfluramine hydrochloride and the failure to give proper warnings. Plaintiffs contend that Count VI does not deal with the adequacy of warnings; rather, Count VI is based on Defendants' distribution of a defective and unreasonably dangerous product due to its side effects, namely primary pulmonary hypertension.

Pennsylvania courts ordinarily impose strict liability on manufacturers of products sold "in a defective condition unreasonably dangerous to the user or consumer" under Section 402A of the Restatement (Second) of Torts. [*19] [4] However, "the strict liability rules for prescription drugs. . .are somewhat different under Pennsylvania law." Mazur v. Merck & Co., Inc., 964 F. 2d 1348, 1353(3d Cir. 1992) (applying Pennsylvania law). Prescription drugs fall into the category of "unavoidably unsafe products" set forth in comment k to Section 402A of the Restatement. See Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206, 219 (Pa. 1971). Recognizing that drug manufacturers are held to a high degree of care, our Supreme Court in Incollingo stated that "*neither the law of Pennsylvania, nor, so far as we are aware, the law of other states has imposed strict liability upon a drug manufacturer merely because of dangerous propensities of the product.*" Id. (emphasis in original).

> 4 Section 402A is entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer."

The Incollingo court went on to find that the strict liability rule of Restatement Section 402A is inapplicable in a case involving a prescription drug. Further, the Court held that the standard of care required for a manufacturer of prescription drugs is set forth in Section 388 of the Restatement (Second) of Torts which concerns the liability of a supplier [*20] of a chattel known to be dangerous for its intended use. [5] See id. at 220 n.8; see also Hahn v. Richter, 427 Pa. Super. 130, 628 A.2d 860, 865 (Pa. Super. Ct. 1993).

> 5 § 388. Chattel Known to be Dangerous for Intended Use

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Because of the inherently dangerous nature of all prescription drugs and their limited legal accessibility through a prescription issued by a licensed physician, and assuming that there was proper preparation and warning, Pennsylvania law provides that a [*21] manufacturer of prescription drugs is not strictly liable under Section 402A for injuries resulting from otherwise useful and desirable products. See Hahn, 628 A.2d at 866. A drug manufacturer is only liable if it fails to exercise reasonable care to inform physicians of the facts which make it likely to be dangerous for its intended use. See Incollingo, 282 A.2d at 221. See also Hahn, 628 A.2d at 866. A drug manufacturer's warning need not accompany the product to the patient. See Baldino v. Castagna, 505 Pa. 239, 478 A.2d 807, 810 (Pa, 1984); see also Ramirez v. Richardson-Merrell, Inc., 628 F.Supp. 85, 87 (E.D. Pa. 1986). However, where the manufacturer of a prescription drug was alleged to have caused injury by providing inadequate warnings to physicians about the dangers associated with the use of the drug, the consumer may have a negligence action against the manufacturer. See Hahn v. Richter, 543 Pa. 558, 673 A.2d 888, 891 (Pa. 1996). The decisions of Incollingo and Baldino, as well as comments j and k "make it clear that where the adequacy of warnings associated with prescription drugs is at issue, the failure of the manufacturer to exercise reasonable care to warn of dangers, i.e., the manufacturer's [*22] negligence, is the only recognized basis of liability." Hahn, 673 A.2d at 891.

Based on premises asserted by both parties, no liability can attach. [6] Plaintiffs sole recourse, based on the allegations in Count VI, appears to be by asserting a claim in accordance with the instruction of the Incollingo case. Accordingly, we dismiss Court VI with leave to amend that count in conformity to this opinion.

> 6 Had Plaintiffs' claim been based on the adequacy of warnings as Defendants allege, Defendants could not be found strictly liable for failing to adequately warn Plaintiff because a manufacturer of prescription drugs is liable only if it fails to exercise reasonable care to inform *physicians*, for whose use the prescription drug is supplied, of the facts which make it likely to be dangerous for its intended use. See Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206, 220 n.8 (Pa. 1971). Drug manufacturers generally have no duty to warn the general public. See Baldino v. Castagna, 505 Pa. 239, 478 A.2d 807 (Pa. 1984).

5. Count VIII - Preliminary Objection to Plaintiff's Claim Alleging Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law

Defendants preliminarily object to Count VIII of Plaintiffs' [*23] Complaint, which alleges violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (hereinafter "UTPCPL" or "the Act"). Plaintiffs' Complaint states that Defendants (1) failed to provide Plaintiffs with a full and accurate description or dexfenfluramine hydrochloride and (2) knowingly and intentionally misrepresented, concealed or made false claims to Plaintiffs regarding dexfenfluramine hydrochloride. Such false and misleading misrepresentations and omissions form the basis of Plaintiffs' cause of action under the UTPCPL.

The UTPCPL makes unlawful unfair methods of competition and deceptive practices in the conduct of any trade or commerce. See 73 P.S. § 201-3; see also Gatten v. Merzi, 397 Pa. Super. 148, 579 A.2d 974, 976 (Pa.

Super. Ct. 1990) (the Gatten court held that the UTPCPL does not apply to physicians rendering medical services). The Act condemns various misrepresentations and other fraudulent conduct that creates a likelihood of confusion or misunderstanding. See 73 P.S. § 201-2(4). The intent of the Act is to prohibit unlawful practices relating to trade or commerce and of the type associated with business enterprises. See Foflygen v. R. Zemel, M.D., 420 Pa. Super. 18, 615 A.2d 1345, 1354 (Pa. Super. Ct. 1992).

Plaintiffs [*24] couch their argument in terms of misrepresentations and omissions of material facts made to them by Defendants regarding the benefits and detriments of using dexfenfluramine hydrochloride. Specifically, Plaintiffs allege that Defendants failed to provide Plaintiff Rosemarie Luke with a full and accurate description of dexfenfluramine hydrochloride and had a duty to inform or warn users like Plaintiff about prescription drugs. Under the "learned intermediary doctrine," a manufacturer of prescription drugs must direct information and warnings to *prescribing physicians*, not the patient. See Taurino v. Ellen, 397 Pa. Super. 50, 579 A.2d 925 (Pa. Super. Ct. 1990). There can be no cause of action based on Defendants' alleged omissions because Defendants had no duty to disclose any information directly to Plaintiff.

Further, to permit a cause of action under the UTPCPL in this case would effectively make a drug manufacturer the absolute guarantor of the anticipated results and effects of a prescription drug. Pennsylvania law, however, recognizes that some prescription drugs by their very nature can never be made safe. See Makripodis by Makripodis v. Merrell-Dow Pharm., Inc., 361 Pa. Super. 589, 523 A.2d 374 (Pa. Super. Ct. 1987). [*25] An inconsistency would result if we were to hold that drug manufacturers must guarantee that prescription drugs are completely safe. The premise behind the UTPCPL was not meant to engender such a result.

Defendants additionally preliminarily object to Count VIII claiming that it (1) fails to allege factual averments identifying the source of alleged misrepresentations or omissions of material fact; (2) fails to aver any factual allegations as to when and where the alleged misrepresentation or omissions occurred; (3) fails to aver factual allegations concerning a causal connection between the alleged misrepresentation or omission of material fact and Plaintiff's ingestion of dexfenfluramine hydrochloride and alleged injuries; and (4) fails to set forth facts to support the elements of common law fraud as required by Pennsylvania law.

Because we hold that Plaintiffs' have no cause of action under the UTPCPL against a manufacturer of prescription drugs, these additional preliminary objections are moot.

WHEREFORE, we enter the following:

**ORDER OF COURT**

AND NOW, this 18th day of November, 1998, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The preliminary objection of Defendants Massachusetts [*26] Institute of Technology, Richard J. Wurtman, M.D. and Judith Wurtman, Ph.D. attacking this court's jurisdiction over them is sustained, and the Counts against them are dismissed.

2. The demurrer to Plaintiffs Count III claiming implied warranty of merchantability and fitness for a particular purpose is granted, and Count III is dismissed.

3. The remaining Defendants' preliminary objection to Count IV is granted. Plaintiffs are granted leave to amend Count IV in accordance with the accompanying opinion within thirty (30) days of this Order.

4. The remaining Defendants' preliminary objection to Count VI, Plaintiffs claim of strict liability, is granted, and Count VI is dismissed; Plaintiffs are granted leave to amend Court VI in accordance with the accompanying opinion within thirty (30) days of this order.

5. The preliminary objection to Count VIII, Plaintiffs' claim that Defendants violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law is sustained, and Count VIII is dismissed.

BY THE COURT:

/s/ James c. Hogan

JAMES C. HOGAN, JUDGE

MARK J. RYCHEL, Plaintiff, v. LANE YATES, et al., Defendants.

Civil Action No. 09-1514

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2011 U.S. Dist. LEXIS 38824

April 11, 2011, Decided
April 11, 2011, Filed

**PRIOR HISTORY:** Rychel v. Yates, 2010 U.S. Dist. LEXIS 56579 (W.D. Pa., June 9, 2010)

**COUNSEL:** [*1] For MARK J. RYCHEL, Plaintiff: Brian A. Lawton, LEAD ATTORNEY, Christopher W. Rogers, Smith Butz, LLC, Canonsburg, PA.

For LANE YATES, Defendant: Stuart C. Gaul , Jr., LEAD ATTORNEY, Mackenzie A. Baird, Thorp, Reed & Armstrong, LLP, Pittsburgh, PA.

For MICHAEL QUICKEL, JR., Defendant: Donald M. Lund, LEAD ATTORNEY, Michael A. Metcalfe, Cohen & Grigsby, Pittsburgh, PA.

**JUDGES:** Nora Barry Fischer, United States District Judge.

**OPINION BY:** Nora Barry Fischer

**OPINION**

MEMORANDUM OPINION

I. INTRODUCTION

This case is a diversity action arising out of Plaintiff Mark J. Rychel's suit against Defendant Lane Yates and Michael Quickel, Jr. alleging breach of contract and fraud in the inducement to form a contract. (*See* Docket No. 20). Plaintiff is a resident of Pennsylvania, and Defendants are residents of North Carolina. (*Id.* at ¶¶ 2-4).

Presently before the Court is a jurisdictional dispute concerning Defendants' argument that this Court lacks personal jurisdiction over them, such that Plaintiff's claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2). For the reasons that follow, this Court finds that it does not have personal jurisdiction over Defendants. Rather than dismiss the case outright, however, [*2] the Court will exercise its discretion and transfer this matter to the Western District of North Carolina for further consideration.

II. PROCEDURAL BACKGROUND

On November 12, 2009, Plaintiff initiated the instant action by filing his original Complaint in the Western District of Pennsylvania. (Docket No. 1). Defendants each filed Motions to Dismiss for lack of jurisdiction, improper venue, and failure to state a claim upon which relief can be granted. (Docket Nos. 10, 13). Plaintiff was granted leave to file an Amended Complaint on March 19, 2010, and filed his Amended Complaint on April 5, 2010. (Docket Nos. 19, 20). In response, Defendants again filed Motions to Dismiss based on the grounds stated in their original Motions to Dismiss. (Docket Nos. 21, 23).

After briefing had concluded on these later motions, the Court issued a Memorandum Opinion and Order on June 9, 2010, which denied Defendants' Motions to Dismiss the Amended Complaint, without prejudice. (Docket Nos. 28, 29). As part of its holding, the Court ordered limited discovery on issues related to the question of personal jurisdiction to occur in the next ninety days. [1] (*Id.*). The opinion also permitted Defendants to renew [*3] their respective motions once said discovery was complete. (Docket No. 28 at 10).

> 1 Specifically, as stated in the Court's Order dated June 9, 2010, Plaintiff was permitted limited discovery on the following issues, for the purposes of establishing whether jurisdiction properly lies with the Court:
>
> > 1. The extent and nature of Defendants' contact with the state of Pennsylvania.
> >
> > 2. The relationship between Sergio Radovcic and Defendants, and specifically any evidence that he acted as their agent in this matter.
> >
> > 3. The representations of Defendants or Sergio Radovcic to Plaintiff regarding Mr. Radovcic's relationship to Defendants.
> >
> > 4. Defendants' alleged intent to aim their conduct at the state of Pennsylvania.
>
> (Docket No. 29 at 1-2).

On September 13, 2010, having been advised that jurisdictional discovery had been completed by the September 10, 2010 deadline, the Court convened a status conference with counsel for the parties. (*See* Docket No. 32). At this conference, Defendants stated their intent to renew their respective motions to dismiss due to an alleged lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). Plaintiff then proposed, given the circumstances of the [*4] parties' dispute, that an evidentiary hearing was required to aid the Court in its determination, to which both Defendants objected. (*See Id.*). The Court ordered the parties to brief the issue and said briefing concluded on October 5, 2010. (Dockets No. 34, 36, 39). After considering the arguments presented, the Court exercised its discretion and granted Plaintiff's Motion for an Evidentiary Hearing. (Docket No. 40).

Subsequently, beginning on December 2, 2010, and continuing on December 15, 2010, this Court held an evidentiary hearing on whether the Court has personal jurisdiction over Defendants. (*See* Docket Nos. 44, 46). Transcripts were prepared, (Docket Nos. 45, 48), and the parties have filed their proposed findings of fact and conclusions of law, (Docket Nos. 49, 50, 51, 52, 53). Thus, this disputed matter has been fully briefed and is ripe for disposition on the issue of jurisdiction.

## III. FACTUAL BACKGROUND

### *A. Plaintiff's Introduction to Sailview*

Plaintiff is a certified financial planner who manages his own firm in Allegheny County, Pennsylvania. (Docket No. 45 at 6-7). In June 2005, a client of Plaintiff's financial planning business sought Plaintiff's assessment of a potential [*5] real estate development in the Turks & Caicos Islands. (*Id.* at 7-8). For this purpose, Plaintiff was introduced to Sergio Radovcic, who he initially hosted at an investment presentation held at Plaintiff's office located in Wexford, Pennsylvania. (*Id.* at 7-9). At the time, Mr. Radovcic maintained a business in Green Tree, Pennsylvania. (*Id.* at 16, 22). During the presentation, Mr. Radovcic described an alternative real estate investment opportunity, which was also to be sited in the Turks & Caicos Islands. (*Id.* at 9). The name of this development project was "Sailview Development Ltd." [2] ("Sailview"). (*Id.*).

> 2 Sailview Development Ltd. is a corporation that was organized and incorporated under the laws of Turks & Caicos to develop a hotel and condominium project located on the island of Grand Turk, in the Turks & Caicos Islands, to be known as "Sailview Resort." (Docket No. 48 at 6, 91-92). Defendants Quickel and Yates are shareholders and directors of Sailview Development Ltd. (*Id.* at 6, 91). David O'Connell, a resident of South Carolina, and Peter Dauwe, a resident of Scotland, are the company's other shareholders. (*Id.*). Sailview Development Ltd. is not a party to this action. (*See* [*6] Docket No. 20).

Although neither he nor his client became involved

in the original investment opportunity, Plaintiff was interested in investing from his own account with respect to Sailview and met with Mr. Radovcic in connection with this interest on multiple occasions in July 2005. (*See Id.* at 7-10). Plaintiff expressed his personal interest in Sailview to Mr. Radovcic and the two men discussed the development project throughout their meetings, which occurred at Plaintiff's office and at his residence in Sewickley, Pennsylvania. (*Id.* at 9-10). Mr. Radovcic did not distribute written materials focused on Sailview as part of these discussions. (*Id.* at 99). All together, Plaintiff and Mr. Radovcic had three or four face-to-face meetings. (*Id.* at 10).

*B. Pre-Contract Negotiations*

During their communications, Mr. Radovcic presented Sailview to Plaintiff as a unique opportunity in the Turks & Caicos Islands because, unlike other similarly located real estate investments, a purchaser in Sailview would have the ability to finance his or her purchase, as opposed to simply paying cash for the property. (*Id.* at 14-15). Mr. Radovcic did not have an employment or agency agreement with Sailview, [*7] nor was he engaged by either Defendant in a personal capacity. (Docket No. 48 at 38, 99). Instead, Mr. Radovcic presented himself to Sailview as someone in the banking and brokering business. (*See Id.* at 37, 101). Through Mr. Radovcic, Plaintiff came to know Defendants. (Docket No. 45 at 12-13; *see also* Docket No. 48 at 57-58, 118). Despite his representations to the contrary, Mr. Radovcic never obtained funding for Sailview, nor was he able to provide financing for any Sailview purchaser. (Docket No. 48 at 38, 103-04). In fact, through their respective interactions with him, both Plaintiff and Defendants became uncomfortable with Mr. Radovcic based on what they learned of his prior relationships. (Docket No. 45 at 21-22, 112-13). Notably, Sailview did not direct Mr. Radovcic to locate purchasers for its development and, consequently, he was never paid a commission or any other payment by the company. (Docket No. 48 at 38-39, 114).

Defendants were not seeking investors for Sailview in July 2005. (Docket No. 48 at 58). Yet, on July 19, 2005, Plaintiff, Defendants, as well as Anthony Agostinelli, participated in a telephone conference call wherein Plaintiff expressed an interest in purchasing [*8] a condominium unit in Sailview. (Docket Nos. 45 at 25-26, 48 at 104-05). During this call, Defendants discussed Sailview's design elements, projected design, construction and development schedules, and future marketing plans. (Docket No. 48 at 12). Defendants also discussed financing and sales for the project, including the price and location of Plaintiff's desired unit. (*Id.* at 125). Mr. Radovcic and the parties' physical locations, however, were not discussed during the call. (*Id.* at 12-14). The phone conversation lasted between seventy-five and ninety minutes. (*Id.* at 12).

Shortly after the conclusion of the July 19, 2005 phone call, Defendant Quickel sent an email to Plaintiff and Mr. Agostinelli, carbon copy to Defendant Rychel, which stated:

> Gentlemen,
>
> Thank you for the time tonight. If we can do anything to help your diligence let us know.
>
> Regards,
> Bo

(Pl.'s Ex. 1). [3] Attached to said email were four portable document files ("pdf") depicting the first conceptual drawings of Sailview. (*See Id.; see also* Docket No. 48 at 15). The drawings were prepared by an architect firm based out of North Carolina and included the following:

> Sales Information: Sailview Limited, Inc. Bo Quickel. Lane [*9] Yates. 249 Williamson Road. Suite 101. Mooresville, North Carolina. 28117. T: 704.425.1600. F: 704.696.2663.

(Pl.'s Ex. 1; Docket No. 48 at 16). Ultimately, neither Plaintiff nor Mr. Agostinelli responded to Defendants' offer of assistance with respect to their diligence. (Docket No. 48 at 15).

> 3 Plaintiff received the July 19, 2005 email from Defendant Quickel at his work email address, which at that time could only be accessed from his office location in Wexford, Pennsylvania. (Docket No. 45 at 88).

Subsequent to the initial conference call, there were four or five additional conference calls between Plaintiff and Defendant Yates. (Docket Nos. 45 at 25, 48 at 17, 106). These calls were initiated by Plaintiff. (Docket No. 48 at 106). Daniel Costa, a partner in Plaintiff's financial

planning business, was present for some of these calls, along with Mr. Agostinelli. (Docket No. 45 at 145-48). In addition, Plaintiff's wife and brother, who resided in Illinois, were also present for at least one call. (*Id.* at 146-48).

After the completion of his investigation of Defendants and Sailview, Plaintiff determined that he wanted to move forward with the purchase of a condominium unit in Sailview. [*10] (*See Id.* at 26). Thus, on July 21, 2005, Defendant Quickel sent an email to Plaintiff, carbon copy to Defendant Yates, wherein he references two attachments. (Pl.'s Ex. 2). Specifically, the documents attached to the July 21, 2005 email were: (1) wire instructions for Misick & Stanbrook, [4] which instructed Plaintiff how he should transmit the first payment for his intended purchase, and (2) a reservation agreement for a penthouse unit at Sailview. (*Id.; see* Docket No. 48 at 17). The next day, Plaintiff forwarded the email to Leilani Costa, who is an attorney located in Pittsburgh, Pennsylvania and the wife of Plaintiff's business partner. (Pl.'s Ex. 2). It is unclear if she reviewed the documents or if she offered any proposed changes. (*See* Docket No. 45 at 150-51).

> 4 Misick & Stanbrook is a law firm located in the Turks & Caicos Islands that represented Defendants with regard to Sailview. (Docket No. 48 at 125).

Subsequently, Defendant Quickel faxed Plaintiff a copy of a reservation agreement between Plaintiff and Sailview, which was dated July 23, 2005 and was addressed to Plaintiff's business location in Wexford, Pennsylvania. [5] (Pl.'s Ex. 3). Misick & Stanbrook handled the negotiation [*11] of said agreement on behalf of Sailview and drafted the document. (Docket No. 48 at 20-21). The agreement was then sent from the law firm to Defendant Quickel via email, who signed the document in his capacity as a director of Sailview before sending the aforementioned fax to Plaintiff. (*Id.* at 19-20). According to the written agreement, because no sale and purchase agreement for the penthouse unit had been executed at that time, in consideration of Plaintiff's advance of $250,000, Sailview agreed to give Plaintiff a 30% discount on the published price for penthouse units, the total cost of which would not exceed $953,000. [6] (Pl.'s Ex. 3). This sum of money was needed for the acquisition of the land on which Sailview was to be constructed. (Docket No. 45 at 30, 173).

> 5 The Court notes that the fax in question was sent to Plaintiff's business fax number, which contains a 724 area code. (*See* Pl.'s Ex. 3). Defendant Quickel testified that he is not familiar with the geographic region corresponding to said area code. (*See* Docket No. 48 at 62).
>
> 6 Plaintiff did not finance his investment in Sailview through Mr. Radovcic and, instead, assembled a group of investors consisting of family members, [*12] friends, and/or business associates for this purpose. (*See* Docket No. 45 at 152). Specifically, in addition to Plaintiff, the following individuals also contributed to the investment: Eric Rychel (Chicago, Illinois), Joe Rychel (Pittsburgh, Pennsylvania), Albert Agostinelli (Pittsburgh, Pennsylvania), Anthony Agostinelli (Pittsburgh, Pennsylvania), Daniel Costa (Pittsburgh, Pennsylvania), and Anthony Mazerello (Boston, Massachusetts). (*Id.* at 147 , 152-53). Plaintiff was the "public face" of the investor group and, beyond him, none of the other capital investors executed an agreement with either Defendant or Sailview. (*See Id.* at 31). Notably, the record is devoid of evidence that Defendants, either individually or in their capacity as directors of Sailview, knew of the existence of all of Plaintiff's investors or their states of residence.

*C. Original Option Agreement*

One week after the parties' initial telephone conference call, Defendant Quickel faxed a second document to Plaintiff, which was entitled "Option Agreement" and was dated July 25, 2005. [7] (Pl.'s Ex. 4). Similar to the reservation agreement, Misick & Stanbrook drafted the document, which was then emailed to Defendant Quickel, [*13] who signed the agreement prior to its transmission to Plaintiff. (Docket No. 48 at 21-22). Although identified by the text of the document as a party to the agreement, Defendant Yates did not sign the Option Agreement. [8] (Pl.'s Ex. 4). Defendants had limited involvement in the negotiation of said agreement. (Docket No. 48 at 21, 109). In fact, but for Defendants' offer made during the July 19, 2005 conference call to discount the price of Plaintiff's condominium purchase, the negotiation of the Option Agreement was handled entirely by Misick & Stanbrook. (Docket No. 48 at 21, 109, 125).

7 Like the reservation agreement, the Court again notes that the original option agreement was faxed to Plaintiff's business fax number. (*See* Pl.'s Ex. 4).

8 Specifically, the Option Agreement provides, in pertinent part:

> THIS AGREEMENT is made this 25 [sic] day of July 2005 BETWEEN MARK RYCHEL, 2000 Corporate Drive, Suite 210, Wexford, PA 15090, USA ... of the ONE PART and LANE YATES and MICHEAL [sic] QUICKEL JR. both c/o Yates Development, L.L.C., P.O. Box 2097, Cornelius, NC 28031, USA ... of the OTHER PART.

(Pl.'s Ex. 4).

