

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

TOP QUALITY MANUFACTURING,	:	
INC. and CHARLES RABBIE	:	
	:	
Plaintiffs,	:	February Term 2004
v.	:	
	:	No.: 03323
MARC SINKOW, JODI SINKOW,	:	
MARCON RUBBER INDUSTRY, SDN,	:	Commerce Program
BHD, MARSIN MEDICAL	:	
INTERNATIONAL, INC., MARC	:	Control No.: 041818
SINKOW AND SHERYL SINKOW, AS	:	
TRUSTEES OF THE TRUST UNDER	:	
WILL OF ADOLPH SINKOW AND AS	:	
TRUSTEES OF THE TRUST UNDER	:	
WILL OF MARILYN SINKOW, TRUST	:	
UNDER WILL OF ADOLPH SINKOW,	:	
TRUST UNDER WILL OF MARILYN	:	
SINKOW, and DOES 1-10, INCLUSIVE	:	
	:	
Defendants	:	

ORDER and MEMORANDUM

AND NOW, this 3rd day of November, 2004, upon consideration of Defendants' Preliminary Objections to Plaintiffs' Complaint and Plaintiffs' Response thereto, it is hereby **ORDERED** and **DECREED** as follows:

- 1) Defendants' Preliminary Objection to Plaintiffs' standing is **OVERRULED**;
- 2) Defendants' Preliminary Objection to Plaintiffs' request for a jury trial is **SUSTAINED** and Plaintiff's demand for a jury is hereby stricken from the Complaint;
- 3) Defendants' Preliminary Objection to Plaintiffs' bringing both legal and equitable claims is **OVERRULED**; and

- 4) Defendants' Preliminary Objection to Plaintiffs' request for punitive damages is **SUSTAINED** and all references to punitive damages are hereby stricken from the Complaint.

Defendants are further ORDERED to file an answer to the remaining averments in Plaintiffs' Complaint within twenty (20) days of this Order.

BY THE COURT,

GENE D. COHEN, J.

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SINKOW, and DOES 1-10, INCLUSIVE	:	
	:	
Defendants	:	

MEMORANDUM OPINION

COHEN, J.

Presently before the court are the Preliminary Objections of Defendants to the Complaint of Plaintiffs. For the reasons that follow, the court overrules in part and sustains in part Defendants' Preliminary Objections.

BACKGROUND

The conflict between Plaintiffs Top Quality Manufacturing, Inc. ("Top Quality"), and Charles Rabbie ("Rabbie") and the several Defendants derives from a series of disputes between the two shareholders of a close corporation over several of the company's transactions. Plaintiff brings causes of action for breach of fiduciary duty,

conspiracy to induce breach of fiduciary duty, misuse and misappropriation of corporate funds, equitable restitution, and an accounting (Count I), breach of contract (Count II), declaratory judgment (Count III), and unjust enrichment (Counts I, IV, and V).

Defendants challenge the individual Plaintiff's standing to bring an action on behalf of the corporate Plaintiff and seek to strike Plaintiffs' jury demand, entire complaint, and claims for punitive damages.

DISCUSSION

Defendants dispute Rabbie's standing to bring this suit on behalf of Top Quality without first making a demand on the board of directors of Top Quality. Plaintiffs contend that such a demand is excused and Rabbie may institute a direct action.

In Cuker v. Mikalauskas, 547 Pa. 600, 692 A.2d 1042 (1997), the Pennsylvania Supreme Court adopted the American Law Institute Principles of Corporate Governance (the "Principles") with respect to standing to maintain a derivative action. In that case, the Court noted that its adoption of the Principles was not exclusive to the sections it had examined and that other courts were free to rely on the Principles as necessary. Id., at 1049 n.5. Both parties agree that Section 7.01(d) of the Principles governs in this instance because Top Quality is a close corporation. See, e.g., Baron v. Pritzker, 52 Pa. D. & C. 4th 14 (C.P. Phila. March 6, 2001) (using Section 7.01(d)); Levin v. Schiffman, 54 Pa. D. & C. 4th 152