According to the provisions of the Option Agreement, "[i]n consideration of the making [*14] of the Advance to Sailview by [Plaintiff] at the request of [Defendants], [Defendants] do hereby grant the Put Option to [Plaintiff]." (Pl.'s Ex. 4). "Advance" and "Put Option" are defined terms within the agreement. (*Id.*). Specifically, pursuant to section 1.1, "Advance" was defined to be the payment of $953,000 to be made by Plaintiff to Sailview. (*Id.*). Likewise, pursuant to sections 1.8 and 2.2, respectively, under the "Put Option," Plaintiff was provided with a period of time within which to require Defendants to either repay the Advance, if Plaintiff and Sailview had not yet entered into a "Sale and Purchase Agreement," or to take an assignment of said "Sale and Purchase Agreement" if one had been executed. [9] (*Id.*). In the event that Plaintiff and Sailview entered into a purchase agreement related to the penthouse unit, the Option Agreement provided that "the Advance shall be deemed to be applied in payment of the full purchase price under the Sale and Purchase Agreement." (*Id.*). The Option Agreement stated that "[a]ll monies to be paid hereunder or pursuant to the exercise of the Put Option shall be funds immediately negotiable at par in the Turks & Caicos Islands." (*Id.*). Finally, [*15] as indicated in section 5.1, the obligations of each Defendant under the Option Agreement were to be "joint and several." (*Id.*).

9 Under section 1.5 of the Option Agreement, "Sale and Purchase Agreement" was defined to mean "an agreement for the sale of the Property to be made between [Plaintiff] and Sailview, the terms of which are currently being negotiated." (Pl.'s Ex. 4).

When Defendant Quickel faxed the Option Agreement to Plaintiff, there were no handwritten changes displayed on the document. (Docket No. 48 at 23). Thereafter, the typed language of section 1.1, which defined "Advance," was revised by handwritten notations to set forth four installment payments to be made in July 2005, on September 15, 2005, on May 15, 2006, and on July 15, 2006, the sum of which totaled $953,000. (Pl.'s Ex. 4). In addition, the "Option Period" set forth in section 1.6 was expanded from 12 to 24 months and the option granted to Plaintiff in section 2.2 was amended to permit Plaintiff to recover interest at the U.S. prime lending rate, in addition to the Advance. (*Id.*). Lastly, the choice-of-law provision contained in section 3.1 electing the application of Turks & Caicos law was crossed out and replaced [*16] with Pennsylvania. (*See Id.*).

Plaintiff initialed the handwritten revisions in the Option Agreement and signed the document. (*Id.*; Docket No. 45 at 34-36). Plaintiff did not, however, transmit his acceptance of the agreement to Defendant Quickel or Yates or send the signed agreement to either of them. (*See* Docket No. 45 at 36). Instead, Plaintiff gave the signed Option Agreement to Mr. Agostinelli, as well as a check for $250,000 representing the initial installment of the Advance under the handwritten terms of the agreement, and decided, along with his co-investors, that Mr. Agostinelli would travel to the Turks & Caicos Islands carrying same. [10] (*Id.* at 32-33, 36, 167-68, 170-71, 177; Docket No. 48 at 23). Once in the Turks & Caicos, Mr. Agostinelli was supposed to make a final determination of whether to go forward with the investment. (Docket No. 45 at 32-33). Ultimately, Mr. Agostinelli had the authority to walk away from the transaction if he was not satisfied after meeting with Defendants and Sailview's sales team. (*Id.* at 167).

10 Mr. Agostinelli is an airline pilot by trade. (Docket No. 45 at 174).

In late July 2005, Mr. Agostinelli travelled to the Turks & Caicos Islands. (*Id.* at 167-68). [*17] While there, he met each Defendant and was introduced to two additional persons who were part of Sailview's sales team. (*Id.* at 168, 176). Mr. Agostinelli also encountered

Mr. Radovcic during this trip; however, he neither recalls who introduced him nor remembers if he was identified as a member of the sales team. (*Id.* at 168-69, 176-77). According to Mr. Agostinelli, the purpose of his trip, in addition to meeting with Defendants, was to have the handwritten changes to the Option Agreement initialed and to deliver the $250,000 check. (*Id.* at 167-68). As to the former, he reported that he would not have been comfortable releasing the money without said initialing. (*See Id.* at 178).

While he was in the Turks & Caicos, Mr. Agostinelli made the decision to proceed with the transaction. (*Id.* at 173-74). This determination was made by Mr. Agostinelli individually, as he did not seek further approval or input from Plaintiff or any other investor after he arrived on the islands. (*Id.* at 173). Mr. Agostinelli presented the Option Agreement containing the handwritten revisions, which had been initialed by Plaintiff, to Defendant Quickel during a real estate closing for the land that was supposed [*18] to be the future site of Sailview. (*Id.* at 170; Docket No. 48 at 24, 108). This marked the first time that Defendant Quickel saw the changes that had been made to the Option Agreement and, as a result, he asked an attorney from Misick & Stanbrook to review the revisions during the closing. (*See* Docket No. 48 at 26). Defendant Quickel initialed the changes to sections 1.2, 1.6, and 2.2. (*Id.* at 25). However, at the suggestion of the attorney, he added North Carolina to section 3.1, the choice-of-law provision, prior to initialing same. (*Id.* at 26).

Although Defendant Yates was informed that Mr. Agostinelli would be carrying a check to the Turks & Caicos, he did not know that he also had a signed copy of the Option Agreement with him. (*Id.* at 108). In this regard, Defendant Yates stated that he did not receive a copy of the signed agreement and that no one asked him to either sign or initial the document. (*Id.* at 109). Accordingly, despite his identification as a party pursuant to the terms of agreement, Defendant Yates did not sign or initial the Option Agreement at any time. (*See Id.* at 109-10).

After Defendant Quickel had affixed his initials next to the handwritten revisions in the [*19] Option Agreement, Mr. Agostinelli hand-delivered the $250,000 check. (Docket No. 45 at 168-72). Mr. Radovcic was not referenced or discussed at that time. (Docket No. 48 at 26). As noted by the Option Agreement, at the time the agreement was executed, Plaintiff was negotiating with Sailview for the purchase of a condominium unit. (Pl.'s Ex. 4). Thus, Plaintiff understood that subsequent payments under the Option Agreement were to be made -- and were made -- to a bank account maintained for Sailview by Misick & Stanbrook in the Turks & Caicos. (Docket No. 45 at 114; Docket No. 48 at 26-27).

*D. Post Option Agreement*

On July 31, 2005, Defendant Yates sent an email to Plaintiff, carbon copy to Defendant Quickel, with a subject line entitled "Welcome to the team." (Pl.'s Ex. 6). In the email, Plaintiff was instructed to "[t]ake a good look at [his] client contact list and identify anyone in the senior management of branded name resorts." (*Id.*). The email also indicated that Defendant Yates intended to "meet with [Plaintiff] in the next week or two as well as make contact with a few names that might be very unique in flagging Sailview." (*Id.*). In this regard, the email relates to Plaintiff's [*20] offer to lend his assistance to Sailview in its effort to secure a "flag" for its development. [11] (*See* Docket No. 45 at 65, 69; *see also* Docket No. 48 at 111, 132-34, 136). Previously, Defendant Yates had informed Plaintiff that Sailview had already secured a letter of intent from the Westin Hotel for the management and operation of a hotel as part of the Sailview development. (Docket No. 48 at 111). However, Plaintiff volunteered to identify other potential options. (*See* Docket No. 45 at 63). For this purpose, through Plaintiff, Sailview was introduced to David Rowe, who at that time was the Senior Vice-President of Interstate Hotels. (Docket No. 45 at 69). According to Defendant Yates, Mr. Rowe was a "hospitality headhunter" who would have been able to provide Sailview with employees for the hotel aspect of the development. (Docket 48 at 73).

> 11 According to Defendant Yates, a "flag" is a hotel franchise that contracts with a developer, wherein the franchise enters into an agreement to manage and operate a hotel within the development project. (Docket No. 48 at 110-11).

Plaintiff, Defendants, and two other persons associated with Sailview--Peter Dauwe and Caroline Thomas--participated [*21] in a telephone conference call on August 3, 2005. [12] (*See* Pl.'s Ex. 7). The conversation included a discussion of the value of a flag in selling the development to individual purchasers and how Sailview should go about obtaining a flag contract. (*See Id.; see also* Docket No. 45 at 70). Later that day,

Mr. Dauwe and Ms. Thomas sent an email to Plaintiff and Mr. Rowe, carbon copy to each Defendant, wherein they purported to summarize their understanding of the topics discussed. (Pl.'s Ex. 7). In response, Defendant Yates sent a reply email addressed to the same list of people, referencing the previous email and indicating that any potential flag should present a strategic marketing plan, as well as a projection of nightly occupancy rates. (*Id.*).

> 12 As previously noted, Mr. Dauwe is a resident of Scotland and is a minority shareholder in Sailview, holding a 5% interest. (Docket No. 48 at 6, 91).

Thereafter, Plaintiff and Defendant Yates exchanged a series of emails, also on August 3, 2005, wherein Plaintiff provided Mr. Rowe's cell phone number and availability to which Defendant Yates proposed setting up a meeting to discuss the final flag negotiations, as well as the availability of two [*22] penthouse units to be offered to Plaintiff's personal contacts. [13] (*Id.*; Pl.'s Ex. 8). In this regard, Defendant Yates' email relates to Plaintiff's efforts to locate other potential buyers for Sailview from within his client list. (Docket No. 48 at 112). As stated in the email:

> If your personal contact would want one of the [two remaining Ocean-Front Penthouses], [Sailview] would discount the unit 5%, 4% of which would normally be the commission paid to Savills [14] if they procured the sale, 1% as an extra incentive. For the 5% discount, the [penthouse] unit would need to be purchased with an up-front $150k deposit [versus] $250 (sic) in August, proceeded by a similar agreed payment structure.

(Pl.'s Ex. 8). Any purchases by Plaintiff's prospective buyers would have been made through Sailview. (Docket No. 48 at 114).

> 13 The Court notes that the telephone number provided as Mr. Rowe's contains a 719 area code. (*See* Pl.'s Ex. 7). Defendant Yates testified that he is not familiar with the geographic region that corresponds with said area code. (Docket No. 48 at 113-14).
>
> 14 According to Defendant Quickel's testimony, Sailview hired Savills, which was based out of London, England, to handle its [*23] international marketing and sales and a company owned by Mr. O'Connell, which was based out of South Carolina, to handle domestic sales. (Docket No. 48 at 8). As previously noted, like Mr. Dauwe, Mr. O'Connell is also a minority shareholder in Sailview who holds a 5% interest. (*See Id.* at 6).

On August 5, 2005, Plaintiff, Defendant Yates, Mr. Rowe, and Colin Dunkley--a client and personal friend of Plaintiff who was and remains the head of International Development for Interstate Hotel--participated in an additional conference call regarding the flagging of Sailview. [15] (Docket No. 45 at 78, 154). According to Plaintiff, Mr. Dunkley's employment required that he travel around the world to develop large resort properties. (*See Id.* at 154). Thus, as a courtesy to Plaintiff, Mr. Dunkley offered to review information related to Sailview during his personal time and at no cost. (*Id.*). Ultimately, Sailview did not open a hotel and, as a consequence, Mr. Rowe was never used to hire employees for same. (Docket No. 48 at 73-74).

> 15 Plaintiff testified that Mr. Dunkley's employment was based out of either Pittsburgh, Pennsylvania or Washington, D.C. at the time in question. (Docket No. 45 at 154-55).

In [*24] addition to offering assistance to help Sailview locate potential flags for its development, Plaintiff also offered to assist in the editing of Sailview's business plan. (*Id.* at 111). The plan itself was drafted by Defendant Yates for use with either a flag hotel or an institutional lender. (*Id.*). When the need for such a plan was mentioned to Plaintiff, he offered that his wife, who holds a degree in communications, could potentially lend some support. (*Id.*). The record does not reflect whether Plaintiff's wife was utilized in this regard or not.

*E. Second Unit in Sailview*

On August 16, 2005, Plaintiff sent an email to Defendant Yates, wherein he stated that "[w]e need to talk about the paperwork for the second unit" and expressed a desire to conduct a telephone call for that purpose. (Pl.'s Ex. 10). This email related to negotiations that were ongoing at that time regarding Plaintiff's purchase of a second condominium unit in Sailview. (Docket No. 45 at 79). Said negotiations began shortly

after the initial Option Agreement was executed, given Sailview's need for additional capital and Plaintiff's desire to obtain the discounted pricing, (*see* Pl.'s Ex. 6; *see also* Docket No. 45 at [*25] 79), and concluded at some point in August 2005, when Plaintiff decided to move forward with the purchase of a second unit in Sailview under an option agreement with terms almost identical to the original agreement, including the handwritten revisions, (*see* Defs.' Ex. 2; *see also* Docket No. 45 at 73). [16] Notably, as was the case in the Option Agreement dated July 25, 2005, Defendant Yates, although again identified by the text of the document as a party to the agreement, did not sign the subsequent Option Agreement dated August 20, 2005. (*See* Defs.' Ex. 2). Thereafter, in an email sent on August 31, 2005, Plaintiff wrote to Defendant Yates that he "wired the $335,000 today." (Pl.'s Ex. 11). The $335,000 payment was the sum of the second installment payment under the initial Option Agreement and the first installment payment under the latter. (Docket No. 45 at 80).

16 Whereas the handwritten notations to section 1.1 of the Option Agreement dated July 25, 2005 provided for an Advance of $953,000 to be made in four installment payments in July 2005, on September 15, 2005, on May 15, 2006, and on July 15, 2006, section 1.1 of the Option Agreement dated August 20, 2005 provided for an Advance [*26] of $255,000 to be made in three equal installment payments on August 30, 2005, May 15, 2006, and June 15, 2006. (*Compare* Pl.'s Ex. 4, *with* Defs.' Ex. 2).

*F. Amendment and Joinder to the Original Option Agreement*

As time progressed and it became apparent that the Sailview development was having some difficulty getting off of the ground, Plaintiff and his co-investors became concerned for their capital investment. (*Id.* at 82). In this regard, Plaintiff testified that because of his increasing apprehension, he grew reluctant to make continued payments under the initial Option Agreement. (*Id.*). Plaintiff communicated his concerns to Defendants, including his desire to refrain from final payment prior to seeing some further movement within the development. (*Id.*; *see* Pl.'s Ex. 12).

In early July 2006, Plaintiff's attorney, Ms. Costa, drafted a document, which was entitled "Amendment and Joinder to Option Agreement." (Pl.'s Ex. 12; *see* Docket No. 45 at 87; *see also* Docket No. 48 at 34). Neither Defendant Quickel nor Yates had any role in drafting or negotiating the amended agreement. (Docket No. 48 at 33-34). Plaintiff sent the amended agreement to Defendant Yates by email on July 10, 2006. [*27] (Pl.'s Ex. 12). Defendant Yates then forwarded Plaintiff's email and attachment to Defendant Quickel the next day, stating that "[Plaintiff] sent some proposed amendments to his purchase sales contract, please review them and let's discuss them in person once we get through our meetings this week." (*Id.*). Pursuant to the terms of the Amendment and Joinder to Option Agreement, the time frame during which Plaintiff was obligated to make the final payment for his penthouse unit was extended until November 30, 2006 and the Option Period was similarly extended until July 25, 2007. [17] (Pl.'s Ex. 5). In addition, the choice of law provision was modified to recite that the agreement was to be governed by Pennsylvania law, with no reference to North Carolina. [18] (*Id.*). According to the amended agreement, "[Defendant Yates] inadvertently did not execute the [Option Agreement dated July 25, 2005] and wishes to join and be bound by all of the terms and conditions of the Option Agreement and this Amendment." (*Id.*).

17 By agreement of the parties, on August 29, 2007, the Option Period was further extended to April 20, 2008. (Pl.'s Ex. 5). Plaintiff, however, does not contend that the August 2007 amendment [*28] is relevant to the Court's inquiry regarding personal jurisdiction over Defendants Quickel and Yates. (Docket No. 45 at 39-40).

18 The Court notes that section 1.3 of the Amendment and Joinder to Option Agreement also provides a more detailed description of the relevant penthouse unit than was contained in the initial Option Agreement. (*Compare* Pl.'s Ex. 4, *with* Pl.'s Ex. 5).

In response to Plaintiff's email, Defendant Quickel sent an email addressed to Plaintiff, carbon copy to Defendant Yates, on July 18, 2006. (*Id.*). In this email, Defendant Quickel stated that the "directors of Sailview [were] the protectors of [its] investors and buyers (sic) dollars" and that "[t]he project will be ramping up to go vertical beginning July 24th, 2006, approximately 7 months behind the original planned start date." (Pl.'s Ex. 12). According to Defendant Quickel's testimony, at the time of his email, the plans and zoning for the Sailview

development were completed and the government contracts were in place. (Docket No. 48 at 69). The property on which the development was to be located had been appraised for $9.9 million as raw land and upwards of $400 million as of the completion of the first phase [*29] of development. (*Id.* at 77). In addition, Sailview had just finalized a deal with Davis Capital, based in Charlotte, North Carolina, which was prepared to pay Sailview $40 million dollars to become an equity partner in the project. (*Id.* at 70).

Unlike the previous two option agreements, Plaintiff and Defendants each signed the Amendment and Joinder to Option Agreement dated July 20, 2006. [19] (*See* Pl.'s Ex. 5). To this end, Plaintiff sent a signed copy of the agreement to Defendant Quickel by either mail or fax. (Docket No. 48 at 33). It is unclear from the record whether Defendant Quickel or Defendant Yates signed the agreement next. (*Id.* at 34). In either event, after both Defendants signed the document, it was then sent back to Plaintiff. (*Id.*). To this date, there has been no physical development on the land acquired by Sailview and the project has been acknowledged as a failure.

19 As stated in the Amendment and Joinder to Option Agreement:

> This AMENDMENT AND JOINDER TO OPTION AGREEMENT (this "Amendment") is made this 20th day of July, 2006 by and among MARK RYCHEL having an address at 2000 Corporate Drive, Suite 210, Wexford, PA 15090 USA ("MR") and LANE YATES (individually, "Yates"; [*30] together with Quickel, "Yates Quickel") and MICHAEL QUICKEL JR., ("Quickel"; together with Yates, "Yates Quickel"), both having an address at c/o Yates Development, L.L.C., P.O. Box 2097, Cornelius, NC 28031, USA.

(Pl.'s Ex. 5).

## IV. LEGAL STANDARD

### *A. Standard of Review*

Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, a court may dismiss a complaint for lack of jurisdiction over the person. Fed. R. Civ. P. 12(b)(2). A defendant bears the initial burden of raising a lack of personal jurisdiction defense. *See* Fed. R. Civ. P. 12(h)(1); *National Paintball Supply, Inc. v. Cossio*, 996 F. Supp. 459, 460 (E.D. Pa. 1998). However, "[w]here the defendant has raised a jurisdictional defense, the plaintiff bears the burden of establishing either that the cause of action arose from the defendant's forum-related activities (specific jurisdiction) or that the defendant has 'continuous and systematic' contacts with the forum state (general jurisdiction)." *Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros, Inc.*, 983 F.2d 551, 554 (3d Cir. 1993). If no evidentiary hearing is held on the motion to dismiss, "the plaintiff need only establish a prima facie case of personal jurisdiction and [*31] the plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004). By contrast, "if the Court conducts an evidentiary hearing, the plaintiff has the more substantial burden of proving that personal jurisdiction is proper by a preponderance of the evidence." *Leone v. Cataldo*, 574 F. Supp. 2d 471, 477 (E.D. Pa. 2008) (citing *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)).

### *B. Motions to Dismiss for Lack of Personal Jurisdiction*

The Due Process Clause protects defendants from binding judgments of foreign states with which the defendants had no significant "contacts, ties, or relations." *Burger King v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (quoting *Int'l Shoe v. Wash.*, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). Due process requires that a defendant be provided a "fair warning" and a "degree of predictability" regarding how his conduct may subject him to legal process and liability in a particular forum. *Burger King*, 471 U.S. at 472.

To exercise personal jurisdiction over a defendant, a federal court sitting in diversity must undertake a two-step inquiry. *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 258-59 (3d Cir. 1998). [*32] First, a court must determine whether the applicable state jurisdictional statute allows it to exercise jurisdiction under the circumstances of the particular case. *Id.* at 259. Second, a court must determine whether the reach of the state statute comports with the Due Process Clause of the

Federal Constitution. *Id.* In Pennsylvania, where the relevant long-arm statute provides for jurisdiction "based on the most minimum contact with th[e] Commonwealth allowed under the Constitution of the United States," 42 Pa. Cons. Stat. § 5322(b), this inquiry is collapsed into a single step, i.e., whether the Federal Constitution allows the state to exercise personal jurisdiction over the defendant. *See IMO Indus.*, 155 F.3d at 259. The constitutional test used to answer this question depends upon whether the jurisdiction sought is "general" or "specific." *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); *see also Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992).

Only specific jurisdiction is relevant to this matter. "Specific jurisdiction" is "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's [*33] contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.8. To establish specific personal jurisdiction, a plaintiff must show that a defendant had fair warning that he or she was subject to legal process in a particular state because the defendant had "minimum contacts" with the state. *Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir. 2007) (citing *Burger King*, 471 U.S. at 472).

In general, a court must analyze questions of personal jurisdiction on a defendant-specific basis. *Miller Yacht Sales*, 384 F.3d at 95 n.1. Similarly, a court usually determines specific jurisdiction on a claim-by-claim basis. *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 318 n.3 (3d Cir. 2007) (citing *Remick v. Manfredy*, 238 F.3d 248, 255-56 (3d Cir. 2001)). "Claim specific analysis is appropriate for analyzing a case with both contract and tort claims because 'there are different considerations in analyzing jurisdiction over contract claims and over certain tort claims.'" *Cataldo*, 574 F. Supp. 2d at 477 (quoting *Manfredy*, 238 F.3d at 255-56).

*C. Acts of an Agent*

Federal Rule of Civil Procedure 4(k) authorizes a court to have personal jurisdiction over non-state residents to the extent Pennsylvania law allows. [*34] *See* Fed. R. Civ. P. 4(k). The Pennsylvania long-arm statute permits that jurisdiction may be based on the acts of an agent. Specifically, the statute provides, in pertinent part, "[a] tribunal of this Commonwealth may exercise personal jurisdiction over a person ... who acts directly or *by an agent*, as to a cause of action or other matter arising from such person ... [t]ransacting any business in th[e] Commonwealth." 42 Pa. Cons. Stat. Ann. § 5322(a)(1) (emphasis added). Since jurisdiction over the instant action is based on diversity of citizenship, *see* 28 U.S.C. § 1332, this case requires the Court to apply Pennsylvania law to the parties' substantive claims. [20] *See Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 91-92 (3d Cir. 2008).

> 20 No party disputes the application of Pennsylvania state law to this matter. Accordingly, decisions of the Pennsylvania Supreme Court are binding precedent upon this Court, while Pennsylvania Superior Court decisions will be treated as persuasive precedent. *See State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 108 n.2 (3d Cir. 2009).

Under Pennsylvania law, to establish the existence of an agency relationship, a party must show that: [*35] (1) there was a manifestation by the principal that the agent would act for it; (2) the agent accepted such an undertaking; and (3) the principal retained control of the endeavor. *Castle Cheese, Inc. v. MS Produce, Inc.*, Civ. No. 04-878, 2008 U.S. Dist. LEXIS 71053, at *27-28 (W.D. Pa. Sept. 19, 2008) (citing *Tribune-Review Publ'g Co. v. Westmoreland County Hous. Auth.*, 574 Pa. 661, 833 A.2d 112, 119-20 (Pa. 2003)). It is not necessary that the parties explicitly state their intention to create an agency relationship, but their intention must be clear from their conduct. *Goodway Mktg., Inc. v. Faulkner Adver. Assocs., Inc.*, 545 F. Supp. 263, 267 (E.D. Pa. 1982) (citing *Brock v. Real Estate-Land Title & Trust Co.*, 318 Pa. 49, 178 A. 146 (Pa. 1935)). The burden of establishing the existence of an agency relationship rests on the party making the assertion. *Goodway*, 545 F. Supp. at 267 (citing *Scott v. Purcell*, 490 Pa. 109, 415 A.2d 56, 60 n.8 (Pa. 1980)).

With respect to the first element, in *Basile v. H&R Block, Inc.*, the Pennsylvania Supreme Court observed that:

> The special relationship arising from an agency agreement, with its concomitant heightened duty, cannot arise from any and all actions, no matter how trivial, arguably [*36] undertaken on another's behalf. Rather, the action must be a matter

> of consequence or trust, such as the ability to actually bind the principal or alter the principal's legal relations. Indeed, implicit in the long-standing Pennsylvania requirement that the principal manifest an intention that the agent act on the principal's behalf is the notion that the agent has authority to alter the principal's relationships with third parties, such as binding the principal to a contract.

563 Pa. 359, 761 A.2d 1115, 1121 (Pa. 2000). A principal manifests intent through written or spoken words or similar conduct. *Scott v. Lackey*, Civ. No. 02-1586, 2010 U.S. Dist. LEXIS 4350, at *22 (E.D. Pa. Jan. 20, 2010) (citing Restatement (Third) of Agency § 1.03). As to the third element, the principal's right to control the actions of the agent is a hallmark of an agency relationship. *Castle Cheese*, 2008 U.S. Dist. LEXIS 71053, at *29.

In the absence of an actual agency relationship, two individuals may form an affiliation based upon apparent agency. [21] *Lackey*, 2010 U.S. Dist. LEXIS 4350, at *22. Citing the Restatement (Second) of Agency, the Pennsylvania Supreme Court has explained that:

> Apparent authority is power to bind [*37] a principal which the principal has not actually granted but which he leads persons with whom his agent deals to believe that he has granted. Persons with whom the agent deals can reasonably believe that the agent has power to bind his principal if, for instance, the principal knowingly permits the agent to exercise such power or if the principal holds the agent out as possessing such power.

*Azur v. Chase Bank, USA*, 601 F.3d 212, 219 (3d Cir. 2010) (quoting *Revere Press, Inc. v. Blumberg*, 431 Pa. 370, 246 A.2d 407, 410 (Pa. 1968)). Apparent authority "flows from the conduct of the principal and not from that of the agent," *D & G Equip. Co. v. First Nat'l Bank*, 764 F.2d 950, 954 (3d Cir. 1985), and "requires a manifestation by the principal that 'another has authority to act with legal consequences' on his or her behalf," *Lackey*, 2010 U.S. Dist. LEXIS 4350, at *23 (quoting Restatement (Third) of Agency § 3.03). As articulated by the United States Court of Appeals for the Third Circuit, "under Pennsylvania law 'the test for determining whether an agent possesses apparent authority is whether a man of ordinary prudence, diligence and discretion would have a right to believe and would actually believe [*38] that the agent possessed the authority he purported to exercise.'" *Azur*, 601 F.3d at 219 (quoting *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 345 (3d Cir. 2004)).

> 21 Pennsylvania law also recognizes theories of implied authority and agency by estoppel. *See Bolus v. United Penn Bank*, 363 Pa. Super. 247, 525 A.2d 1215, 1221 (Pa. Super. Ct. 1987). Implied authority has been defined as the "authority to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority." *Poskin v. TD Banknorth, N.A.*, 687 F. Supp. 2d 530, 545 (W.D. Pa. 2009). "A finding of express authority is, therefore, a prerequisite to the existence of implied authority." *Lackey*, 2010 U.S. Dist. LEXIS 4350, at *20 n.13 (citing *Friedman v. Kasser*, 332 Pa. Super. 475, 481 A.2d 886, 890 (Pa. Super. Ct. 1984)). In addition, an agent may bind his or her principal by estoppel. *See Bolus*, 525 A.2d at 1221. "However, agency by estoppel may only arise from the conduct of the purported principal, and then only ' [i]f the purported principal becomes aware that others are dealing with the purported agent in the mistaken belief that he is the agent of the purported principal and does not take reasonable [*39] steps to correct the mistake.'" *Lackey*, 2010 U.S. Dist. LEXIS 4350, at *20-21 n.13 (quoting *Diversified Packing & Dev. Corp. v. Dore & Assocs. Contracting, Inc.*, 48 Fed. Appx. 392, 398 (3d Cir. 2002)); *see also McNeil Real Estate Fund XXVI, L.P. v. Matthew's, Inc.*, 112 F. Supp. 2d 437, 443 (W.D. Pa. 2000) (quoting *Apex Fin. Corp. v. Decker*, 245 Pa. Super. 439, 369 A.2d 483, 486 (Pa. Super. Ct. 1976) ("Authority by estoppel occurs when a principal, by his culpable negligence, permits an agent to exercise powers not granted to him, even though the principal did not know or have notice of the agent's conduct.")). In the instant matter, the Court does not understand Plaintiff to argue an estoppel theory and, therefore, will not further entertain this theory of agency.

Although Pennsylvania law permits that jurisdiction

may be based on the acts of an agent, the mere fact that a principal-agent relationship exists does not confer personal jurisdiction over a nonresident principal. *See Lackey*, 2010 U.S. Dist. LEXIS 4350, at *35-36 n.18 (citing *Nissley v. JLG Indus., Inc.*, 306 Pa. Super. 557, 452 A.2d 865, 868 (Pa. Super. Ct. 1982) (holding that "it does not necessarily follow that the jurisdictional contacts made by the agent can be [*40] imputed back to the principal")); *see also Myelle v. Am. Cyanamid Co.*, Civ. No. 92-5243, 1993 U.S. Dist. LEXIS 3977, at *21 (E.D. Pa. Mar. 31, 1993) ("The proposition that the mere existence of an agency relationship satisfies the minimum contacts requirement, without more, holds no water."). Therefore, irrespective of any agency relationship, the Court must engage in a constitutional inquiry to determine whether Defendants are properly haled into this forum. *See Lackey*, 2010 U.S. Dist. LEXIS 4350, at *36 n.18.

*D. Specific Jurisdiction for Breach of Contract Claim*

Given the case *sub judice* involves allegations of breach of contract and intentionally tortious activity, i.e., fraudulent inducement, Plaintiff must satisfy two different three-prong tests with respect to each Defendant to establish that this Court has specific jurisdiction over the entirety of his claims. The Court will first address the question of specific jurisdiction over the alleged contract claim.

The inquiry as to whether specific jurisdiction exists begins with the "traditional test." *See Shafik v. Curran*, Civ. No. 09-2469, 2010 U.S. Dist. LEXIS 60103, at *9-17 (M.D. Pa. June 17, 2010) (applying the traditional test [*41] to a contract dispute between forum and non-forum residents). The traditional test has three parts. *Marten*, 499 F.3d at 296 (citing *O'Connor*, 496 F.3d at 317). First, the defendant must have "'purposefully directed' his activities" at the forum. *Burger King*, 471 U.S. at 472 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)). Second, the plaintiff's claim must "arise out of or relate to" at least one of those specific activities. *Helicopteros*, 466 U.S. at 414; *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1559 (3d Cir. 1994). And, third, if the prior two requirements are met, courts may consider whether the exercise of jurisdiction "comport[s] with 'fair play and substantial justice.'" *Burger King*, 471 U.S. at 476 (quoting *Int'l Shoe*, 326 U.S. at 320).

"In contract disputes, solicitation and formation of the contract itself are not dispositive." *Shafik*, 2010 U.S. Dist. LEXIS 60103, at *10; *see also Grand Entm't Group v. Star Medical Sales*, 988 F.2d 476, 482 (3d Cir. 1993) ("[A] contract alone does not 'automatically establish sufficient minimum contacts in the other party's home forum.'") (quoting *Burger King*, 471 U.S. at 478). Instead, the district court must consider [*42] the totality of the circumstances. *Telcordia Tech, Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 177 (3d Cir. 2006). Whether the defendant is physically present in the forum state is not required, so long as the defendant "purposefully availed [himself] of the privilege of conducting activities within the forum," *O'Connor*, 496 F.3d at 317 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)), thus invoking the benefits and protections of the forum state's laws. *See Shafik*, 2010 U.S. Dist. LEXIS 60103, at *10 (citing *Manfredy*, 238 F.3d at 255); *see also Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 150-51 (3d Cir. 2001) ("In modern commercial business arrangements ... communication by electronic facilities, rather than physical presence, is the rule.").

Specific factors to consider in determining personal jurisdiction over a breach of contract claim include: the location and character of the contract negotiations, whether the non-resident solicited business from the forum state, whether the non-resident invoked and received benefits under the laws of the forum state, the contemplated future consequences of the contract, the terms and provisions of the contract, and the parties' course of dealing. [*43] *Manfredy*, 238 F.3d at 255-56; *Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co.*, 75 F.3d 147, 151 (3d Cir. 1995); *Empire Abrasive Equip. Corp. v. H.H. Watson, Inc.*, 567 F.2d 554, 559 (3d Cir. 1977); *Strick Corp. v. A.J.F. Warehouse Distribs., Inc.*, 532 F. Supp. 951, 958 (E.D. Pa. 1982). However, it is not significant that one or the other party initiated the relationship. *See Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 150 (3d Cir. 1992). "In the commercial milieu, the intention to establish a common venture extending over a substantial period of time is a more important consideration." *Gen. Elec. Co.*, 270 F.3d at 151. The Court now turns to the alleged intentional tort claim.

*E. Specific Jurisdiction for Intentional Tort Claim*

In addition to his breach of contract claim, Plaintiff has brought a claim against Defendants for fraudulent statements made to induce Plaintiff to enter a contract. (

*See* Docket No. 20 at 9-11). With respect to specific jurisdiction over claims of intentional torts, the United States Court of Appeals for the Third Circuit has suggested that district courts should apply the "effects test," as established by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). [*44] *Shafik*, 2010 U.S. Dist. LEXIS 60103, at *18 (citing *Manfredy*, 238 F.3d at 258; *Marten*, 499 F.3d at 297; *Miller Yacht Sales*, 384 F.3d at 99). Under the effects test, the plaintiff must show that: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; and (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity. *IMO Indus.*, 155 F.3d at 265-66. If a plaintiff satisfies these three elements, the plaintiff can "demonstrate a court's jurisdiction over a defendant even where the defendant's 'contacts with the forum alone are far too small to comport with the requirements of due process' under the [Court of Appeals'] traditional analysis." *Marten*, 499 F.3d at 297 (quoting *IMO Indus.*, 155 F.3d at 259).

The crucial aspect of the effects test is that a plaintiff must demonstrate that a defendant "expressly aimed its tortious conduct at the forum." *CentiMark Corp. v. Highland Commercial Roofing, LLC*, Civ. No. 09-1244, 2009 U.S. Dist. LEXIS 102530, at *8 (W.D. Pa. Nov. 4, 2009) [*45] (quoting *IMO Indus.*, 155 F.3d at 266). For this purpose, simply asserting that the defendant knew or should have known that the plaintiff was located in the forum is insufficient. *Shafik*, 2010 U.S. Dist. LEXIS 60103, at *18. Likewise, the plaintiff's residence in the forum does not on its own create jurisdiction over nonresident defendants. *Marten*, 499 F.3d at 298. Instead, to establish that a defendant "expressly aimed" his conduct, the plaintiff has to demonstrate "the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed [his] tortious conduct at the forum." *Id.* at 297-98 (quoting *IMO Indus.*, 155 F.3d at 266). If a plaintiff fails to show that the defendant "manifest[ed] behavior intentionally targeted at and focused on the forum," *IMO Indus.*, 155 F.3d at 265, the plaintiff fails to establish jurisdiction under the effects test. *Marten*, 499 F.3d at 298.

## V. DISCUSSION

In the present case, Plaintiff argues that under the "traditional test," jurisdiction lies with this Court because Defendants directed their activities at Pennsylvania, and Plaintiff's [*46] breach of contract claim arises from Defendants' acts. (Docket No. 49 at ¶¶ 17, 18, 20, 21 24). Specifically, Plaintiff asserts that Defendants utilized Mr. Radovcic as an agent in Pennsylvania, and that Mr. Radovcic solicited Plaintiff's business on Defendants' behalf in Pennsylvania. (*Id.* at ¶¶ 16, 17). Plaintiff also claims that Defendants' contacts were "instrumental" in the formation of the contracts at issue. (*See* Docket No. 20 at ¶¶ 34-49; *see also* Docket No. 49 at ¶ 19). Plaintiff also invokes the "effects test" when stating that Defendants' allegedly fraudulent actions were directed at Plaintiff in Pennsylvania, that he suffered the brunt of his injuries here, and that Defendants were aware that the consequences of their actions would result in Pennsylvania. (*See* Docket No. 49 at ¶¶ 17, 18, 23, 25). Defendants challenge Plaintiff's claim that jurisdiction is proper. (*See* Docket Nos. 50, 51).

### A. *Defendants Are Not Subject to Specific Jurisdiction for Plaintiff's Breach of Contract Claim*

As an initial matter, the Court finds that Mr. Radovcic is not an agent of either Defendant Quickel or Yates. Plaintiff has not proven that Mr. Radovcic possessed express authority to act on behalf [*47] of Defendants. Indeed, there is no evidence that Defendants manifested any intention for Mr. Radovcic to act as a "commissioned sales agent" on their behalf. (*See* Docket No. 20 at ¶ 6). Defendants never entered into any sort agreement--formal or informal--with Mr. Radovcic, nor did he receive any commission or other form of compensation. Furthermore, there is no evidence that Defendants instructed Mr. Radovcic to meet with Plaintiff, or to solicit Plaintiff to invest in Sailview.

Plaintiff has also failed to prove that Mr. Radovcic enjoyed apparent authority to speak on Defendants' behalf. Plaintiff testified that he learned of Sailview through a meeting with Mr. Radovcic, which occurred at Plaintiff's business office in Wexford, Pennsylvania. (Docket No. 45 at 9). Defendants, however, did not direct Mr. Radovcic to find purchasers or investors for Sailview. (*See* Docket No. 48 at 39). Moreover, Defendant Quickel testified that he has no knowledge that anyone else associated with Sailview did likewise. (*Id.*).

In this Court's estimation, there is no evidence that either Defendant acted in a manner that would allow a person of "ordinary prudence, diligence and discretion" to believe that [*48] Mr. Radovcic possessed the authority he purported to exercise. *See Azur*, 601 F.3d at 219 (quoting *In re Mushroom*, 382 F.3d at 345). To this end, the Court notes that Plaintiff testified that after he had performed some due diligence, he "became somewhat uncomfortable with some of [Mr. Radovcic's] prior relationships." (Docket No. 45 at 21-22). In fact, according to his testimony, prior to the date of the initial Option Agreement, Plaintiff communicated his discomfort to Defendant Yates, who then indicated that he, too, felt uneasy about Mr. Radovcic. (*See* Docket No. 45 at 21-22, 112-13). This being the case, and recognizing that apparent authority focuses on the actions of the principal as compared to the agent, the Court is constrained to hold, based on the evidence before it, that a reasonable person would conclude that when Mr. Radovcic spoke with Plaintiff that he did so on Defendants' behalf. *See D & G Equip.*, 764 F.2d at 954. Consequently, the Court may not exercise personal jurisdiction on the basis of an agency relationship, and must instead exam Defendants' contacts with the forum to determine whether personal jurisdiction exists. *See Lackey*, 2010 U.S. Dist. LEXIS 4350, at *29.

In [*49] support of his argument that personal jurisdiction is lacking, Defendant Quickel contends that he never met with Plaintiff in Pennsylvania, that he engaged in only limited telephone and email communications with Plaintiff, and that he did not know where Plaintiff was located when he engaged in said communications. (Docket No. 50 at ¶¶ 16, 17). Similarly, Defendant Yates asserts that he has never undertaken or participated in any real estate development projects in Pennsylvania and has likewise never had any business dealings in Pennsylvania. (Docket No. 51 at ¶ 12). Collectively, Defendants argue that minimum contacts for Plaintiff's breach of contract claim do not exist merely because Defendants exchanged phone calls and emails with Plaintiff, entered into a contractual relationship with him, and accepted funds from a Pennsylvania bank. [22] (*See* Docket No. 50 at ¶¶ 19, 20; *see also* Docket No. 51 at ¶¶ 18, 23). Defendants also contend that the unilateral activity of Plaintiff is not an appropriate consideration within the context of the instant motion and that a choice of law provision, standing alone, is insufficient to confer jurisdiction. (*See* Docket No. 50 at ¶ 33; *see also* Docket [*50] No. 51 at ¶ 14, 15, 19).

22 Given the circumstances of this case, the jurisdictional analysis for each Defendant is virtually identical. Thus, the Court considers the Court's jurisdiction as to each Defendant within the same analysis.

To resolve the parties' dispute, the Court notes initially that both Defendants in this case are shareholders and directors of Sailview. (Docket No. 48 at 6-7, 91). "In certain situations, 'jurisdiction over corporate officers in their personal capacities may be based on acts performed in their corporate capacity.'" *Hyndman v. Johnson*, Civ. No. 10-7131, 2011 U.S. Dist. LEXIS 14871, at *11 (E.D. Pa. Feb. 15, 2011) (quoting *American Int'l Airways, Inc. v. American Int'l Group, Inc.*, Civ. No. 90-7135, 1991 U.S. Dist. LEXIS 6888, at *10 (E.D. Pa. May 21, 1991)). Specifically, "when personal jurisdiction is based on an officer's corporate activities, only those actions taken within the forum state are to be considered in the jurisdictional analysis." *Hyndman*, 2011 U.S. Dist. LEXIS 14871, at *12 (citation omitted). "Otherwise, 'an individual's transaction of business solely as an officer or agent of a corporation does not create personal jurisdiction over that [*51] individual.'" *Id.* (quoting *Feld v. Tele-View, Inc.*, 422 F. Supp. 1100, 1104 (E.D. Pa. 1976)).

Here, it is clear to the Court that the majority of the contacts relied on by Plaintiff in his attempt to establish personal jurisdiction over Defendants were made on behalf of Sailview, which is not a party to this action, and not on behalf of the individual Defendants. (*See* Docket No. 20). As such, the record is equally clear that none of Defendants' respective activities as corporate officers took place in Pennsylvania. (*See* Docket No. 48 at 4, 90). Indeed, as provided in their testimony, prior to the evidentiary hearing held on December 2, 2010, neither Defendant Quickel nor Yates had ever traveled to Pennsylvania. (*Id.*). Therefore, within the standard adopted by district courts sitting in the Eastern District for similar situations, the majority of the contacts relied on by Plaintiff to satisfy the Court's test for specific jurisdiction are not to be considered. *See Hyndman*, 2011 U.S. Dist. LEXIS 14871, at *12.

However, even without excluding the contacts that Plaintiff alleges were instrumental in the formation of the contracts at issue, (*see* Docket No. 49), this Court is able to conclude [*52] that it lacks personal jurisdiction over either Defendant as to Plaintiff's breach of contract claim

based on the following case law.

In *Rotondo Weinreich Enterprises, Inc. v. Rock City Mechanical, Inc.*, the district court held that:

> Where the only contacts an out of state defendant has with the forum state are that it concluded a contract with a forum state plaintiff and sent some related communications to that plaintiff, and where the contract negotiations were initiated by the plaintiff, the contract is to be performed entirely outside the forum state, the contract does not contain a choice-of-law clause designating the application of forum state law, and the contract does not create long-term or substantial ties with the forum state, the defendant does not have sufficient contacts.

Civ. No. 04-5282, 2005 U.S. Dist. LEXIS 764 (E.D. Pa. Jan. 19, 2005). Similarly, in *Novacare, Inc. v. Strategic Theracare Alliance*, the court concluded that it lacked personal jurisdiction over the non-resident defendants, whose contracts to provide services in their home state were made with a Pennsylvania corporation; contained notice provisions indicating the plaintiff's Pennsylvania address; contained [*53] Pennsylvania choice of law provisions; and resulted in significant correspondence, payments by check, and occasional telephone contact--each by the defendant to the plaintiff in Pennsylvania. Civ. No. 98-625, 1999 U.S. Dist. LEXIS 6108 (Apr. 30, 1999); *see also Budget Blinds, Inc. v. White*, 536 F.3d 244, 261-263 (3d Cir. 2008) (indicating that although a choice-of-law provision may reinforce a party's "deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there," a court should hesitate to attribute such a meaning to the provision if it has been changed at the insistence of the forum resident) (quoting *Burger King*, 471 U.S. at 482).

Counseled by these decisions, this Court thus concludes that Plaintiff's presence in Pennsylvania, the inclusion of Pennsylvania identification and notice provisions in the agreements at issue, the Pennsylvania choice of law provision, and the agreement-related telephone and email correspondence between Plaintiff and Defendants are insufficient to support an exercise of specific personal jurisdiction over Plaintiff's breach of contract claim against the named Defendants.

*B. Defendants Are Not Subject to Specific Jurisdiction for Plaintiff's Intentional Tort Claim* [*54]

With respect to the claim for fraud in the inducement, Plaintiff's allegations relate to Defendants' representations providing that: (1) Defendants raised sufficient capital to break ground on construction of the development; (2) Defendants had commitments for the sale of units in the development; (3) Defendants had the financial wherewithal to complete the development; and (4) Plaintiff's advance under the agreements in question would be secured by a lien against the development's real estate. (Docket No. 20 at ¶ 42).

To meet the "effects test" for both Defendants, Plaintiff has the burden of establishing that: (1) each Defendant committed an intentional tort; (2) Plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by Plaintiff as a result of those torts; and (3) each Defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity. *See IMO Indus.*, 155 F.3d at 265-66. Only if all three facts are found may the Court exercise personal jurisdiction under this test. *See Marten*, 499 F.3d at 297. [*55] As Plaintiff has failed to show that either Defendant Quickel or Yates "expressly aimed" the alleged tortious conduct at Pennsylvania in a way that could make Pennsylvania the focal point of their claimed tortious activity, he has not met his burden under the effects test with regard to either Defendant. Accordingly, the Court finds that personal jurisdiction does not exist over Defendants as to Plaintiff's claim for fraudulent inducement.

VI. TRANSFER

Having concluded that this Court lacks personal jurisdiction over Defendants, the question remains whether the Court should dismiss this action or transfer it to the Western District of North Carolina. *See Gehling v. St. George's Sch. of Med., Ltd.*, 773 F.2d 539, 544 (3d Cir. 1985) (stating that a district court lacking personal jurisdiction can transfer a case to a district in which the case could have originally been brought). Although Plaintiff has not expressly renewed his request that the case be transferred as an alternative to dismissal, (*see* Docket Nos. 49, 52), the Court acknowledges his prior request, (*see* Docket No. 25 at 20), and further recognizes

*sua sponte* its authority under 28 U.S.C. § 1631 to transfer this matter to a [*56] judicial district where the matter could have been brought. [23] *See Junge v. Wheeling Island Gaming, Inc.*, Civ. No. 10-1033, 2010 U.S. Dist. LEXIS 116484, at *20 (W.D. Pa. Nov. 2, 2010) (holding that transfer under 28 U.S.C. § 1631 is proper even if the parties do not invoke said provision) (citing *Chicosky v. Presbyterian Med. Ctr.*, 979 F. Supp. 316, 320-23 (D.N.J. 1997)).

The language of Section 1631 provides, in pertinent part:

> Whenever a civil action is filed in a court ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed .., and the action ... shall proceed as if it has been filed in ... the court to which it is transferred on the date upon which it was actually filed in ... the court from which it is transferred.

28 U.S.C. § 1631. In this case, the interests of justice are better served if this case is transferred to the Western District of North Carolina rather than dismissed. [24] Personal jurisdiction over Defendants and venue are proper in that court. Moreover, such a transfer will serve [*57] the interests of justice because it will eliminate the need for Plaintiff to incur additional filing costs and will avoid any statute of limitations problems that could arise from an outright dismissal at this point. *See Lawman Armor Corp. v. Simon*, 319 F. Supp. 2d 499, 507 (E.D. Pa. 2004) ("[N]ormally transfer will be in the interest of justice because dismissal of an action that could be brought elsewhere is time-consuming and justice-defeating."). By transferring this action to a district court in the State of North Carolina, the Court is not unmindful of the potential financial hardship and inconvenience that Plaintiff may incur as the result of such a transfer. Nonetheless, cost and inconvenience to Plaintiff do not entitle the Court to disregard well-established jurisdictional requirements. *See Castapheny v. W. Va. State Police*, Civ. No. 09-424, 2010 U.S. Dist. LEXIS 45981, at *25-26 (W.D. Pa. Apr. 15, 2010).

23 At the hearing held on December 2, 2010, the Court notes Defense counsel acknowledged that the potential transfer of this case to the Western District of North Carolina had been raised as an alternative to dismissal. (*See* Docket No. 45 at 189).

24 Because the Court finds [*58] that transfer of this case is appropriate, it expresses no opinion on Defendants' arguments that Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted, believing those decisions are better left to the North Carolina court.

## VII. CONCLUSION

Based on the foregoing, the Court finds that Defendants are not subject to personal jurisdiction in Pennsylvania. However, because the action could have originally been brought in the Western District of North Carolina and because a transfer is in the interest of justice, the action will be transferred to that district, rather than dismissed, pursuant to 28 U.S.C. § 1631. An appropriate Order follows.

*/s/ Nora Barry Fischer*

Nora Barry Fischer

United States District Judge

Date: April 11, 2011

SCHILLER-PFEIFFER, INC. and JEP MANAGEMENT, INC. v. COUNTRY HOME PRODUCTS, INC., JOSEPH M. PERROTTO, RICHARD P. ALTHER, and WILLIAM M. LOCKWOOD, JR.

CIVIL ACTION No. 04-CV-1444

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2004 U.S. Dist. LEXIS 24180

December 1, 2004, Decided

**DISPOSITION:** Defendants' motion to dismiss and/or transfer, granted in part and denied in part. Clerk directed to transfer action to United States District Court for District of Vermont.

**COUNSEL:** [*1] For Plaintiffs SCHILLER-PFEIFFER, INC., and JEP MANAGEMENT, INC.: Mitchell L. Bach and Sheldon Kivell, Eckert Seamans Cherin & Mellott, LLC, Philadelphia, PA.

For Defendants COUNTRY HOME PRODUCTS, INC., JOSEPH M. PERROTTO, RICHARD P. ALTHER, and WILLIAM M. LOCKWOOD, JR.: Marc B. Heath, Downs Rachlin Martin PLLC, Burlington, VT, and Michael L. Kichline and Stuart T. Steinberg, Dechert, Price & Rhoads, Philadelphia, PA.

**JUDGES:** R. Barclay Surrick, Judge.

**OPINION BY:** R. Barclay Surrick

**OPINION**

**SURRICK, J. DECEMBER 1, 2004**

**MEMORANDUM & ORDER**

Presently before the Court is Defendants' Motion to Dismiss and/or Transfer the Above Captioned Matter to the United States District Court of Vermont filed on May 17, 2004 (Doc. No. 4). Defendants seek dismissal under Fed. R. Civ. P. 12 (b)(12) and/or transfer pursuant to 28 U.S.C. § 1404(a). [1] For the following reasons, Defendants' Motion will be granted in part and denied in part.

1 Also pending is Defendants' Motion To Dismiss under Fed.R.Civ.P 12(b)(6), filed on July 20, 2004 (Doc. No. 10).

[*2] **I. INTRODUCTION**

**A. Factual Background**

This action involves a dispute between Plaintiffs Schiller-Pfeiffer, Inc. ("Schiller-Pfeiffer") and JEP Management, Inc. ("JEP"), and Defendants Country Home Products, Inc. ("CHP"), Joseph Perrotto ("Perrotto"), Richard P. Alther ("Alther"), and William M. Lockwood, Jr. ("Lockwood"), regarding Defendants' conduct during Schiller-Pfeiffer's failed attempt to acquire CHP's business operations. In 2003, Schiller-Pfeiffer, a Pennsylvania corporation that manufactures and distributes lawn and garden equipment, entered into negotiations with CHP, a Vermont corporation involved in the same line of business, for

acquisition of CHP's operational assets. [2] (Compl. PP 1, 3, 17.) Representatives of the two parties, including Perrotto--CHP's President, Chief Executive Officer, and a member of the board of directors--conducted detailed negotiations through written correspondence, email, and telephone conversations. (Waitsman Aff. P 12.) During this time, Perrotto also traveled to Schiller-Pfeiffer's offices in Pennsylvania to meet with Plaintiffs' managers, officers, and lawyers. (Waitsman Aff. P 10; Amend. Compl. P 8, *Country Home Prods. v.* [*3] *Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004).) These discussions culminated in the execution of a detailed Letter of Intent ("LOI") between Schiller-Pfeiffer and CHP on December 30, 2003. (Compl. P 19, Ex. A.)

2 JEP, a Pennsylvania corporation that provides financial, accounting, and legal services for Schiller-Pfeiffer, also participated in these negotiations. (Compl. PP 2, 12-13, 17.)

The LOI "set forth the general terms and conditions by which Schiller-Pfeiffer . . . would be willing to acquire certain assets and assume certain liabilities" of CHP. It also established a framework for conducting final negotiations between the parties. (*Id.*) The LOI was not binding on Schiller-Pfeiffer and CHP, except for certain specified paragraphs regarding the parties' obligations during final negotiations. (*Id.* Ex. A PP 6-10.) Specifically, the LOI provided for an exclusive "no shop" period from December 30, 2003, through March 31, 2004 (the "Exclusive Period"), during which CHP and its [*4] agents, advisors, and representatives would not enter into or continue any discussions, or review or consider any proposals, for the ownership of CHP and/or the acquisition of its assets by anyone other than Schiller-Pfeiffer. (*Id.* P 26, Ex. A P 6.) The LOI also required CHP to (1) not disclose any non-public information regarding its assets or finances to anyone other than Schiller-Pfeiffer during the Exclusive Period, (2) promptly notify Schiller-Pfeiffer and JEP of any acquisition inquiries or proposals that it received, and (3) negotiate in good faith to reach a final agreement with Schiller-Pfeiffer. [3] (*Id.* PP 6, 10.) Either party could terminate the LOI by giving notice in writing, and the LOI would automatically expire on March 31, 2004, if a final agreement had not been reached by that date. (*Id.* P 12.) In addition, the LOI provided that, in the event of a legal dispute arising out of the LOI, Pennsylvania law would govern. [4] (*Id.* P 9.) All of these provisions were contractually binding on the parties. (*Id.* Ex. A P 6.) Defendants Perrotto, Alther, and Lockwood signed the LOI on behalf of CHP. (*Id.* Ex. A.) Alther and Lockwood are directors and shareholders [*5] of CHP. Alther is also the corporation's Secretary. (*Id.* PP 5-6.). Plaintiffs allege that Alther and Lockwood are the controlling shareholders of CHP. (*Id.* P 7-8.)

3 Paragraph 6 of the LOI states:

> 6. **No Shop.** In consideration of [Schiller-Pfeiffer]'s agreement to commence due diligence and draft the definitive documentation, CHP agrees that, during the Exclusive Period, it will not, and will cause its agents, advisors and representatives not to, directly or indirectly, (i) enter into or continue any discussions, or review any proposal or offer, with respect to the acquisition by any person (other than [Schiller-Pfeiffer]) of any capital stock or other significant ownership interest in CHP or any significant portion of the assets and properties of CHP; or (ii) furnish or cause to be furnished any non-public information concerning CHP or the assets and properties of CHP to any person (other than [Schiller-Pfeiffer] and its representatives), other than in the ordinary course of business or as required by applicable laws and regulations. CHP will promptly notify [Schiller-Pfeiffer] of any inquiry or proposal received by CHP with respect to the acquisition by any other person of any capital stock or significant ownership interest in CHP or any significant portion of the assets and properties of CHP.

(Compl. Ex. A P 6.)

[*6]

4 The LOI did not include a forum selection clause.

During the Exclusive Period, representatives of Schiller-Pfeiffer, JEP, and CHP had numerous meetings and communications regarding the final terms of the proposed acquisition. (Compl. P 35.) Both parties also undertook due diligence concerning various aspects of the proposed acquisition and exchanged draft versions of a final agreement. (*Id.* PP 38-41; Waitsman Aff. PP 8, 13; Letter from Paul H. Ode, Jr., Esq., Counsel for CHP, to Mitchell L. Bach, Esq., Counsel for Schiller-Pfeiffer, at 5 (March 23, 2004), *attached to* Doc. No. 9, Ode Aff. Ex. A ("Ode Letter").) Concern about the lack of progress in the negotiations resulted in representatives of CHP and Schiller-Pfeiffer meeting on March 4 and 5, 2004 in Philadelphia to discuss various unresolved issues regarding the final agreement. (Ode Letter at 3-4.) This meeting apparently did not resolve most of the outstanding issues. (*Id.*)

On March 15, 2004, CHP sent a letter to Schiller-Pfeiffer, informing them that CHP was exercising its right to terminate the LOI. (Ode Aff. P 6.) On [*7] March 16, 2004, Paul H. Ode, Jr., Counsel for CHP, called Vicki J. Waitsman, Counsel for Schiller-Pfeiffer and JEP, concerning CHP's termination of the LOI. (*Id.* P 7; Waitsman Aff. P 16.) Waitsman asserts that Ode stated that CHP had elected to terminate the LOI in favor of a management buyout, and that Plaintiffs knew that they had been competing with a management buyout concept during the final negotiations. (Waitsman Aff. P 16.) Ode denies making such a statement. (Ode Aff. P 9.)

Plaintiffs were aware of the fact that Defendants had previously discussed the possibility of a management buyout of CHP. (*Id.* P 29.) According to Plaintiffs, Defendants advised Schiller-Pfeiffer and JEP during pre-LOI negotiations that all management buyout discussions had ceased and that there were no further plans to pursue such a buyout. (*Id.* P 30.)

## II. PROCEDURAL HISTORY

### A. Pennsylvania Action

On March 17, 2004, Plaintiffs filed a praecipe for a writ of summons in the Court of Common Pleas of Philadelphia County, Pennsylvania. [5] (Doc. No. 4 at 2.) Defendants removed the action to this Court on April 2, 2004. (Doc. No. 1.) On May 11, 2004, prior to Plaintiffs' filing of a [*8] Complaint, Defendants Perrotto, Alther, and Lockwood moved to dismiss the claims against them under Federal Rule of Civil Procedure 12(b)(2), asserting that they lacked sufficient minimum contacts with Pennsylvania to satisfy the requirements for personal jurisdiction. (Doc. No. 4.) In the same Motion, all Defendants request that this Court transfer the action to the United States District Court for the District of Vermont pursuant to 28 U.S.C. § 1404(a). (*Id.*)

5 In Pennsylvania courts, a party may commence an action by filing a praecipe for writ of summons instead of a complaint. Pa. R. Civ. P. 1007.

On June 30, 2004, Plaintiffs filed a Complaint, asserting various contract and tort claims against Defendants. Specifically, Plaintiffs allege that: (1) Defendant CHP breached the LOI during the Exclusive Period by negotiating with and furnishing non-public information to the management buyout group, failing to promptly notify Plaintiffs about [*9] management's buyout proposal, and failing to negotiate in good faith for a final agreement (Compl. PP 54-57); (2) all Defendants fraudulently and deliberately misrepresented to Plaintiffs that discussions of a management buyout had ceased prior to and during the Exclusive Period (*id.* PP 58-70); (3) Defendants Perrotto, Alther, and Lockwood committed fraud by assisting, inducing, encouraging, or condoning CHP's senior managers to prepare and propose a management buyout offer during the Exclusive Period (*id.* PP 71-81); (4) all Defendants are liable for the above-mentioned conduct pursuant to the doctrines of equitable and/or promissory estoppel (*id.* PP 82-83); and (5) Defendants Perrotto, Alther, and Lockwood tortiously interfered with Plaintiffs' business relationship with CHP by assisting, inducing, encouraging, or condoning a senior management buyout during the Exclusive Period (*id.* PP 84-87.) Plaintiffs seek to recover compensatory damages, attorney's fees, and costs. (*Id.*)

### B. Vermont Action

On May 11, 2004, CHP filed a Complaint against Schiller-Pfeiffer and JEP in the United States District Court for the District of Vermont, seeking declaratory judgment [*10] that CHP had not violated either the LOI or the corresponding Confidentiality Agreement, a separate document which governed the parties' exchange of information during final negotiations. (Compl., *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004).) CHP also alleged that Schiller-Pfeiffer and JEP had failed to return or destroy confidential information under the terms of the

Confidentiality Agreement, and requested that the District Court order compliance. (*Id.* PP 18, 20.)

On July 29, 2004, prior to the filing of an answer or motion to dismiss, CHP filed an Amended Complaint under Federal Rule of Civil Procedure 15(a). In the Amended Complaint, CHP withdrew its previous request that the District Court order Schiller-Pfeiffer and JEP to comply with the Confidentiality Agreement, but retained the declaratory judgment claim. (Am. Compl., *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004)). CHP also added Stuart M. Bryan, President of Schiller-Pfeiffer, and Jeffrey E. Perelman, Chief Executive Officer of Schiller-Pfeiffer and President of JEP, as defendants, [*11] and alleged that they committed the torts of fraudulent misrepresentation and fraudulent concealment during final negotiations in the Exclusive Period. (*Id.* PP 22-30, 45-48.) Defendants in the Vermont action (Schiller-Pfeiffer, JEP, and its officers) then filed a motion to dismiss for lack of personal jurisdiction and/or transfer the case to the Eastern District of Pennsylvania. (Doc. No. 13, *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004).) After briefing and oral argument, the United States District Court for the District of Vermont denied the motion to dismiss or transfer on November 19, 2004. *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. Nov. 19, 2004) (order denying motion to dismiss or transfer).

## III. PERSONAL JURISDICTION

### A. Standard

A district court has personal jurisdiction over a nonresident defendant to the extent allowed by the law of the state where the court sits, subject to the constitutional limitations of due process. Fed. R. Civ. P. 4(e); *see also Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001). Under Pennsylvania's [*12] long-arm statute, Pennsylvania courts may exercise jurisdiction "the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322(b) (West 2002). The reach of Pennsylvania's long-arm statute is therefore coextensive with the Due Process Clause of the Fourteenth Amendment. *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 690 (3d Cir. 1990); *Taylor v. Fedra Int'l, Ltd.*, 2003 PA Super 233, 828 A.2d 378, 381 n.1 (Pa. Super. Ct. 2003).

A court may exercise personal jurisdiction based on the defendant's general or specific contacts with the forum state. *GE . v. Deutz AG*, 270 F.3d 144, 150 (3d Cir. 2001). Specific jurisdiction may exist when the cause of action arises from the defendant's forum-related activities. *North Penn Gas Co.*, 897 F.2d at 690. We apply a two-part test to determine whether specific jurisdiction exists. *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998);*Creative Waste Mgmt., Inc. v. Capitol Envtl. Servs.*, No. 04-1060, 2004 U.S. Dist. LEXIS 21497, [*13] at *8 (E.D. Pa. Oct. 22, 2004). First, the plaintiff must show that the defendant has "minimum contacts with the forum" such that the defendant could "'reasonably anticipate being haled into court there.'" *Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 201 (3d Cir. 1998) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)). The required "minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987) (O'Connor, J., plurality opinion) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)). Second, we inquire whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King Corp.*, 471 U.S. at 476 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320, 90 L. Ed. 95, 66 S. Ct. 154 (1945)). Although this second prong "need only be applied [*14] at a court's discretion," the Third Circuit has "generally chosen to engage in this second [part] of analysis in determining questions of personal jurisdiction." *Pennzoil Prods. Co.*, 149 F.3d at 201. Among the factors that a court may consider in this determination are "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' [and] 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies.'" *Burger King Corp.*, 471 U.S. at 477 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292)).

Once a defendant has raised a jurisdictional defense, "'plaintiff bears the burden of demonstrating contacts with the forum state sufficient to give the court in

personam jurisdiction.'" *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 63 (3d Cir. 1984) (quoting *Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A.*, 723 F.2d 357, 362 (3d Cir. 1983)). While a court must "accept the plaintiff's allegations as true and construe disputed facts in [his] [*15] favor," *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 457 (3d Cir. 2003), a plaintiff may not rest solely on the pleadings to satisfy its burden of proof. *Carteret Sav. Bank v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992). Rather, the plaintiff must present sworn affidavits or other evidence that demonstrates a *prima facie* case for the exercise of personal jurisdiction. *Mellon Bank v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992); *Carteret Sav. Bank*, 954 F.2d at 146. Because a Rule 12(b)(2) motion "requires resolution of factual issues outside the pleadings," *Time Share Vacation Club*, 735 F.2d at 67 n.9, we may consider all undisputed evidence submitted by the parties.

**B. Minimum Contacts**

Defendants Perrotto, Alther, and Lockwood (collectively, the "individual Defendants") assert that all of their contacts with Pennsylvania occurred in their capacities as corporate officers and/or directors of CHP. (Perrotto Aff. PP 3-5; Alther Aff. PP 2-4; Lockwood Aff. PP 2-4.) They argue that we cannot exercise personal jurisdiction over them individually:

> The mere fact that Defendants Perrotto, [*16] Alther, and Lockwood are officers or shareholders of CHP is irrelevant to the issue of minimum contact. "[A] defendant is not individually subject to personal jurisdiction merely based on his actions in a corporate capacity." *[TJS Brokerage & Co. v.] Mahoney*, 940 F. Supp. [784,] 789 [(E.D. Pa. 1996)]. Moreover, "it is well settled that, absent allegations that the corporate shield is a sham, jurisdiction over the corporation does not subject officers, directors and shareholders of the corporation to personal jurisdiction." *PSC Prof. Servs. Group, Inc. v. Am. Digital Sys., Inc.* 555 F. Supp. 788, 791 n.5 (E.D. Pa. 1983); *see also Hugo v. Galant*, 1987 U.S. Dist LEXIS 3562, *3-4 (E.D. Pa. Apr. 27, 1987).

(Doc. No. 4 at 4-5.)

"Generally, a court can not assert jurisdiction over a non-resident defendant whose only contacts with the forum state are based on the defendant's role as a corporate officer." *Direct Response Media v. Fall Line Entm't, Inc.*, 1999 U.S. Dist. LEXIS 16109, No. 99-2645, 1999 WL 962542, at *4 (E.D. Pa. Oct. 20, 1999); *see also Nat'l Precast Crypt Co. v. Dy-Core of Pa., Inc.*, 785 F. Supp. 1186, 1191 (W.D. Pa. 1992) [*17] ("'Individuals performing acts in a state in their corporate capacity are not subject to the personal jurisdiction of the courts of that state for those acts.'" (quoting *Bowers v. NETI Techs., Inc.*, 690 F. Supp. 349, 357 (E.D. Pa. 1988))). However, the protections of this rule, which is commonly called the corporate or fiduciary shield doctrine, are not absolute. *Directory Dividends, Inc. v. SBC Comms., Inc.*, No. 01-1974, 2003 U.S. Dist. LEXIS 19560, at *7 (E.D. Pa. Oct. 23, 2003). An individual's status as an officer or employee of a corporation "does not provide an automatic shield for their activities." 16 James Wm. Moore, Moore's Federal Practice § 108.42[3][b][iii] (3d ed. 2000).

One commonly recognized exception to the corporate shield doctrine exists when the corporate officer or director was personally involved in tortious conduct. *See, e.g., Worldcom Techs., Inc. v. Intelnet Int'l, Inc.*, No. 00-2284, 2002 U.S. Dist. LEXIS 15892, at *11 (E.D. Pa. Aug. 22, 2002) ("This district has recognized an exception to the general rule so that personal liability may attach for torts that are committed [*18] in the corporate capacity."); *see also DaimlerChrysler Corp. v. Askinazi*, 2000 U.S. Dist. LEXIS 8740, No. 99-5581, 2000 WL 822449, at *4 (E.D. Pa. June 26, 2000); *Elbeco Inc. v. Estrella de Plato, Corp.*, 989 F. Supp. 669, 676 (E.D. Pa. 1997). Corporate officers may be individually liable for tortious conduct "if they personally took part in the commission of the tort, or if they specifically directed other officers, agents or employees of the corporation to commit the act." *Donner v. Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1233 (E.D. Pa. 1979) (citing *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978); *Zubik v. Zubik*, 384 F.2d 267, 275 (3d Cir. 1967)). Courts in this District have applied a three-prong test to determine if an officer's corporate contacts should be considered for personal jurisdiction over the officer: (1) the officer's role in the corporate structure; (2) the quality of the officer's contacts; and (3) the nature and extent of the officer's role in the alleged tortious conduct. *See, e.g., Streamlight, Inc. v. ADT Tools, Inc.*, No. 03-1481, 2003 U.S. Dist. LEXIS 19843, [*19] at *11

(E.D. Pa. Oct. 9, 2003); *Worldcom Techs. Inc.*, 2002 U.S. Dist. LEXIS 15892, at *4; *D & S Screen Fund II v. Ferrari*, 174 F. Supp. 2d 343, 347 (E.D. Pa. 2001).

1. The Role of the Individual Defendants in the Corporate Structure

The first factor requires an examination of the individual Defendants' roles in CHP's corporate structure. Here, it is undisputed that all individual Defendants play major roles in CHP. Perrotto is CHP's President, Chief Executive Officer, and one of the corporation's three directors. (Compl. PP 4, 7; Doc. No. 15 Ex. A P 8.) Alther and Lockwood are the other two members of the board of directors. Alther also serves as CHP's corporate Secretary. (Waitsman Aff. P 7.) Together, Defendants Alther and Lockwood are the controlling stockholders of CHP. (*Id.*) Consequently, we conclude that Plaintiffs have satisfied this factor for all three individual Defendants. *See Lautman v. Loewen Group, Inc.*, No. 99-55, 2000 U.S. Dist. LEXIS 8241, at *20 (E.D. Pa. June 15, 2000) (concluding that the first prong was satisfied because "the individual defendants were high-ranking corporate officials with a significant [*20] level of authority in the corporation"); *TJS Brokerage & Co. v. Mahoney*, 940 F. Supp. 784, 789 (E.D. Pa. 1996) (finding that president and controlling shareholder played a "significant role" in the corporation's structure).

2. The Quality of the Contacts of the Individual Defendants With Pennsylvania

The second relevant factor is the nature of the individual Defendants' contacts with Pennsylvania. One important element in this determination is the scope of a corporate officer's communications with parties located in the forum state. As the Supreme Court held in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985), substantial telephone and electronic communications with parties located in the forum state can qualify as sufficient minimum contacts for the exercise of personal jurisdiction. Here, Defendant Perrotto engaged in substantial telephone and email communications with Plaintiffs, who are located in Pennsylvania, during the period leading up to the LOI and continuing until its termination on March 15, 2004. (Waitsman Aff. P 12; Doc. No. 15 Ex. A P 24.) A corporate officer's actual presence during precontractual negotiations [*21] is also relevant evidence of minimum contacts. *Gen. Elec. Co.*, 270 F.3d at 150. As both parties acknowledge, Perrotto personally visited the offices of Schiller-Pfeiffer in Pennsylvania at least once during the acquisition negotiations. (Waitsman Aff. P 10; Doc. No. 15 Ex. A P 8.) This situation is similar to *Banyan Healthcare Servs., Inc. v. Laing*, No. 98-2004, 1998 U.S. Dist. LEXIS 13222 (E.D. Pa. Aug. 19, 1998), in which the Court found that personal jurisdiction existed over a corporation's CEO because he played a major role in the corporation, had numerous phone calls and electronic communications with plaintiffs during contract negotiations, and personally visited Pennsylvania to meet with plaintiff's representatives. 1998 U.S. Dist. LEXIS 13222, at *10-11. Plaintiffs have satisfied the second factor as to Perrotto.

We reach a different conclusion, however, with respect to the other two individual Defendants. Alther and Lockwood assert that they have not engaged in any business communications with Plaintiffs, nor have they personally traveled to Pennsylvania to conduct corporate business. [6] (Alther Aff. P 3; Lockwood Aff. P 3.) Their only direct contact with the [*22] forum state appears to be their signatures approving the LOI, a copy of which was transmitted via facsimile to Schiller-Pfeiffer's office in Pennsylvania. (Doc. No. 4 Ex. A.) Although in some situations "[a] single contact that creates a substantial connection with the forum can be sufficient to support the exercise of personal jurisdiction," *Miller Yacht Sales v. Smith*, 384 F.3d 93, 96 (3d Cir. 2004), Alther and Lockwood's signatures on the LOI alone is insufficient to confer personal jurisdiction. *See Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co.*, 75 F.3d 147, 151 (3d Cir. 1995) (holding that an individual defendant's breach of a single contract was insufficient grounds to exercise personal jurisdiction); *Grand Entm't Group v. Star Media Sales*, 988 F.2d 476, 482 (3d Cir. 1993) ("[A] contract alone does not 'automatically establish sufficient minimum contacts in the other party's home forum.'" (quoting *Burger King Corp.*, 471 U.S. at 478)); *Royal Gist-Brocades N.V. v. Sierra Prods., Ltd.*, No. 97-1147, 1999 U.S. Dist. LEXIS 12414, at *22 (E.D. Pa. Aug. 11, 1999) (holding that a corporate [*23] officer's signature of a distribution agreement did not confer personal jurisdiction, even though breach of that agreement was the basis for several of plaintiffs' claims). We note that Plaintiffs have not presented any evidence that CHP's corporate form is an alter ego for the activities of Alther and Lockwood, who are its controlling shareholders. *See* 4A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1069.4 (3d ed. 2002) ("If the corporation is not a viable one and the individuals are in

fact conducting personal activities and using the corporate form as a shield, a federal court may pierce the corporate veil and permit the assertion of personal jurisdiction over the individuals.") Thus, we are compelled to conclude that Plaintiffs have not carried their burden on this factor with respect to Defendants Alther and Lockwood.

> 6 Lockwood acknowledged in a subsequent affidavit that he had engaged in business communications with Schiller-Pfeiffer and traveled to its corporate offices in 1998 or 1999 as part of the initial stages of negotiations regarding cooperation over a particular product line. (Lockwood Supp. Aff. PP 5, 7.) Because these discussions occurred four or five years before the transactions at issue in this litigation and did not result in any agreement with Schiller-Pfeiffer (*id.*), we do not consider them relevant for purposes of personal jurisdiction.

[*24] 3. The Role of the Individual Defendants in the Alleged Tortious Conduct

The third and final factor to consider is the individual Defendants' role in the alleged tortious conduct. Here, Plaintiffs allege that the individual Defendants committed the intentional torts of (1) fraudulent misrepresentation regarding the termination of the proposed management buyout plan of CHP (Compl. PP 58-81) and (2) tortious interference with business relations between Schiller-Pfeiffer, JEP, and CHP (*id.* PP 84-87).

As previously discussed, Perrotto made numerous communications to Plaintiffs prior to the LOI's execution and continuing through the March 15, 2004 termination letter. (Compl. PP 29-30, 35-37, 40-41; Waitsman Aff. PP 9-12.) Plaintiffs allege that representatives of CHP, including Perrotto, intentionally misrepresented during these communications that CHP was no longer considering a management buyout when the parties signed the LOI. (Compl. PP 31-34, 38-39, 60-64, 68-69, 81.) Plaintiffs relied on these representations in conducting due diligence on CHP and engaging in final status negotiations, ultimately incurring expenses in excess of $ 300,000 for these activities. (Compl. PP [*25] 31-34, 38-39, 64, 70, 78-79; Waitsman Aff. PP 13-14.) If true, these allegations would establish a prima facie case of the tort of intentional misrepresentation. [7] Obviously, any representations made by Perrotto, the President and CEO of CHP, regarding the termination of a proposed management buyout would be critical to Plaintiffs' decision to agree to the LOI. Thus, we conclude that Plaintiffs have satisfied the third factor for Perrotto.

> 7 Under Pennsylvania law, the elements of the tort of intentional misrepresentation are (1) a representation, (2) material to the transaction at hand, (3) made falsely, with knowledge or recklessness of its falsity, (4) with the intent of misleading another into relying on it, (5) justifiable reliance on the misrepresentation, and (6) the resulting injury was proximately caused the reliance. *Bortz v. Noon*, 556 Pa. 489, 729 A.2d 555, 560 (Pa. 1999).

In contrast, Plaintiffs have not adduced any evidence that Defendants Alther and Lockwood participated in any [*26] of the allegedly tortious conduct. Plaintiffs vaguely assert that Alther and Lockwood "either directly, or through Perrotto . . . had numerous communications with Plaintiffs located in Pennsylvania," but cannot point to a single statement or representation that Alther or Lockwood made to them which could be considered fraudulent. (Doc. No. 8 at 12.) These bare allegations are insufficient for us to conclude that Plaintiffs have satisfied their burden on the third factor for Alther and Lockwood. "Once the defense [of personal jurisdiction] has been raised, then the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence . . . . At no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion." *Time Share Vacation Club*, 735 F.2d at 66 n.9.

Likewise, Plaintiffs present little evidence to support their claim of tortious interference with business relations by Alther and Lockwood to justify our exercise of personal jurisdiction over them. Plaintiffs point to a single statement allegedly made by Paul H. Ode, Jr., Counsel for CHP, to Vicki Waitsman, [*27] Counsel for Schiller-Pfeiffer and JEP, on the day after the LOI was terminated, asserting that Perrotto had engaged in management buyout discussion during the Exclusive Period with CHP and/or Alther and Lockwood. (Waitsman Aff. P 16.) Ode, however, categorically denies ever making such a statement to Waitsman (Ode Aff. P 9), and Plaintiffs do not point to any other evidence that Alther and Lockwood personally participated in any alleged management buyout discussions.

We are satisfied that at this juncture the exercise of personal jurisdiction over Alther and Lockwood would be problematic at best. Plaintiffs appear unable to satisfy their burden of establishing personal jurisdiction as to Alther and Lockwood with respect to two of the three prongs discussed above. [8] In any event, our decision to transfer this case to the United States District Court for the District of Vermont, discussed in Part IV, *infra*, obviates the necessity to resolve this issue.

8 As discussed above, once a court has determined that minimum contacts exist, it must then examine whether jurisdiction over a defendant would comport with the idea of "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. A heavy burden rests with Defendants to show that the exercise of jurisdiction would be unreasonable. *Grand Entm't Group*, 988 F.2d at 483; *see also Carteret Savings Bank*, 954 F.2d at 150 (holding that once plaintiff has made out a prima facie case of minimum contacts, "defendant 'must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable'" (quoting *Burger King Corp.*, 471 U.S. at 477)). Here, the individual Defendants limited their argument to whether they had sufficient contacts with Pennsylvania, and did not discuss whether specific jurisdiction over the individual Defendants would be unreasonable despite the presence of minimum contacts.

[*28] **IV. TRANSFER**

Defendants also request that we transfer this case to the United States District Court for the District of Vermont pursuant to 28 U.S.C. § 1404(a). Requests for transfer under § 1404(a) may be granted when venue is proper in both the original and the requested venue. [9] *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 878 (3d Cir. 1995). Under § 1404(a), district courts have wide discretion "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 101 L. Ed. 2d 22, 108 S. Ct. 2239 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964)); *see also Jumara*, 55 F.3d at 883 ("Section § 1404(a) was intended to vest district courts with broad discretion to determine . . . whether convenience and fairness considerations weigh in favor of transfer."). In determining whether a transfer is appropriate under § 1404(a), courts in the Third Circuit have considered a wide range of public and private interests. [10] *See, e.g., Precimed S.A. v. Orthogenesis, Inc.*, 2004 U.S. Dist. LEXIS 23357, No. 04-1842, 2004 WL 263059, [*29] at *4 (E.D. Pa. Nov. 17, 2004).

9 Because all Defendants are residents of the State of Vermont (Compl. PP 3-6), this action could have been brought in the District of Vermont. 28 U.S.C. § 1391(a)(1) (2000).

10 The private interests that may be considered include: (1) the plaintiff's forum preference as manifested in the original choice, (2) the defendant's preference of forum, (3) whether the claim arose elsewhere, (4) the convenience of the parties as indicated by their relative physical and financial condition, (5) the convenience of the witnesses, to the extent that the witnesses may actually be unavailable for trial in one of the fora, and (6) the location of books and records, similarly limited to the extent that the files could not be produced in the alternative forum. *Jumara*, 55 F.3d at 879 (internal citations omitted). The public interests include: (1) the enforceability of the judgment, (2) practical considerations that could make the trial easy, expeditious, or inexpensive, (3) the relative administrative difficulty in the two fora resulting from court congestion, (4) the local interest in deciding local controversies at home, (5) the public policies of the fora, and (6) the familiarity of the trial judge with the applicable state law in diversity cases. *Id.* at 879-80 (internal citations omitted).

[*30] After consideration of the relevant factors, we will exercise our discretion and transfer this case to the United States District Court for the District of Vermont. Specifically, we find compelling the interest in consolidating this action with the related litigation currently pending in the District of Vermont. It is well-settled that the presence of a related case in the proposed transferee forum is a strong reason to grant a motion for a change of venue. *See Southampton Sports Zone, Inc. v. ProBatter Sports, LLC*, 2003 U.S. Dist. LEXIS 18126, No. 03-3185, 2003 WL 22358439, at *5 (E.D. Pa. Sept. 10, 2003) ("The presence of . . . related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served

when federal cases arising out of the same circumstances and dealing with the same issues are allowed to proceed separately." (quoting *Prudential Ins. Co. of Am. v. Rodano*, 493 F. Supp. 954, 955 (E.D. Pa. 1980)); *see also Weber v. Basic Comfort, Inc.*, 155 F. Supp. 2d. 283, 286 (E.D. Pa. 2001); *Jontri Trans. Co. v. North Bank Dev. Co.*, 1990 U.S. Dist. LEXIS 10857, No. 90-2372, 1990 WL 121511, [*31] at *2 (E.D. Pa. Aug. 15, 1990). In fact, courts in this District have concluded that this factor alone is sufficient to warrant a transfer. *See, e.g., Southampton Sports Zone, Inc.* 2003 U.S. Dist. LEXIS 18126, 2003 WL 22358493, at *5 (discussing *Blanning v. Tisch*, 378 F. Supp. 1058, 1061 (E.D. Pa. 1974)).

We are satisfied that a transfer to the District of Vermont would simultaneously promote judicial economy and the interests of justice. As the Supreme Court has noted, "to permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Cont'l Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 26, 4 L. Ed. 2d 1540, 80 S. Ct. 1470 (1960). Even though the claims of the two cases here are not exactly the same, [11] they arise from the same set of facts and occurrences. If these actions were filed in the same district, consolidation would certainly be appropriate. *See* Fed. R. Civ. P. 42(a) ("When actions involving a common question of law or fact are pending before the court, . . . it may order all the [*32] actions consolidated."). Both cases also involve the common legal issue of whether Defendant CHP breached the LOI. (Compl. PP 54-57; Am. Compl. PP 41-44, *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt.).) Moreover, transferring this action will benefit all parties because

> the two actions could be consolidated before one judge thereby promoting judicial efficiency, pretrial discovery could be conducted in a more orderly manner, witnesses could be saved the time and expense of appearing at trial in more than one court, duplicative litigation involving the filing of records in both courts could be avoided eliminating unnecessary expense[,] and the possibility of inconsistent results could be avoided.

*Pall Corp. v. Bentley Lab, Inc.*, 523 F. Supp. 450, 453 (D. Del. 1981). Obviously, these factors weigh heavily in favor of transfer. [12]

> 11 In this case, Schiller-Pfeiffer and CHP claim breach of contract, promissory estoppel, fraud, and tortious interference with business relations against CHP and/or its corporate officers. (Doc. No. 7 PP 57-87.) In the Vermont action, CHP alleges fraudulent misrepresentation and fraudulent concealment against Schiller-Pfeiffer and/or its corporate officer, and also seek declaratory judgment that CHP did not breach the LOI. (Am. Compl. PP 41-48, *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, No. 04-CV-111 (D. Vt. filed May 11, 2004).).

[*33]

> 12 Court congestion may also favor transfer to the District of Vermont. In its opinion denying Schiller-Pfeiffer's motion to transfer, the Vermont District Court noted that "due to the modest caseload, this Court can address the case expeditiously." *Country Home Prods. v. Schiller-Pfeiffer, Inc.* at 17, No. 04-CV-111 (D. Vt. Nov. 19, 2004) (memorandum and order denying defendants' motion to dismiss and transfer). Although this factor is generally not worthy of great weight, *see, e.g., Penda Corp. v. STK, LLC*, No. 03-6240, 2004 WL 2004439, at *3 (E.D. Pa. Sept. 7, 2004), the District Court in Vermont considered it significant.

Plaintiffs assert that transfer of this case to the District of Vermont would violate the "first-filed" rule. (Doc. No. 17 at 3-5.) We disagree. The "first-filed" rule stands for the general proposition that "in all cases of federal concurrent jurisdiction, the court which first has possession of the subject [of the litigation] must decide it." *Am. Soc'y for Testing & Mat'ls v. Corrpro Cos.*, 254 F. Supp. 2d 578, 580 (E.D. Pa. 2003) [*34] (citing *IMS Health, Inc. v. Vitality Tech, Inc.*, 59 F. Supp. 2d454, 463 (E.D. Pa. 1999)). It is designed to "encourage[] sound judicial administration and promote[] comity among federal courts of equal rank" by granting district courts "'the power' to enjoin the subsequent prosecution of proceedings involving the same parties and the same issues already before another district court." *EEOC v. Univ. of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988), *aff'd*, 493 U.S. 182, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990). The "first-filed" rule, however, "is not a rigid or inflexible rule to be mechanically applied" in all circumstances.

*Am. Soc'y for Testing & Mat'ls*, 254 F. Supp. 2d at 580. As the Third Circuit has noted, "district courts have always had discretion to retain jurisdiction given appropriate circumstances justifying departure from the first-filed rule." *Univ. of Pa.*, 850 F.2d at 972; *see also Kellen Co. v. Calphalon Corp.*, 54 F. Supp. 2d 218, 221 (S.D.N.Y. 1999) ("The first-filed rule is not to be applied mechanically, but is intended to aid in judicial administration.").

There are several reasons why [*35] we should decline to exercise our discretion under the "first-filed" rule. Initially, the action in the District of Vermont has already progressed farther than the current case. The further progression of a case in a court of coordinate jurisdiction is one circumstance where courts in this District have declined to enforce the "first-filed" rule. *See, e.g., Dudwick Shindler Verdini, Inc. v. Crowley Bros., Inc.*, No. 99-1942, 1999 WL 374174, at *1 (E.D. Pa. July 9, 1999). Since the filing of CHP's Amended Complaint in July, 2004, the Vermont District Court has ruled on Schiller-Pfeiffer's initial Rule 12 motion and established that it has personal jurisdiction over all parties in that action. *Country Home Prods. v. Schiller-Pfeiffer, Inc.* No. 04-CV-111 (D. Vt. Nov. 19, 2004) (memorandum and order denying defendants' motion to dismiss or transfer). The Vermont Court has also denied defendants' motion to transfer the Vermont action to this District. *Id.* Next, the District of Vermont will be able to exercise personal jurisdiction over all Defendants in this action. If the case remains in this Court, we would be compelled to either (1) permit Plaintiffs to pursue [*36] jurisdictional discovery regarding Defendants Alther and Lockwood, potentially further delaying the progress of this case, or (2) outright dismiss all of Plaintiffs' claims against Alther and Lockwood, foreclosing any possibility of recovery against them. Transferring this case to the District of Vermont obviates this problem. *See Kahhan v. City of Fort Lauderdale*, 566 F. Supp. 736, 740 (E.D. Pa. 1983) ("A transfer, obviating a jurisdictional difficulty, has been found to serve the interests of justice."). Finally, transfer may be more convenient for the parties in conducting discovery and, ultimately, proceeding to trial. The Vermont District Court has noted that many of the documents and witnesses relating to this case are located in Vermont, and that much of the negotiation for the LOI also occurred in Vermont. *Id.* at 17-18.

The somewhat unusual procedural history and timing of these two actions is an additional reason for us to decline exercise the "first-filed" rule. Although Plaintiffs technically filed the first lawsuit by issuing a praecipe for writ of summons in the Court of Common Pleas, Philadelphia County, on March 17, 2004, Plaintiffs did not file [*37] a Complaint until June 30, 2004, after the case had been removed to this Court. (Doc. No. 7.) As Defendants noted in their motion to dismiss, the praecipe only identified the case as an action arising in contract, with no specific allegations regarding the exact grounds for the dispute. (Doc. No. 4 at 2.) In the meantime, Defendants filed their action in the District of Vermont on May 11, 2004. This does not appear to be a situation where Defendants acted in bad faith or engaged in forum shopping by rushing filing suit in the District of Vermont. Under the circumstances, we decline to invoke the "first-filed" rule.

Because we find that a transfer would be in the interests of justice, we will grant Defendants' Motion to transfer this action to the United States District Court for the District of Vermont.

An appropriate Order follows.

**ORDER**

AND NOW, this 1st day of December, 2004, upon consideration of Defendants' Motion to Dismiss and/or Transfer the Above Captioned Matter to the United States District Court of Vermont (Doc. No. 4, No. 04-CV-1444), it is ORDERED that:

1. Defendant Joseph M. Perrotto's motion to dismiss for lack of personal jurisdiction is DENIED; and

[*38] 2. Defendants' motion to transfer is GRANTED; and

3. Defendants Richard P. Alther and William P. Lockwood, Jr.'s motions to dismiss for lack of personal jurisdiction are DENIED as MOOT; and

4. The Clerk of Court is directed to TRANSFER this action to the United States District Court for the District of Vermont.

IT IS SO ORDERED.

S:/R. Barclay Surrick, Judge

LEONARD A. SYLK, et al., Plaintiffs, v. BARRY BERNSTEN, Defendant.

No. 1906, Commerce Program, Control Nos. 080528, 080530

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2003 Phila. Ct. Com. Pl. LEXIS 75

February 4, 2003, Decided

JUDGES: [*1] ALBERT W. SHEPPARD, JR., J.

OPINION BY: Albert W. Sheppard, Jr.

OPINION

OPINION

Albert W. Sheppard, Jr., J.

There are two sets of preliminary objections pending in this case. Plaintiff, Leonard Sylk ("Sylk"), has filed preliminary objections to the Counterclaim of defendant, Barry Bernsten ("Bernsten") (Control No. 080528). In addition, Winston J. Churchill ("Churchill") and the Churchill Family Partnership have filed preliminary objections to Bernsten's Counterclaim (Control No. 080530). [1] For the reasons discussed, this court is issuing a contemporaneous Order sustaining certain objections and overruling others.

1 The Churchill Family Partnership is a named plaintiff and counterclaim defendant, but Winston J. Churchill, as an individual, is a counterclaim defendant only.

FACTS

The Counterclaim sets forth the following factual allegations. [2]

2 For purposes of the pending objections, this court will accept the facts as presented by Bernsten.

[*2] In February, 1999, Bernsten sought funds for the development and construction of a proposed steel galvanizing plant in Estonia, and discussed the situation with Sylk. Counterclaim, P 58. Thereafter, Bernsten met with Sylk and Churchill and they discussed the possibility of investing in Bernsten's partial interest in the entity(ies) formed to construct, own and operate the proposed plant. Id. at P 59. Churchill is the general partner of the Churchill Family Partnership, a Pennsylvania limited partnership. Id. at PP 56- 57. Bernsten further states that upon information and belief, Sylk and the Churchill Family Partnership had an existing investment partnership or joint venture. Id. at P 62. Sylk, individually, and Churchill, on behalf of the Churchill Family Partnership, ultimately agreed to purchase a portion of Bernsten's interest in the entity(ies) formed to construct, own and operate the proposed plant. Id. at P 59.

According to Bernsten, he explained to Sylk and Churchill that any interest that Sylk, Churchill or the Churchill Family Partnership bought would not be a direct interest in the steel plant, and that they would not have any rights of control, [*3] such as voting rights, relating to the proposed plant. Id. at P 60. Bernsten agreed that if Sylk and the Churchill Family Partnership purchased a portion of Bernsten's interest, they would

receive a portion of Bernsten's share of profits, if and when Bernsten received any profits. Id. at P 61. On February 10, 1999, Sylk and Churchill, on behalf of the Churchill Family Partnership, gave Bernsten a letter they had prepared containing terms of the purchase of a portion of Bernsten's interest, and represented to Bernsten that the letter conformed to the agreement reached among them. Id. at PP 60, 63-64; Amended Compl., Ex. A. On February 10, 1999, Bernsten executed the letter agreement. Id. at P 66; Amended Compl., Ex. A.

In April 2000, Sylk and Churchill, on behalf of the Churchill Family Partnership, gave Bernsten a second letter, which Churchill prepared, for the purchase of an additional portion of Bernsten's interest in the subject entity(ies). Counterclaim, P 67; Amended Compl., Ex. B. According to Bernsten, Sylk and Churchill, on behalf of the Churchill Family Partnership, reiterated that they anticipated receiving a percentage of the proposed plant's profits [*4] based on their portion of Bernsten's interest, provided that profits were, in fact, distributed. Counterclaim, P 68. In addition, Sylk and the Churchill Family Partnership again agreed that they would have no ownership in the entity that would own the proposed plant. Id. at P 68. On April 25, 2000, Bernsten executed the second letter agreement. Id. at P 69; Amended Compl., Ex. B.

In his Counterclaim, Bernsten asserts that Sylk and Churchill, on behalf of the Churchill Family Partnership, intentionally and deceptively drafted the letters of February 10, 1999 and April 25, 2000 (the "Letter Agreements") to provide a basis for the argument that Bernsten must pay Sylk and the Churchill Family Partnership a portion of Bernsten's salary and expenses received by Bernsten for his work on the proposed plant. Counterclaim, P 70. Bernsten further asserts that Sylk and Churchill, on behalf of the Churchill Family Partnership, intentionally and deceptively drafted the Letter Agreements to provide a basis for the argument that if Sylk and the Churchill Family Partnership wanted to sell or transfer their interests in the proposed plant, then Bernsten would have a right of first [*5] refusal, and otherwise, the interests could be sold or transferred to any purchaser or transferee. Id. at P 71. Bernsten contends that in drafting the Letter Agreements, Sylk and Churchill intended to extort money from Bernsten by forcing him to purchase back the interests he had sold to Sylk and the Churchill Family Partnership at a commercially unreasonable price (ten million dollars), or else risk having the interests be sold to another purchaser. Id. at PP 72, 74, 81. Bernsten states that if he had known what Sylk and Churchill intended to demand, he would not have executed the Letter Agreements. Id. at P 73.In addition, Bernsten maintains that Sylk, on his own behalf and on behalf of Churchill, the Churchill Family Partnership, and the joint venture between Sylk and the Churchill Family Partnership, slandered Bernsten in order to pressure him to purchase back the interests that Sylk and the Churchill Family Partnership had previously purchased. Id. at PP 80-81. Bernsten contends that Sylk told Harvey and Babette Snyder, parents of an employee of Bernsten's, that Bernsten violated the Letter Agreements by paying for travel-related expenses in connection [*6] with Mr. and Mrs. Snyder's trip to Estonia for the groundbreaking of the proposed steel plant. Id. at PP 75-77. Bernsten further alleges that Sylk told Mr. and Mrs. Snyder that Bernsten was dishonest, had committed fraud in his business dealings, filed false tax returns, and that their son, David Snyder, should not work for Bernsten because "Bernsten would teach and train David to act dishonestly." Id. at P 78. In addition, according to Bernsten, Sylk repeated and continues to repeat those false statements to Bernsten's social friends and business associates, including Daniel Bain (Bernsten's business partner). Id. at PP 79-80.

Moreover, Bernsten asserts that in the spring of 2001, Sylk advised Bernsten that if he and the Churchill Family Partnership did not receive a portion of Bernsten's salary and expense reimbursement, or if Bernsten did not purchase their interests back for ten million dollars, then Sylk and the Churchill Family Partnership would contact Byerische Hypo-Und Vereinsbank Aktiengesellschaft, the bank which had partially financed the proposed steel plant, and tell the bank's representatives of Bernsten's "fraud." Id. at P 82 [*7] . According to Bernsten, Sylk also threatened to file suit against Bernsten for breach of the Letter Agreements. Id. Moreover, Sylk and Churchill also demanded that Bernsten enter into an additional written agreement in connection with their interests in the proposed plant. Id. at P 83. Bernsten states that the new agreement would have provided that Sylk and Churchill Family Partnership did have rights of control over the proposed plant and direct ownership in the company(ies) that would construct and run the plant. Id. at P 84.

Bernsten further states that he paid Sylk and Churchill approximately $ 75,000 of his salary to "save the proposed plant and his business relationships" and to

"prevent this blackmail." Id. at P 85. However, Bernsten did not agree to enter into a new agreement relating to the interests Sylk and the Churchill Family Partnership purchased and did not agree to purchase those interests for ten million dollars. Id. at P 86. Counsel for Bernsten apparently offered to purchase the interests back for two million dollars, but Sylk and Churchill refused that offer. Id. at P 87.

On March 5, 2002, Sylk and the Churchill Family Partnership [*8] filed an Amended Complaint alleging breach of contract and breach of fiduciary duty and good faith. Amended Compl., PP 33-42. Bernsten asserts that the plaintiffs filed this lawsuit to "cover up their extortionist conduct," and at the same time, "to force Bernsten to give into their demands." Counterclaim, PP 89-90.

On June 19, 2002, Bernsten filed an Answer, New Matter, and Counterclaim to the Amended Complaint. Bernsten's Counterclaim asserts six counts against Sylk, Churchill and the Churchill Family Partnership: fraudulent inducement (Count I), negligent misrepresentation (Count II), breach of fiduciary duty (Count III), interference with business relations (Count IV), defamation (Count V) and breach of the duty of good faith and fair dealing (Count VI).

On August 8, 2002, Sylk, as well as Churchill and the Churchill Family Partnership, filed preliminary objections to Bernsten's Counterclaim. Bernsten filed memoranda of law in opposition to both sets of objections, and Sylk then filed a reply in support of its set of objections.

## DISCUSSION

The majority of plaintiffs' preliminary objections are in the nature of demurrers. [*9] A demurrer tests the legal sufficiency of the causes of action as alleged in a complaint or counterclaim. Pa. R. Civ. P. 1028(a)(4); Tucker v. Philadelphia Daily News, 2000 PA Super 183, 757 A.2d 938, 941-42 (Pa. Super. 2000); Smith v. Wagner, 403 Pa. Super. 316, 320, 588 A.2d 1308, 1310 (1991). A demurrer admits all well-pleaded material facts set forth in the pleadings as well as all reasonable inferences, but does not admit conclusions of law. Id. Furthermore,

> it is essential that the face of the complaint [or counterclaim] indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 1999 PA Super 97, 729 A.2d 1206, 1211 (Pa. Super. 1999) (citation omitted).

### A. Sylk's Preliminary Objections to Counterclaim

1. Demurrer to Count I (Fraudulent Inducement)

Sylk first asserts that Bernsten [*10] has failed to allege a cause of action for fraudulent inducement because Bernsten does not allege that Sylk made any material misrepresentations of past or presently existing fact. Sylk's Memorandum of Law In Support of Preliminary Objections, pp. 4-5.

To state a claim of fraudulent inducement, a party must allege (1) a representation, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false, (4) with the intent of misleading another into relying on it, (5) justifiable reliance on the misrepresentation, and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citation omitted); See also Blumenstock v. Gibson, 2002 PA Super 339, 811 A.2d 1029, 1034 (Pa. Super. 2002).

Bernsten maintains that he has sufficiently alleged a fraudulent inducement claim because Sylk and Churchill prepared Letter Agreements which Bernsten executed that did not include all of the terms and conditions upon which they now rely. Counterclaim, PP 63- 64, 70-71, 93. The Counterclaim states that:

> At [*11] the time [Bernsten] entered into the Letter Agreements, [Sylk and Churchill] had no intention to accept from Bernsten only a portion of the profits but, rather, [they] at all times intended to demand from Bernsten and receive in addition to a portion of the profits, a portion of Bernsten's salary and expense reimbursements and, further, intended to extort Bernsten into repurchasing their

> interest at exorbitant prices and forcing the paying of such amounts upon the threat of defaming him, interfering with his business relationships, and initiating frivolous litigation, and to destroy his future and the investment.

Counterclaim, P 93.

The essence of Bernsten's fraudulent inducement claim, therefore, is that Sylk and Churchill represented that the Letter Agreements they prepared conformed to the agreement they had reached with Bernsten, that Sylk and Churchill misrepresented the terms of the agreement by failing to include in the Letter Agreements a description of the monies that they now claim are owed by Bernsten, that Sylk and Churchill intended to mislead Bernsten, that Bernsten justifiably relied on the misrepresentation by signing the Letter Agreements, [*12] and that he suffered damages as a result of his reliance. Thus, the misrepresentation that Bernsten asserts is actually in the nature of an omission.

An assertion of an omission may suffice as a misrepresentation under the standard for fraud. "To be actionable, a misrepresentation need not be in the form of a positive assertion but is any artifice by which a person is deceived to his disadvantage and may be by false or misleading allegations or by concealment of that which should have been disclosed, which deceives or is intended to deceive another to act upon it to his detriment." Wilson v. Donegal Mutual Insurance Co., 410 Pa. Super. 31, 41, 598 A.2d 1310, 1315 (1991), citing Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 108, 464 A.2d 1243, 1252 (1983). However, "an omission is actionable as fraud only where there is an independent duty to disclose the omitted information . . . and such an independent duty exists where the party who is alleged to be under an obligation to disclose stands in a fiduciary relationship to the party seeking disclosure . . . ." [*13] In re Estate of Evasew, 526 Pa. 98, 105, 584 A.2d 910, 913 (1990) (citation omitted). Thus, to state a claim for fraud, an assertion of an omission must be accompanied by a duty to speak. Wilson, 410 Pa. Super. at 41, 598 A.2d at 1316; Smith v. Renaut, 387 Pa. Super. 299, 306, 564 A.2d 188, 192 (1989); See also IRPC, Inc. v. Hudson United Bancorp, 2002 Phila. Ct. Com. Pl. LEXIS 77, 2002 WL 372945, *7 (Pa. Com. Pl. 2002).

Here, Sylk and Churchill did not have a duty to speak because they owed no fiduciary duties to Bernsten. A fiduciary relationship exists "when one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Commonwealth Dep't of Transp. v. E-Z Parks, Inc., 153 Pa. Commw. 258, 267, 620 A.2d 712, 717 (1993) (citations omitted). It was Bernsten, not Sylk or Churchill, who held the equity interest in the entity(ies) to own and operate the proposed steel plant, and who sold a non-voting portion [*14] of that interest. Counterclaim, PP 58-60. Bernsten's argument that Sylk and Churchill owed a fiduciary duty to him because Bernsten needed their investment is not persuasive. See Bernsten's Memorandum of Law In Opposition to Preliminary Objections, p. 15. Since they did not owe a fiduciary duty, Sylk and Churchill had no duty to disclose to Bernsten that any terms of the agreement to purchase a portion of his interests that they had discussed were not included in the Letter Agreements.

Absent a duty to speak, Sylk's and Churchill's failure to disclose any terms of their agreement in the Letter Agreements does not qualify as an omission. Wilson, 410 Pa. Super. at 41, 598 A.2d at 1316; Smith, 387 Pa. Super. at 306, 564 A.2d at 192; See also, IRPC, 2002 Phila. Ct. Com. Pl. LEXIS 77, 2002 WL 372945 at *7. Therefore, Bernsten has failed to assert the first element of a fraudulent inducement claim.

Thus, Sylk's demurrer to the fraudulent inducement claim is sustained. [3]

> 3 Sylk also asserts that Bernsten's fraudulent inducement claim should be dismissed because the parol evidence rule prohibits the court's consideration of any representations made prior to the Letter Agreements being signed because the subject of the representations are covered by the Letter Agreements. Sylk's Memorandum of Law In Support of Preliminary Objections, pp. 5-6. The court declines to analyze this parol evidence argument because the objection is sustained for the reasons discussed.

[*15]

2. Demurrer to Count II (Negligent Misrepresentation)

Similar to Sylk's argument relating to the fraudulent

inducement claim, Sylk asserts that Bernsten has failed to allege a cause of action for negligent misrepresentation because Bernsten does not allege that Sylk made material misrepresentations of past or presently existing facts. Sylk's Memorandum of Law In Support of Preliminary Objections, p. 7.

To state a claim for negligent misrepresentation, the pleadings must allege (1) a representation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known of its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Bortz, 556 Pa. at 501, 729 A.2d at 561.

Bernsten has failed to assert either a representation of a material fact, or an omission along with a duty to disclose (See Discussion, Section A.1. *supra*). Thus, Bernsten has failed to assert the first element of a negligent misrepresentation claim, and Sylk's demurrer to Count II is sustained.

3. Demurrer to Count III (Breach of Fiduciary Duty)

[*16] Sylk next argues that Bernsten's cause of action for breach of fiduciary duty fails because no fiduciary duty exists. Sylk's Memorandum of Law In Support of Preliminary Objections, pp. 9-10. In this claim, Bernsten asserts that Sylk, Churchill and the Churchill Family Partnership owed Bernsten a duty of loyalty and that they breached their fiduciary duty through fraudulent inducement, defamation and threats of litigation with the intention of interfering with the contractual relationship between Bernsten and Daniel Bain and between Bernsten and "others." Counterclaim, P 105. Bernsten asserts that "Sylk and the Churchill Defendants were, on the basis of the fact that they were sophisticated businessman [sic] who had the financing that Bernsten needed for his project, in a superior position to Bernsten because he needed their investment." Bernsten's Memorandum of Law In Opposition to Preliminary Objections, p. 15.

The determination of whether Sylk (and Churchill and the Churchill Family Partnership) owed Bernsten a fiduciary duty requires this court to consider the relative positions of the parties. "The Supreme Court has determined that [*17] a confidential relationship and the resulting fiduciary duty may attach 'wherever one occupies toward another such a position of advisor or counsellor as reasonably to inspire confidence that he will act in good faith for the other's interest.'" Basile v. H&R Block, Inc., 2001 PA Super 136, 777 A.2d 95, 101-02 (Pa. Super. 2001), *appeal denied,* 569 Pa. 714, 806 A.2d 857 (2002) (quoting Brooks v. Conston, 356 Pa. 69, 76, 51 A.2d 684, 688 (1947)). Stated in another way, a fiduciary relationship exists "when one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Commonwealth Dep't of Transp. v. E-Z Parks, Inc., 153 Pa. Commw. 258, 267, 620 A.2d 712, 717 (citations omitted), *appeal denied,* 534 Pa. 651, 627 A.2d 181 (1993). In the context of a business relationship, Pennsylvania courts have held that "[a] business association may be the basis of a confidential relationship 'only if one party surrenders substantial [*18] control over some portion of his affairs to the other.'" E-Z Parks, 153 Pa. Commw. at 269, 620 A.2d at 717, quoting In re Estate of Scott, 455 Pa. 429, 433, 316 A.2d 883, 886 (1974).

This court concludes that Sylk did not owe a fiduciary duty to Bernsten. Bernsten admits that he represented to Sylk that as of February 10, 1999, he would have an equity interest of 50% in a company(ies) to be formed which would develop, own and operate a steel galvanizing plant. Answer to Amended Complaint, P 8. Bernsten agreed to sell a portion of this interest to Sylk and the Churchill Family Partnership. Counterclaim, PP 59, 67. This court is not persuaded that, simply because Bernsten sought additional funds to offset the expenses he incurred relating to the development of the proposed plant (Counterclaim, P 58) and Sylk and Churchill Family Partnership had the funds and the motivation to purchase a portion of Bernsten's interest, a confidential relationship and resulting fiduciary duty were created. The Counterclaim fails to assert facts that show that Bernsten surrendered substantial control over his affairs as to lead to an overmastering dominance on [*19] the part of Sylk and the Churchill Family Partnership, or a weakness, dependence or justifiable trust on the part of Bernsten. Further, the fact that Churchill is an attorney does not, in and of itself, create a fiduciary duty because there is no allegation that Bernsten was his client. On the contrary, Churchill, on behalf of the Churchill Family Partnership, was on the other side of a one million dollar deal from Bernsten.

This court disagrees with Bernsten's argument that the facts as pleaded parallel the facts in Burdett v. Miller, 957 F.2d 1375 (7th Cir. 1992). [4] In that case, the appellant appealed the district court's finding that he had violated a fiduciary duty to appellee by giving misleading investment advice on which the appellee relied to her detriment. Appellant was a certified public accountant, the owner of his own accounting firm and an investment advisor to appellee. Appellee was a salesperson for a typography firm and an unsophisticated investor. Id. at 1378. Judge Posner found that appellant "cultivated a relation of trust with [appellee] over a period of years, holding himself out as an expert in a field (investments) [*20] in which she [appellee] was inexperienced and unsophisticated. He knew that she took his advice uncritically and unquestioningly . . . ." Id. at 1381. Based on these facts, the Court held that the district judge did not commit clear error in finding that the appellant owed a fiduciary duty to appellee. Id. at 1382. Unlike the facts in Burdett, this case does not reveal that Sylk (or Churchill) advised Bernsten in any regard, or that Bernsten reposed any degree of trust in Sylk (or Churchill). Instead, the Counterclaim asserts that Bernsten initiated and negotiated a sizable business transaction with Sylk and the Churchill Family Partnership.

> 4 Although this Seventh Circuit case does not constitute binding authority, this court discusses it because Bernsten relies on it in his memorandum of law. Commonwealth v. Lambert, 2000 PA Super 396, 765 A.2d 306, 315 n.4 (Pa. Super. 2000).

[*21] Our Superior Court has stated that the Supreme Court's decisions which address fiduciary duty suggest that the "disparity between the respective parties is to be adjudged subjectively, and may occur anywhere on a sliding scale of circumstances. " Basile, 777 A.2d at 102. Admitting all of the well-pleaded facts and reasonable inferences in the Counterclaim as true, there is no evidence that Sylk (or Churchill or the Churchill Family Partnership) owed a fiduciary duty to Bernsten. Thus, the demurrer to this cause of action is sustained.

4. Demurrer to Count IV (Interference with Business Relations)

Sylk also argues that Bernsten's claim for intentional interference with business relations fails because the Counterclaim does not identify the existence of any contract or prospective contract, any interference with contract or prospective contract, or any actual damages. Sylk's Memorandum of Law In Support of Preliminary Objections, pp. 11-12.

The elements of a cause of action for intentional interference with business relations are: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful [*22] action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. Pawlowski v. Smorto, 403 Pa. Super. 71, 78, 588 A.2d 36, 39-40 (1991) (to analyze the intentional interference with business relations claim, the court employed the standard for intentional interference with contractual or prospective contractual relations); See also Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (1994). To state this claim, there must be an assertion of an act which served to deprive the claimant of some benefit to which he was entitled by contract. Id. (citation omitted).

The Counterclaim does not offer sufficient allegations to support the claim of intentional interference with business relations. Bernsten states that "at all relevant times, Sylk and Churchill were aware of Bernsten's ongoing and continuing business relationship with, among others, Daniel Bain and David Snyder. [*23] " Counterclaim, P 109. Regarding David Snyder, Bernsten states that he was an employee of Bernsten, and that Sylk told Harvey and Babette Snyder that their son, David Snyder, should not work for Bernsten. Id. at P 78. Bernsten refers to Daniel Bain as his "business partner." Id. at P 80. In addition, Bernsten states that "Sylk and Churchill were aware of Bernsten's potential business relationships with PNC Bank." Id. at P 109.

Assuming these well-pleaded facts and all reasonable inferences are true, Bernsten fails to state the existence of a contractual, or prospective contractual relation between himself and a third party. There is no assertion that there was an employment contract between David Snyder and Bernsten. In fact, there is no indication of the type of work David Snyder performs. In addition, Bernsten fails to describe any contract or business dealing with Daniel Bain. The only information this court can glean from the Counterclaim regarding Daniel Bain is that he is

Bernsten's "business partner." Moreover, aside from stating that he had "potential business relationships" with PNC Bank, Bernsten fails to describe them in any way, and in any event, fails [*24] to state how Sylk or Churchill interfered with those potential relationships. As for damages, Bernsten fails to assert what actual legal damages he suffered as a result of an interference with business relations. [5] Therefore, Sylk's demurrer to Count IV is sustained.

5 Although Bernsten does not argue that his assertions regarding the bank, Byerische Hypo-Und Vereinsbank Aktiengesellschaft, state a claim for intentional interference with business relations, this court considers those allegations in that context in the interest of thoroughly studying the Counterclaim. Bernsten asserts that in the spring of 2001, Sylk advised Bernsten that if he and the Churchill Family Partnership did not receive a portion of Bernsten's salary and expense reimbursement, or if Bernsten did not purchase their interests back for ten million dollars, then Sylk and the Churchill Family Partnership would contact Byerische Hypo-Und Vereinsbank Aktiengesellschaft, the bank which had partially financed the proposed steel plant, and tell the bank's representatives of Bernsten's "fraud." Counterclaim, P 82. Upon review, these assertions do not state a claim for intentional interference with business relations because Bernsten failed to assert that Sylk or Churchill or anyone on behalf of the Churchill Family Partnership, in fact, contacted the bank.

[*25]

5. Demurrer to Count V (Defamation)

Sylk maintains that Bernsten's defamation claim is legally insufficient because it fails to identify the third parties to whom the defamatory statements were made, who heard and understood the statements to be defamatory, and the actual damages caused by the statements. Sylk's Memorandum of Law in Support of Preliminary Objections, pp. 13-14.

A claim for defamation must allege: "(1) the defamatory character of the communication; (2) publication; (3) that the communication refers to the complaining party; (4) the third party's understanding of the communication's defamatory character; and (5) injury." Raneri v. DePolo, 65 Pa. Commw. 183, 186, 441 A.2d 1373, 1375 (1982); See also 42 Pa.C.S. § 8343(a). A complaint for defamation must allege with particularity the content of the defamatory statements, the identity of the persons making such statements, and the identity of the persons to whom the statements were made. Itri v. Lewis, 281 Pa. Super. 521, 524, 422 A.2d 591, 592 (1980).

Pennsylvania courts have elaborated on the determination of whether a publication is defamatory. [*26] "A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule or injure him in his business or profession." Agriss v. Roadway Express, Inc., 334 Pa. Super. 295, 305, 483 A.2d 456, 461 (1984) (citation omitted). A publication is also defamatory if it "lower[s] a person in the estimation of the community, deter[s] third persons from associating with him, or adversely affect[s] his fitness for the proper conduct of his lawful business or profession." Green v. Mizner, 692 A.2d 169, 172 (Pa. Super. 1997).

Bernsten has asserted that Sylk, individually, and on behalf of Churchill, the Churchill Family Partnership, and the joint venture between Sylk and the Churchill Family Partnership (Counterclaim, P 62), made and published false statements to Harvey and Babette Snyder, as well as Daniel Bain. Id. at PP 78, 113. Bernsten states that "Sylk specifically falsely stated to the Snyders that Bernsten filed false tax returns and 'warned' the Snyders that their son, David, should terminate his employment with Bernsten because Bernsten would teach and train David to act dishonestly. [*27] " Id. at P 78. In addition, Bernsten states that "Sylk made the same false and fraudulent statements to Bernsten's business partner, Daniel Bain, to undermine Bernsten's relationships with his business associates." Id. at P 80. Bernsten asserts that the Snyders and Bain understood Sylk's statements to apply to Bernsten and to be defamatory. Id. at P 114. The statements were made without privilege or justification, according to Bernsten. Id. at 115. Furthermore, Bernsten asserts that he "suffered actual monetary damages as a result of the slanderous and defamatory statements made and published by Sylk including, but not limited to, additional business costs and loss of business opportunities." Id. at P 116.

Sylk argues that this defamation claim, which might be considered a slander *per se* claim, fails because

Bernsten fails to assert general damages, which has been defined as "proof that one's reputation was actually affected by the slander, or that [one] suffered personal humiliation, or both." Sylk's Memorandum of Law In Opposition to Preliminary Objections, pp. 14-15; [*28] Walker v. Grand Central Sanitation, Inc., 430 Pa. Super. 236, 246, 634 A.2d 237, 242 (Pa. Super. 1993), citing Restatement (Second) of Torts, § 573. Initially, it should be noted that in Walker, the case upon which Sylk relies, our Superior Court considered the evidence of damages as had been presented at a jury trial. The instant case is only at the nascent preliminary objection stage. Further, at this stage, the court must consider all reasonable inferences from Bernsten's assertions, and if there is any doubt, it should be resolved by the overruling of the demurrer. Bailey, 729 A.2d at 1211. One reasonable inference from Bernsten's assertion that he has suffered business costs and lost business opportunities as a result of the slander is that his reputation in the business community was actually affected by the slander. Therefore, this court finds that Bernsten has stated a legally sufficient claim for defamation, including the damages element. Sylk's demurrer to this Count V is overruled.

6. Demurrer to Count VI (Breach of Duty of Good Faith and Fair Dealing)

Sylk contends that Bernsten has failed [*29] to set forth a claim for breach of duty of good faith and fair dealing because he does not allege a breach of any agreement, and Pennsylvania law does not recognize this claim absent an underlying breach of an agreement.

The implied duty of good faith and fair dealing arises under the law of contracts. Creeger Brick and Building Supply Inc. v. Mid-State Bank and Trust Company, SEDA, 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989). There is no independent cause of action for breach of the implied duty of good faith absent an underlying breach of contract. Donahue v. Federal Express Corp., 2000 PA Super 146, 753 A.2d 238, 242 (Pa. Super. 2000).

Good faith "has been defined as honesty in fact in the conduct or transaction concerned." Heritage Surveyors & Engineers, Inc. v. National Penn Bank, 2002 PA Super 194, 801 A.2d 1248, 1253 (Pa. Super. 2002), quoting Creeger Brick, 385 Pa. Super. at 35, 560 A.2d at 153. The obligation to act in good faith in the performance of contractual duties varies within different factual contexts, but bad faith could include "evasion of the spirit of the bargain, lack of diligence [*30] and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. " Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 318, 671 A.2d 716, 721-22 (1996).

The only agreements that Bernsten refers to in the Counterclaim are what he terms the "Letter Agreements," the letters of February 10, 1999, and April 25, 2000, which Bernsten executed. Counterclaim, PP 63-64, 66-70; Amended Compl., Exs. A and B. In responding to the preliminary objections, however, Bernsten argues that the underlying agreement for his good faith and fair dealing claim is the "oral agreement which the parties entered into prior to the execution of the letter agreements." Bernsten's Memorandum of Law In Opposition to the Preliminary Objections, p. 21.

The Counterclaim describes the discussions between Sylk, Churchill and Bernsten prior to the execution of each Letter Agreement as negotiations, rather than as oral agreements separate from the Letter Agreements. Indeed, Bernsten refers to the parties' discussions as negotiations when he asserts that he relied on Sylk's and Churchill's [*31] assurances that the Letter Agreements conformed to the terms agreed to in their discussions. Counterclaim, PP 60, 64, 68, 70. (In fact, Bernsten employs this very argument for his fraudulent inducement and negligent misrepresentation claims.) Admitting all of Bernsten's well-pleaded material facts and all reasonable inferences, this court does not find that Bernsten pled in the Counterclaim any agreement which could serve as the basis for his good faith and fair dealing claim. Sylk's demurrer to this claim is sustained.

7. Objection to Strike Scandalous and Impertinent Matter

Finally, Sylk argues that pursuant to Pa. R. Civ. P. 1028(a)(2), this court should strike scandalous and impertinent matter contained in the Counterclaim, such as the terms "blackmail" and "extortion," because that matter implies criminal conduct. Sylk's Memorandum of Law in Support of Preliminary Objections, p. 16. Sylk requests that the court order Bernsten to amend the Counterclaim to delete all scandalous and impertinent matter.

"Scandalous and impertinent matter" is defined as "allegations . . . immaterial and inappropriate to the proof of the cause of action. [*32] " Common

Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 115 (Pa. Commw. 1998) (citation omitted), *aff'd*, 562 Pa. 632, 757 A.2d 367 (2000). "There is some authority for the proposition that even if the pleading . . . [is] impertinent matter, that matter need not be stricken but may be treated as 'mere surplusage' and ignored. Furthermore, the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice." Commonwealth, Dep't of Envtl. Resources v. Hartford Accident & Indem. Co., 40 Pa. Commw. 133, 137-38, 396 A.2d 885, 888 (1979) (citations omitted).

To the extent that the terms which Sylk considers scandalous and impertinent are relevant to Bernsten's defamation claim, this court will consider that language as part of Bernsten's claim. The court will ignore the remaining language and consider it "mere surplusage." Therefore, this preliminary objection is overruled.

**B. Winston J. Churchill and The Churchill Family Partnership's Preliminary Objections to Counterclaim**

Churchill and the Churchill Family Partnership also raise preliminary [*33] objections to the Counterclaim.

1. Demurrer to Counts I-VI of Counterclaim for Failure to Allege Agency

The first objection, brought by the Churchill Family Partnership only, states that Counts I-VI of the Counterclaim should be dismissed because Bernsten fails to allege that the Churchill Family Partnership authorized an agent to engage in tortious activities on its behalf, or that the Churchill Family Partnership ratified those acts. Memorandum of Law In Support of Preliminary Objections, pp. 4-5.

In response, Bernsten argues that there is no need to reach the issue of agency because he has alleged that Sylk, Churchill and the Churchill Family Partnership "all act as agents of the other" and are "bound by the tortious acts of their co-adventurers committed in furtherance of the joint venturer." Bernsten's Memorandum of Law In Opposition to Preliminary Objections, p. 5.

The court agrees with Bernsten. In a joint venture, "each joint venturer is both an agent and a principal of the joint venture." Gold & Co., Inc. v. Northeast Theater Corp., 281 Pa. Super. 69, 73 n.1, 421 A.2d 1151, 1153 n.1 (1980) [*34] (citations omitted). Similarly, "every member of a partnership is liable for a tort committed by one of the members acting in the scope of the firm business, even if the other partners did not participate in, ratify or have knowledge of the tort." Svetik v. Svetik, 377 Pa. Super. 496, 505, 547 A.2d 794, 799 (1988), *appeal denied*, 522 Pa. 604, 562 A.2d 827 (1989); See also 15 Pa.C.S. § 8325 ("Wrongful Act of Partner").

The Counterclaim asserts that Sylk and the Churchill Family Partnership entered into a joint venture or partnership together, as follows: "Sylk and the [Churchill] Family Partnership, at the direction of Churchill, were an existing investment partnership or joint venture, which investment partnership or joint venture . . . would invest in and own an interest in Bernsten's equity interest pursuant to the terms of the agreement." Counterclaim, P 62. The Counterclaim further asserts that Sylk acted in the scope of the business by investing in a portion of Bernsten's interest in the proposed steel plant. Counterclaim, PP 60, 62-64, 67. Therefore, Bernsten has sufficiently stated that Sylk, as a [*35] joint venturer or partner of the Churchill Family Partnership, acted on behalf of the Churchill Family Partnership.

Moreover, the Counterclaim asserts that Churchill acted on behalf of the Churchill Family Partnership. Counterclaim, PP 59, 62-64, 67-68, 71-72. In the February 10, 1999 letter attached as Exhibit A to the Amended Complaint (and as referenced in the Counterclaim, P 66), Winston J. Churchill signed the letter agreement on behalf of the Churchill Family Partnership. In addition, in the April 25, 2000 letter attached as Exhibit B to the Amended Complaint (and as referenced in the Counterclaim, P 67), Winston J. Churchill signed the letter agreement on behalf of the Churchill Family Partnership.

In fact, the Churchill Family Partnership is hard-pressed to argue that Churchill did not act on its behalf because in its Amended Complaint it stated that Winston J. Churchill is a general partner of Churchill Family Partnership and holds a 32% limited partnership interest in that Pennsylvania limited partnership. Amended Compl., PP 3-4. Moreover, Winston J. Churchill signed the verification to the Amended Complaint stating that he is empowered to make the verification [*36] on behalf of the Churchill Family Partnership.

Therefore, although some of Bernsten's claims against the Churchill Family Partnership fail to state a claim, as discussed below, the claims do not fail for lack of allegations regarding agency. This preliminary objection is overruled.

2. Demurrer to Counts I-V for Imposition of Punitive Damages against Churchill Family Partnership

The Churchill Family Partnership argues that Bernsten's claim for punitive damages against it in Counts I-V of the Counterclaim should be stricken because Bernsten fails to allege that Sylk or Churchill acted in a clearly outrageous manner to warrant punitive damages, on behalf of the Churchill Family Partnership, with the intent to further its interests. Memorandum of Law In Support of Preliminary Objections, pp. 5-6.

Generally, a plaintiff may recover punitive damages when the defendant's acts are the result of reckless indifference to the rights of others or an evil or malicious motive. Rizzo v. Michener, 401 Pa. Super. 47, 60, 584 A.2d 973, 979 (1990), *appeal denied,* 528 Pa. 613, 596 A.2d 159 (1991). For a defamation claim, punitive damages are available [*37] if the defamed party can show that the publisher acted with actual malice. Bargerstock v. Washington Greene Community Action Corp., 397 Pa. Super. 403, 415, 580 A.2d 361, 366 (1990), *appeal denied,* 529 Pa. 655, 604 A.2d 247 (1992). Actual malice exists if the publisher made the defamatory statement with knowledge that it was false or with reckless disregard of whether it was false. Id. (citation omitted).

Here, Bernsten has asserted that "the Counterclaim Defendants acted with oppression, fraud and malice." Counterclaim, PP 97, 117. To support the element of malice, Bernsten has further asserted that "Sylk, acting on his own behalf and on behalf of Churchill and the Family Partnership, embarked upon a concerted plan to defame Bernsten . . . in furtherance of a forced sale of their interests to Bernsten." Counterclaim, P 74. Bernsten's assertions that the defamation was a "concerted plan" meant to pressure Bernsten into buying back the interests at a commercially unreasonable price are akin to stating that Sylk knew that the statements were false, or at least, that he made them with reckless disregard of whether they were false. Counterclaim, [*38] PP 78-81, 86.

Therefore, at this stage, assuming all well-pled facts and reasonable inferences of the Counterclaim as true, this preliminary objection is overruled.

3. Demurrer to Counts I (Fraudulent Inducement) and Count II (Negligent Misrepresentation)

Churchill and the Churchill Family Partnership contend that Bernsten's claims of fraudulent inducement and negligent misrepresentation are legally insufficient. Memorandum of Law In Support of Preliminary Objections, pp. 6-8. For the reasons discussed above in Section A.1., Bernsten has failed to set forth the first element of a fraudulent inducement claim, and thus, the demurrer to that claim is sustained. In addition, for the reasons discussed in Section A.2., Bernsten has failed to set forth the first element of a negligent misrepresentation claim, and thus, the demurrer to that claim is sustained.

4. Demurrer to Count IV (Interference with Business Relations)

Churchill and the Churchill Family Partnership argue that Bernsten's claim of interference with business relations is legally insufficient. Memorandum of Law In Support of Preliminary Objections, pp. 8-9. For the reasons discussed above in Section A. [*39] 4., Bernsten fails to state a claim for interference with business relations. The demurrer to that claim is sustained.

5. Demurrer to Count V (Defamation)

Churchill and the Churchill Family Partnership urge that Bernsten's claim of defamation is legally insufficient. Memorandum of Law In Support of Preliminary Objections, p. 10. For the reasons discussed above in Sections B.1. (relating to joint ventures and agency) and A.5. (relating to defamation), the demurrer to the defamation claim is overruled.

6. Demurrer to Count VI (Breach of the Duty of Good Faith and Fair Dealing)

Churchill and the Churchill Family Partnership argue that Bernsten's claim of breach of the duty of good faith and fair dealing is legally insufficient. Memorandum of Law In Support of Preliminary Objections, p. 10. For the reasons discussed above in Section A.6., Bernsten has failed to set forth the requisite underlying breach of an agreement for this claim. Thus, the demurrer to this claim is sustained.

**CONCLUSION**

For these reasons, this court finds that:

(a) Sylk's preliminary objection to Bernsten's fraudulent inducement claim (Count I) is **Sustained;**

(b) Sylk's preliminary [*40] objection to Bernsten's negligent misrepresentation claim (Count II) is **Sustained;**

(c) Sylk's preliminary objection to Bernsten's breach of fiduciary duty claim (Count III) is **Sustained;**

(d) Sylk's preliminary objection to Bernsten's interference with business relations claim (Count IV) is **Sustained;**

(e) Sylk's preliminary objection to Bernsten's defamation claim (Count V) is **Overruled;**

(f) Sylk's preliminary objection to Bernsten's breach of duty of good faith and fair dealing claim (Count VI) is **Sustained;**

(g) Sylk's preliminary objection to strike scandalous and impertinent matter is **Overruled;**

(h) Churchill Family Partnership's preliminary objection to Bernsten's Counts I-VI for Failure to Allege Agency is **Overruled;**

(i) Churchill and Churchill Family Partnership's preliminary objection to Imposition of Punitive Damages As to Counts I-V is **Overruled** without prejudice to reassert in a future motion after the completion of discovery, if appropriate;

(j) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's fraudulent inducement and negligent misrepresentation claims (Counts I and II, respectively) [*41] is **Sustained;**

(k) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's interference with business relations claim (Count IV) is **Sustained;**

(l) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's defamation claim (Count V) is **Overruled;**

(m) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's breach of the duty of good faith and fair dealing claim (Count VI) is **Sustained.**

This court will issue a contemporaneous Order in connection with this Opinion.

**BY THE COURT,**

**ALBERT W. SHEPPARD, JR., J.**

**ORDER**

AND NOW, this 4th day of February 2003, upon consideration of: (a) Leonard A. Sylk's Preliminary Objections to defendant's Counterclaim (Control No. 080528) and the response in opposition, and (b) Winston J. Churchill and Churchill Family Partnership's Preliminary Objections to defendant's Counterclaim (Control No. 080530) and the response in opposition, the respective memoranda, all matters of record, and in accordance with the contemporaneous Opinion being filed of record, it is **ORDERED** that:

(a) Sylk's preliminary objection to [*42] Bernsten's fraudulent inducement claim (Count I) is **Sustained;**

(b) Sylk's preliminary objection to Bernsten's negligent misrepresentation claim (Count II) is **Sustained;**

(c) Sylk's preliminary objection to Bernsten's breach of fiduciary duty claim (Count III) is **Sustained;**

(d) Sylk's preliminary objection to Bernsten's interference with business relations claim (Count IV) is **Sustained;**

(e) Sylk's preliminary objection to Bernsten's defamation claim (Count V) is **Overruled;**

(f) Sylk's preliminary objection to Bernsten's breach of duty of good faith and fair dealing claim (Count VI) is **Sustained;**

(g) Sylk's preliminary objection to strike scandalous and impertinent matter is **Overruled;**

(h) Churchill Family Partnership's preliminary objection to Bernsten's Counts I-VI for Failure to Allege Agency is **Overruled;**

(i) Churchill and Churchill Family Partnership's preliminary objection to Imposition of Punitive Damages As to Counts I-V is **Overruled** without prejudice to

reassert in a future motion after the completion of discovery, if appropriate;

(j) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's [*43] fraudulent inducement and negligent misrepresentation claims (Counts I and II, respectively) is **Sustained;**

(k) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's interference with business relations claim (Count IV) is **Sustained;**

(l) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's defamation claim (Count V) is **Overruled;**

(m) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's breach of the duty of good faith and fair dealing claim (Count VI) is **Sustained.**

**BY THE COURT,**

**ALBERT W. SHEPPARD, JR., J.**

ROLAND TURK, Plaintiff, v. SALISBURY BEHAVIORAL HEALTH, INC., SALISBURY MANAGEMENT, INC., and PAUL VOLOSOV, Defendants.

CIVIL ACTION NO. 09-CV-6181

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2010 U.S. Dist. LEXIS 41640

April 27, 2010, Decided
April 27, 2010, Filed

**COUNSEL:** [*1] For ROLAND TURK, Plaintiff: TIMOTHY M. KOLMAN, LEAD ATTORNEY, ADAM C. LEASE, TIMOTHY M. KOLMAN AND ASSOCIATES, PENNDEL, PA.

For PAUL VOLOSOV, SALISBURY BEHAVIORAL HEALTH, INC., t/d/b/a SALISBURY BEHAVIORAL HEALTH, MILESTONES COMMUNITY HEALTHCARE, INC., SALISBURY HOUSE, SALISBURY MANAGEMENT, AND SALISBURY MANAGEMENT, INC., SALISBURY MANAGEMENT, INC., t/d/b/a SALISBURY BEHAVIORAL HEALTH, SALISBURY BEHAVIORAL HEALTH, INC., SALISBURY HOUSE AND MILESTONES COMMUNITY HEALTHCARE, INC., Defendants: MICHAEL D. KRISTOFCO, LEAD ATTORNEY, WISLER PEARLSTINE TALONE CRAIG, ET AL, BLUE BELL, PA.

**JUDGES:** JAN E. DUBOIS, J.

**OPINION BY:** JAN E. DUBOIS

**OPINION**

*MEMORANDUM*

**DuBOIS, J.**

Presently before the Court is defendants' Motion to Dismiss Amended Complaint (Document No. 7, filed March 15, 2010), seeking to dismiss Counts I and II of the First Amended Civil Action Complaint ("Amended Complaint") against Salisbury Management, Inc. and Paul Volosov, and to dismiss Counts IV and VI against all defendants. For the following reasons, defendants' motion is: (1) granted with prejudice as to defendant Paul Volosov with respect to Counts I and II; (2) denied as to defendant Salisbury Management, Inc. with respect to Counts I and II; and (3) granted [*2] as to all defendants with respect to Counts IV and VI, without prejudice to plaintiff's right to file a second amended complaint within twenty days, if warranted by the facts.

**I. BACKGROUND** [1]

1 These facts are taken from the Amended Complaint and the exhibits attached to defendants' motion - two EEOC Complaints filed by Turk asserting claims of age discrimination and retaliation against Salisbury Behavioral Health, Inc. and Volosov, to which reference is made in the Amended Complaint - and are presented in the light most favorable to plaintiff. In its factual analysis, the court may "consider an undisputedly authentic document that a defendant attaches as

an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

Plaintiff Roland Turk was jointly employed by defendants Salisbury Behavioral Health, Inc. ("SBH") and Salisbury Management, Inc. ("SMI") as Chief Operations Officer for approximately nine years. (Am. Compl. PP 11, 23.) SBH "directed [Turk's] work on a daily basis." (Am. Compl. P 12.) SMI provided management, payroll, and other services to SBH, and was responsible [*3] for paying Turk. (Am. Compl. PP 5, 13.) SMI and SBH have interrelated operations, common ownership and management, centralized control of labor relations, and utilize the same letterhead. (Am. Compl. PP 9-10, Ex. A.) Defendant Paul Volosov was President of both SBH and SMI during Turk's employment. (Am. Compl. P 24.)

On January 20, 2009, Volosov terminated Turk, at the age of 68, on behalf of SBH and SMI. (Am. Compl. P 27.) Following his termination, Turk filed two Equal Employment Opportunity Commission ("EEOC") Complaints charging age discrimination and retaliation against Volosov and SBH. (Defs.' Mot. Exs. A-B.) Turk's two EEOC Complaints did not name SMI as a party. (Defs.' Mot. Exs. A-B.) Turk subsequently filed suit in federal court on December 29, 2009, naming SMI and Volosov as defendants. (Compl.) Turk's Amended Complaint, filed on February 16, 2010, added SBH as a third defendant. (Am. Compl.)

In the Amended Complaint, plaintiff avers that defendants "besmirched and defamed" him by disseminating false statements about his job performance which damaged his reputation and prevented him from obtaining employment elsewhere. (Am. Compl. PP 34, 50-51, 59.) According to the Amended [*4] Complaint, defendants provided false information about the reasons for Turk's termination to his former co-workers and prospective employers. (Am. Compl. PP 34, 51, 59.)

In their motion to dismiss, defendants challenge four of the six claims in plaintiff's Amended Complaint. [2] Specifically, defendants move to dismiss Counts I and II, alleging claims of discrimination and retaliation under the Age Discrimination Employment Act ("ADEA"), against SMI and Volosov, and Counts IV, alleging defamation, and VI, alleging intentional interference with prospective contractual relations, against all three defendants.

2 Because the Amended Complaint does not specify which claims are asserted against which defendants, the Court assumes each claim is asserted against all three defendants.

## II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the Court "accept[s] all factual allegations as true, [and] construe[s] the complaint in the light most favorable to the plaintiff...." *Phillips v. County of Allegheny*, 515 F.3d 224, 231, 233 (3d Cir. 2008) [*5] (internal quotations omitted).

"To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level....'" *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). To satisfy the plausibility standard, a plaintiff's allegations must show that defendant's liability is more than "a sheer possibility." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

In *Twombly*, the Supreme Court utilized a "two-pronged approach" which it later formalized in *Iqbal*. *Iqbal*, 129 S. Ct. at 1950; *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). Under this approach, a district court first identifies those factual allegations which constitute nothing more than "legal conclusions" or "naked [*6] assertions." *Twombly*, 550 U.S. at 555, 557. Such allegations are "not entitled to the assumption of truth" and must be disregarded. *Iqbal*, 129 S. Ct. at 1950. The court then assesses "the 'nub' of the plaintiff['s] complaint - the well-pleaded, nonconclusory factual allegation[s]... to determine" whether it states a plausible claim for relief. *Id.*

## III. DISCUSSION

**A. Counts I and II: ADEA Claims**

**1. Defendant Paul Volosov**

Defendants argue that the ADEA claims in Counts I and II against Paul Volosov should be dismissed because "the ADEA does not provide for individual liability." *Hill v. Borough of Kutztown*, 455 F.3d 225, 246 n.29 (3d Cir. 2006). Plaintiff does not dispute this statement of the law and concedes that the Amended Complaint does not state any ADEA claims against Volosov. Accordingly, Counts I and II against Volosov are dismissed with prejudice.

**2. Defendant SMI**

Defendants argue that any claim against SMI under the ADEA must be dismissed because only SBH and Volosov were named in plaintiff's EEOC Complaints. A civil action under the ADEA generally may only be brought against respondents named in the EEOC complaint. *See* 29 U.S.C. § 626(d)-(e); *see also Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh*, 903 F.2d 243, 251-52 (3d Cir. 1990). [*7] [3] However, the Third Circuit has recognized an exception to this rule which permits ADEA claims to proceed against a party unnamed in an EEOC complaint if it shares an "identity of interest" with a party named in the EEOC complaint. *Id.*

> 3 Although *Schafer* is a Title VII case, the filing provisions of Title VII and ADEA are so similar that courts often apply Title VII rules to ADEA cases. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979) (concluding that Congress intended the construction of ADEA to mimic the construction of Title VII); *see also Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992) (applying *Schafer* and other Title VII doctrine to ADEA claim); *Magee v. Local 2187*, No. 05-1669, 2008 U.S. Dist. LEXIS 55433, 2008 WL 2812986, at *8 (E.D. Pa. July 21, 2008) (applying identity of interest test from *Schafer* to ADEA claim).

In *Glus v. G.C. Murphey Co.*, the Third Circuit established four factors for determining whether a party unnamed in an EEOC complaint may be sued in a civil action:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests [*8] of a named [party] are so similar as the named party that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

562 F.2d 880, 888 (3d Cir. 1977).

The Amended Complaint sets forth facts that, if viewed in the light most favorable to plaintiff, satisfy these factors. Specifically, plaintiff has alleged that SBH responded to the EEOC Complaints on SMI letterhead, that SMI was responsible for paying plaintiff, and that SBH and SMI have common ownership, management, and "centralized control of labor relations." (Am. Compl. PP 9, 13, Ex. A.) These allegations demonstrate that SMI had notice of the EEOC Complaints, and that SMI's and SBH's interests were so similar that naming both parties in the EEOC Complaints was unnecessary.

Defendants argue that because plaintiff has not alleged that he was unrepresented by counsel when he filed his [*9] EEOC Complaints, he cannot avail himself of the identity of interest exception to the EEOC exhaustion requirement. Defendants rely on *Christaldi-Smith v. JDJ, Inc.*, 367 F. Supp. 2d 756 (E.D. Pa. 2005) and *Cronin v. Martindale Andres & Co.*, 159 F. Supp. 2d 1 (E.D. Pa. 2001) in advancing this argument.. These cases hold that the identity of interest exception applies only to pro se litigants. This Court rejects those rulings.

The Third Circuit has observed that, "[t]he purpose of requiring an aggrieved party to resort first to the EEOC is twofold: to give notice to the charged party and provide an avenue for voluntary compliance without resort to litigation." *Glus*, 562 F.2d at 888. As the *Glus* factors make clear, the identity of interest exception focuses on

whether the unnamed party had notice of the EEOC complaint, and is based on "the goal of conciliation" and "the availability of complete redress." *Id.* Although the *Glus* court notes that the exception helps those unrepresented by counsel avoid a technical stumbling block, the Third Circuit did not limit the identity of interest exception to pro se litigants. Nor will this Court. So long as the *Glus* factors are satisfied, a claim under [*10] the ADEA may be brought against a party unnamed in the EEOC complaint.

Therefore, the Court concludes that Turk's ADEA claims against SMI may proceed based on the identity of interest exception, regardless of whether he was represented by counsel when he filed the EEOC Complaints. Accordingly, defendants' motion to dismiss Counts I and II against SMI is denied.

**B. Count IV: Defamation**

Defendants move to dismiss Count IV, alleging defamation based on statements made about Turk's job performance. Defendants argue that plaintiff has failed to aver sufficient facts to support a claim because the Amended Complaint does not identify any specific statements capable of defamatory meaning.

The elements of a defamation claim under Pennsylvania law are: 1) the defamatory character of the communication, 2) its publication by the defendant, 3) its application to the plaintiff, 4) the understanding by the recipient of its defamatory meaning, 5) the understanding by the recipient of it as intended to be applied to the plaintiff, 6) special harm resulting to the plaintiff from its publication, 7) abuse of a conditionally privileged occasion. *See Joseph v. Scranton Times L.P.*, 2008 PA Super 217, 959 A.2d 322, 335 (Pa. Super. Ct. 2008); [*11] 42 Pa. C.S.A. § 8343(a).

The federal pleading standards apply to state law claims asserted in federal court. *Hanna v. Plumer*, 380 U.S. 460, 473, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). However, there is a split of opinion in this District as to the level of specificity required to plead a defamation claim under Pennsylvania law. *Compare Ersek v. Twp. of Springfield*, 822 F. Supp. 218, 223 (E.D. Pa. 1993) ("A complaint for defamation must, on its face, specifically identify what allegedly defamatory statements were made by whom and to whom.") *with Reager v. Williams*, No. 3:08cv2035, 2009 U.S. Dist. LEXIS 88753, 2009 WL 3182053, at *5 (M.D. Pa. Sept. 25, 2009) (pleading of precise defamatory statements is not required "as long as the count provides sufficient notice to the defendant"); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1245 (3d ed. 2004) (questioning whether the historically stringent pleading standard for defamation survives the federal pleading rules). Even where courts apply a more liberal pleading requirement, plaintiff must nonetheless allege facts which sufficiently set forth the substance of the alleged defamatory statements to give proper notice of plaintiff's claim to defendants. *See Joyce v. Alti America, Inc.*, No. 00-5420, 2001 U.S. Dist. LEXIS 17432, 2001 WL 1251489, at *3 (E.D. Pa. Sept. 27, 2001).

Regardless [*12] of which pleading standard applies, plaintiff's Amended Complaint fails to state a claim for defamation. The Amended Complaint does not identify the substance of the alleged defamatory statements, or state the circumstances under which they were allegedly made. Rather, plaintiff merely avers in conclusory fashion that defendants "besmirched and defamed" him, and "disseminated false statements... concerning [his] job performance." (Am. Compl. PP 34, 50-51.) Furthermore, plaintiff has not identified any specific recipient of the alleged communications, and thus has failed to connect the defamatory statements to his failure to obtain a job, harm to his reputation, or any other claimed injury. As such, plaintiff has not sufficiently plead facts which satisfy the elements of defamation under Pennsylvania law. Accordingly, Count IV of the Amended Complaint is dismissed without prejudice to plaintiff's right to file a second amended complaint within twenty days, if warranted by the facts.

**C. Count VI: Interference with Prospective Contractual Relations**

Defendants also move to dismiss Count VI of the Amended Complaint, which alleges a claim of intentional interference with prospective contractual [*13] relations. Defendants argue that plaintiff has not pled sufficient facts to support this claim, including any particular contract with which defendants allegedly interfered. The Court agrees.

The elements of a claim interference with prospective contractual relations are: 1) a prospective contractual relation, 2) intent to harm the plaintiff by preventing the relation from occurring, 3) absence of privilege or justification on the defendant's part, and 4) resulted damage. *See Silver v. Mendel*, 894 F.2d 598, 602

(3d Cir. 1990) (citing *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (1979)). As to the first element, a prospective contract is something more than a mere hope, "it exists if there is a reasonable probability that a contract will arise." *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994) (quoting *Glenn v. Point Park Coll.*, 441 Pa. 474, 272 A.2d 895 (1971)).

Plaintiff alleges that, as a result of defendants "besmirch[ing] and defam[ing]" him to other agencies and by giving negative references, he has been "unable to gain other employment." (Am. Compl. P 34.) However, the Amended Complaint does not identify a single contract or job which he did not receive due to defendants' [*14] actions. *See Brunson Commc'ns, Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550, 578 (E.D. Pa. 2002) (granting motion to dismiss because plaintiff did not identify any specific prospective contract). Shorn of the legal conclusions that defendants intentionally interfered with prospective contracts, the Amended Complaint only states that plaintiff has been generally unable to obtain a job. Without more, the Amended Complaint does not state a claim for intentional interference with contractual relations. Accordingly, defendants' motion to dismiss Count VI is granted without prejudice to plaintiff's right to file a second amended complaint within twenty days, if warranted by the facts.

## IV. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted in part and denied in part. With respect to Counts I and II, defendants' motion is granted with prejudice as to defendant Volosov and denied as to defendant SMI. Defendants' motion with respect to Counts IV and VI is granted without prejudice to plaintiff's right to file a second amended complaint within twenty days, if warranted by the facts.

An appropriate order follows.

## *ORDER*

**AND NOW**, this 27th day of April, 2010, upon consideration [*15] of Defendants' Motion to Dismiss Amended Complaint (Document No. 7, filed March 15, 2010), and Plaintiff's Memorandum of Law in Opposition to the Defendants' Motion to Dismiss the Plaintiff's First Amended Complaint (Document No. 8, filed March 30, 2010), for the reasons set forth in the Memorandum dated April 27, 2010, **IT IS ORDERED** that:

1. That part of defendants' motion which seeks a dismissal of Counts I and II against Paul Volosov is **GRANTED WITH PREJUDICE**;

2. That part of defendants' motion which seeks a dismissal of Counts I and II against Salisbury Management, Inc. is **DENIED**;

3. That part of defendants' motion which seeks a dismissal of Count IV is **GRANTED WITHOUT PREJUDICE** to plaintiff's right to file a second amended complaint within twenty days, if warranted by the facts;

4. That part of defendants' motion which seeks a dismissal of Count VI is **GRANTED WITHOUT PREJUDICE** to plaintiff's right to file a second amended complaint within twenty days, if warranted by the facts.

**IT IS FURTHER ORDERED** that a preliminary pretrial conference will be scheduled in due course.

**BY THE COURT**:

/s/ **Jan E. DuBois**

**JAN E. DUBOIS, J.**

STEVEN H. UNTRACHT vs. ROBERT T. FRY, M.D.,

No. 1683

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2010 Phila. Ct. Com. Pl. LEXIS 77

April 7, 2010, Decided

SUBSEQUENT HISTORY: Affirmed without opinion by Untracht v. Fry, 2010 Pa. Super. LEXIS 7044 (Pa. Super. Ct., Nov. 22, 2010)

PRIOR HISTORY: Untracht v. Fikri, 454 F. Supp. 2d 289, 2006 U.S. Dist. LEXIS 61896 (W.D. Pa., 2006)

JUDGES: [*1] Judge John M. Younge.

OPINION BY: John M. Younge

OPINION

Younge, J.

The Plaintiff, Steven H. Untracht, filed this appeal from this Court's Order that granted a motion for judgment on the pleadings filed by the Defendant, Robert T. Fry, M.D.

I. Facts and Procedure

The Plaintiff asserts claims for defamation of character, injurious falsehood/commercial disparagement, and intentional interference with a contractual relationship or prospective contractual relationship. (The Plaintiff's Opposition to the Defendant's Motion for Judgment on the Pleadings P 1 (April 28, 2009)). He brought this claim for injuries that he alleged were caused by a negative peer review letter that was dated December 6, 2002 and written by the Defendant, who was the Chief of Colon and Rectal Surgery at the University of Pennsylvania. (Complaint P 15 (April 16, 2008)). Conemaugh Memorial Medical Center (Conemaugh) in Johnstown, Pennsylvania retained the Defendant to review the Plaintiff's unsuccessful performance of a surgery on an 85-year-old patient, Earl Esherick, who was suffering from rectal cancer. (Complaint P 4, Ex. A (April 16, 2008)).

In his peer review letter, the Defendant opined that the medical treatment offered by the Plaintiff [*2] fell far below the standard of care. He cited multiple instances of the Plaintiff's failure to exercise sound medical judgment. The Plaintiff alleges that this negative peer review letter led to the termination of his staff privileges at Conemaugh and UPMC Lee Regional Hospital (Lee). He also alleges that the Defendant's negative peer review letter made it virtually impossible for him to find comparative employment in his chosen field of expertise. (Complaint (April 16, 2008)).

On May 14, 2003, the Plaintiff filed a *pro se* compliant in the United States District Court for the Eastern District of Pennsylvania against thirty-six defendants including the Defendant named in the case *sub judice*. This action was ultimately transferred to the Western District of Pennsylvania. By Opinion and Order dated August 30, 2006, the Honorable Kim R. Gibson of the United States District Court granted summary judgment on behalf of all of the defendants including the

above-captioned Defendant. However, Judge Gibson declined to exercise supplemental jurisdiction over the Plaintiff's state law claims pursuant to 28 U.S.C. § 1367. The Plaintiff ultimately exhausted his federal appellate rights on March 17, [*3] 2008. The Opinion authored by the Honorable Kim R. Gibson contains a recitation of the facts surrounding the Plaintiff's loss of surgical privileges at Conemaugh. It reads as follows:

> Plaintiff experienced no problems or adverse action at Conemaugh until November 22, 2002 when Plaintiff operated on an 85 year old Jehovah's Witness who was suffering from colorectal cancer. The patient, Earl Esherick (hereinafter "EE"), died and on November 27, 2002, Plaintiff was informed that his clinical privileges at Conemaugh were being suspended because of this patient's death. The next day, Thanksgiving 2002, Plaintiff called Dr. Saluzzo and informed him that Plaintiff felt the patient's death was the fault of the anesthesiologists.
>
> As a result of events in the operating room that led to the patient's death, and Plaintiffs attempts to blame the anesthesiologists, the Conemaugh Credentials Committee voted to revoke his clinical privileges on December 17, 2002....
>
> On December 19, 2002 Plaintiff informed EE's family of the wrongdoing Plaintiff felt occurred in the deceased patient's care, including that the anesthesiologists were at fault, and Plaintiff assisted the family in finding an attorney to sue [*4] to protect their rights.
>
> In response to Conemaugh's vote to revoke his privileges, Plaintiff participated in Conemaugh's fair hearing process. The hearings were conducted between March 10, 2003 and May 21, 2003. During the Conemaugh fair hearing process, Plaintiff called witnesses and presented evidence and Conemaugh made a determination to suspend and/or revoke his staff privileges. The Conemaugh hearing panel determined revocation of Plaintiffs privileges was warranted based on the unprofessional nature of Plaintiffs communications with EE's family.
>
> Subsequently, Attorney Alan H. Perer, the attorney contacted by Plaintiff on behalf of EE's family, filed suit on behalf of the personal representative of EE's estate against Conemaugh and Plaintiff (no anesthesiologist or other doctors), alleging negligence on the part of Plaintiff and negligence on Conemaugh's part in granting clinical privileges to Plaintiff. The parties agreed to binding high-low arbitration, which meant that Conemaugh and Plaintiff would have to pay regardless of the outcome and the arbitration was only to determine in what amount. The arbitration was held March 10, 2005. Despite the fact the arbitrator awarded $ 375,000 [*5] to the deceased patient's personal representative, Plaintiff elects in his pleadings to this Court to characterize this as a ruling in his favor.

Untracht v. Fikri, 454 F.Supp.2d 289, 301-303 (W.D. Pa. 2006) (internal citations omitted).

The Plaintiff filed this state action against this Defendant alleging defamation of character, injurious falsehood/commercial disparagement, and intentional interference with a contractual relationship or prospective contractual relationship. These state claims are now currently under review.

**II. Standard of Review**

Pennsylvania Rule of Civil Procedure 1034 states, "(a) After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. (b) The court shall enter such judgment or order as shall be proper on the pleadings."

In McAllister v. Millville Mut. Ins. Co., 433 Pa. Super. 330, 640 A.2d 1283 (1994), the Superior Court stated:

> A motion for judgment on the pleadings should be granted only where the

> pleadings demonstrate that no genuine issue of fact exists, and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1034. Thus, a trial court must confine its consideration [*6] to the pleadings and relevant documents and accept as true all well pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed. The court may grant judgment on the pleadings only where the moving party's right to succeed is certain and the case is so free from doubt that trial would clearly be a fruitless exercise.

Id. at 640 A.2d at 1285.

**III. Discussion**

This Court granted the Defendant's motion for judgment on the pleadings because the pleadings and related documents failed to establish that the Plaintiff was entitled to financial compensation on theories of defamation of character, injurious falsehood/commercial disparagement, or intentional interference with a contractual relationship or prospective contractual relationship.

**A. Defamation of Character**

All of the pleadings and related documents failed to establish the Plaintiffs right to financial compensation for any damages alleged to have occurred on a theory of defamation as codified in 42 Pa. C.S. § 8343. [1] The statements contained in the peer review letter authored by the Defendant amount to nothing more than a mere expression of his opinion, [*7] and his opinion was not capable of having a defamatory meaning among its intended audience. Baker v. Lafayette College, 350 Pa. Super. 68, 504 A.2d 247 (1986) (where statements of opinion that did not suggest undisclosed defamatory facts were not capable of having a defamatory meaning in the context of the audience that was intended to receive those statements).

> 1 (a) BURDEN OF PLAINTIFF.-- In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised: (1) The defamatory character of the communication. (2) Its publication by the defendant. (3) Its application to the plaintiff. (4) The understanding by the recipient of its defamatory meaning. (5) The understanding by the recipient of it as intended to be applied to the plaintiff. (6) Special harm resulting to the plaintiff from its publication. (7) Abuse of a conditionally privileged occasion.

In Gordon v. Lancaster Osteopathic Hosp. Ass'n, Inc., 340 Pa. Super. 253, 489 A.2d 1364 (1985), the Court affirmed a trial court order that sustained preliminary objections in favor of the defendants and dismissed allegations of defamation from the plaintiff's complaint. In Gordon, a doctor brought suit against [*8] a hospital and several other doctors. These defendant doctors had written letters that were critical of the plaintiffs ability to practice medicine. [2] The Court in Gordon held that the communications were not capable of defamatory meaning. It wrote, "We believe that the only reasonable interpretation of these letters is that they are expressions of opinions. Opinion without more is not actionable libel." Id. at 1369. The Court went on to write, "We must conclude, after review of the context, identity of the parties and the context of the communications that the letters were not defamatory." Id. at 1370.

> 2 The Court recited the content of the letters in Gordon as follows:
>
> > We are totally unhappy and would like to present a vote of no confidence in Dr. Ivan Gordon. We all feel that we lack trust in the reporting of Dr. Gordon. We feel that the Pathology Department should be stronger as the institution grows. At this point, we would not like to go into absolute detail, but just inform you of the above opinion. [T]he department concludes that because of the difficulty in communication and lack of confidence in Dr. Ivan Gordon's work, that we regretfully recommend to you that under no circumstances [*9] shall Dr. Ivan Gordon accede the chairmanship of the department of Pathology at the Lancaster Osteopathic Hospital, and we further feel that attempts at recruitment of a pathologist should

> be actively carried out by the institution.
>
> Gordon v. Lancaster Osteopathic Hosp. Ass'n. Inc., 340 Pa. Super. 253, 258, 489 A.2d 1364, 1367 (1985).

In Constantino v. Univ. of Pittsburgh, 2001 PA Super 4, 766 A.2d 1265 (Pa. Super. 2001), the Court affirmed a trial court order that sustained preliminary objections in favor of the defendants and dismissed allegations of defamation from the plaintiff's compliant. The plaintiff in Constantino was a doctor who was a faculty member of the University of Pittsburgh. Two of the defendants were employed or otherwise associated with the co-defendant, University of Pittsburgh. These two co-defendants authored letters critical of the plaintiff's performance. These letters were forwarded to the Dean of the School of Nursing and the Chairperson of the Dean's Distinguished Award Committee. The Court agreed with the trial court's assessment that these letters were incapable of defamatory meaning. The Court reasoned, in part, that preliminary objections were properly sustained because, [*10] "[t]he letters in this case were ... directed to a particular audience whose professional duties included evaluating employees' performance and assessing their merit as teachers; therefore, this audience would not as likely be affected by any derogatory inference in the letters as might the public at large." Id. at 1270.

The fact pattern of the case *sub judice* bears some resemblance to both Gordon and Constantino. In all three cases, the letters that formed the factual basis for the defamation claim were sent to an audience whose professional duties included evaluating and assessing the plaintiff's ability to teach or practice medicine. [3] The pleadings clearly establish that the Defendant authored the allegedly defamatory letter in connection with a peer review proceeding that was being conducted by Conemaugh. A copy the Defendant's peer review letter was attached to the Plaintiff's Complaint. This peer review letter was addressed to the Chairman of the Department of Surgery at Conemaugh. The Plaintiff's Complaint avers that the peer review letter was published when it was provided to Conemaugh. (Complaint P 25 (April 16, 2008)).

> 3 The fact that the plaintiffs' defamation claims were dismissed [*11] on preliminary objection in both Gordon and Constantino does not diminish their applicability to the case *sub judice*. A preliminary objection in the nature of a demurrer is properly sustained where the court assumes that all well pled facts in the plaintiff's complaint are true and those facts fail to set forth a cause of action. Cunningham v. Prudential Prop. & Cas. Ins. Co., 340 Pa. Super. 130, 489 A.2d 875, 877 (Pa. Super. 1985)

A plain reading of the peer review letter illustrates that it was not defamatory within the context of its publication. This letter does nothing more than state the Defendant's professional opinion as to the Plaintiff's breach of the standard of care in performing surgery on his 85-year-old patient. This statement of a medical opinion in connection with a peer review proceeding is not capable of having a defamatory meaning. The letter was intended for the medical professional community at Conemaugh, which was specifically in charge of evaluating the Plaintiff's professional conduct. This audience was qualified to evaluate the merits of the opinions in the Defendant's negative peer review letter.

Noteworthy is the fact that experts in medical malpractice litigation routinely offer [*12] opinions as to breach of the standard of care and causation. This Court is unaware of a single instance where an expert who testified before it was sued for defamation of character for offering a negative expert opinion in open court.

**B. Injurious Falsehood and Commercial Disparagement**

The Plaintiffs claim for injurious falsehood and commercial disparagement must fail for the same reason as the Plaintiff's claim for defamation of character. The negative peer review letter was simply incapable of having a defamatory meaning in the context of its publication in relationship to the peer review process. It was clear that the Defendant was expressing his opinions to a reasonable degree of medical certainty when he authored the negative peer review letter and these opinions are not actionable. Richard G. Phillips Assocs. v. Selig, 2006 Phila. Ct. Com. Pl. LEXIS 386 (2006) (wherein the court held that the plaintiff's claims for injurious falsehood and commercial disparagement failed because the statements at issue were mere opinions incapable of having a defamatory meaning).

A cause of action for injurious falsehood or

commercial disparagement is closely related to a cause of action for defamation [*13] of character. Pro Golf Mfg. v. Tribune Review Newspaper Co., 570 Pa. 242, 809 A.2d 243 (2002). The difference between these two torts is largely explained by the interests each tort is intended to protect. Defamation of character protects one's character and reputation. Injurious falsehood/commercial disparagement protects economic interests providing redress to one who suffers pecuniary loss from slurs affecting the marketability of his or her goods. Zerpol Corp. v. DMP Corp., 561 F. Supp. 404, 408 (E.D. Pa. 1983).

**C. Intentional Interference with a Contractual Relationship or Prospective Contractual Relationship**

The pleadings and related documents failed to establish the Plaintiffs right to financial compensation on a theory of intentional interference with a contractual relationship or prospective contractual relationship.

The Plaintiff's allegation that the Defendant's negative peer review letter interfered with his existing contractual relationships does not stand up to logical analysis. In order to state a cause of action for interference with existing contractual relationships, the Plaintiff would have to allege: (1) the existence of a contractual relationship between himself and [*14] a third party; (2) an intent on the part of the Defendant to harm the Plaintiff by interfering with that contractual relationship; (3) the absence of privilege or justification on the part of the Defendant; and (4) the occasioning of actual damage as a result of Defendant's conduct. Restatement (Second) of Torts § 766; Small v. Juniata Coll., 452 Pa. Super. 410, 682 A.2d 350, 354 (Pa. Super. 1996), *appeal denied*, - 547 Pa. 731, 689 A.2d 235 (Pa. 1997); Triffin v. Janssen, 426 Pa. Super. 57, 626 A.2d 571, 574 (Pa. Super. 1993), *appeal denied*, 536 Pa. 646, 639 A.2d 32 (1994).

Focusing specifically on the first element in the above-referenced test, the Court in Curran v. Children's Serv. Ctr. of Wyoming County, Inc., 396 Pa. Super. 29, 578 A.2d 8 (1990), affirmed a trial court order that granted a defense motion for summary judgment on a claim for intentional interference with a contractual relationship. That case involved a psychologist who sued the Children's Service Center of Wyoming County, Inc. and the clinical director of the program where he worked prior to his termination. The Court reasoned that under the facts of that case, there was no third party against whom an action for [*15] intentional interference with a contractual relationship could lie. The psychologist was employed by the Children's Service Center and the clinical director was acting as an agent of the Children's Service Center when he terminated the psychologist. Id. at 40, 13.

The pleadings and related documents, in the case *sub judice*, completely failed to show that the Defendant interfered with an existing contractual relationship with a third party as required by the first element in the above-referenced test. In count three of his Complaint, the Plaintiff only identifies two business relationships that he alleges were destroyed by the Defendant's negative peer review letter--these relationships were with Conemaugh and Lee. Any alleged contractual relationship with Conemaugh would be insufficient to qualify as a third party contractual relationship in the context of this case. The pleadings establish that the Defendant was retained by Conemaugh in connection with its peer review process and that the Defendant authored his letter in connection with that process. It cannot be said that the Defendant interfered with the contract of a third party when he participated in a peer review that was specifically [*16] requested by Conemaugh. In this regard the Defendant was acting as Conemaugh's agent; therefore, no third party contractual relationship can be established. Rutherfoord v. Presbyterian-University Hosp., 417 Pa. Super. 316, 612 A.2d 500 (1992) (affirming an order granting summary judgment on a claim of interference with a contractual relationship where the defendants were acting as duly appointed agents of the hospital and enjoyed privilege to terminate the plaintiff). [4]

> 4 In Rutherfoord, the Court upheld a grant of summary judgment despite the plaintiff's allegation that his cause of action remained "viable because an agent is liable for intentional interference if he or she intentionally and improperly induces his principal to break its contract with a third person." Id. at 333, 508. The Court reasoned that the agents in that case enjoyed the privilege to terminate the plaintiff. It stated, "Pennsylvania law recognizes that corporate officers, directors, and other management personnel have a privilege to cause the corporate employer to terminate an employee." Id.

It is impossible to believe that the Defendant's negative peer review letter interfered with any business relationship that [*17] the Plaintiff had with Lee. This Court takes judicial notice of the Opinion authored by the Honorable Kim R. Gibson, which is properly part of the record in the case *sub judice*. Bykowski v. Chesed, Co., 425 Pa. Super. 595, 625 A.2d 1256, 1258, n.4 (Pa. Super. 1993) (stating that the court has the right to take notice of publicly filed documents when reviewing a preliminary objection). According to the Opinion authored by the Honorable Kim R. Gibson, Lee had begun to take action against the Plaintiff's clinical privileges as early as 1999 when it hired Dr. Millburn Jessup to provide an outside review of Plaintiffs conduct. Judge Gibson wrote, "Dr. Jessup offered a report dated September 1, 1999 in which he found that [the] Plaintiff displayed poor judgment in two of the nine cases submitted to him for review, both of which involved fatalities." Untracht v. Fikri, 454 F. Supp. 2d 289, 296 (2006). The peer review letter at issue in the case *sub judice* is dated December 6, 2002. Clearly, the Plaintiff's business relationship with Lee was questionable prior to the Defendant authoring his negative peer review letter.

The Plaintiff's allegation that the Defendant's negative peer review letter interfered with [*18] his prospective contractual relationships does not stand up to logical analysis. The Plaintiff completely failed to identify any prospective contractual relationship that was interfered with by the Defendant. To establish a claim for interference with a prospective contractual relationship, the Plaintiff would have to allege (1) the existence of a prospective contractual relationship; (2) the Defendant purposefully or intentionally harmed the Plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the Defendant; and (4) the occasioning of actual damage resulting from the Defendant's conduct. Restatement (Second) of Torts § 766B; Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 209, 412 A.2d 466, 471 (1979).

Focusing specifically on the first element in the above-referenced test, the Supreme Court in Thompson Coal Co. declined to find a prospective contractual relationship based on evidence that the parties had renewed a year-to-year lease for mineral rights for ten consecutive years. Id. at 210, 472. The Supreme Court wrote that defining a "prospective contractual relationship" can be difficult; "[t]o a certain extent, the term [*19] has an evasive quality, eluding precise definition. It is something less than a contractual right, something more than a mere hope." Id. at 209, 471. In determining the "reasonable likelihood or probability" of a prospective contractual relationship, courts must apply an objective standard that requires more than the existence of a current business or contractual relationship. Id.

In the third count of his Complaint, the Plaintiff alleges that the negative peer review letter interfered with his ability to contract with potential or prospective employers (Complaint P 43-44 (April 16, 2008)). A plain reading of the third count (Id. at P40-45) illustrates the Plaintiff's complete failure to identify a single potential employer or prospective relationship that was lost based on the negative peer review letter. Based on the Court's holding in Thompson, mere hope of future employment is insufficient to support a claim.

**IV. Conclusion**

For these reasons, this Court requests that the Superior Court affirm its order that granted the Defendant's motion for judgment on the pleadings and dismissed the Plaintiff's Complaint.

BY THE COURT:

/s/ John M. Younge

Judge John M. Younge

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Addendum to Memorandum in Support of Preliminary Objections has on this date been forwarded to the individuals listed below as addressed, by first class mail, postage prepaid:

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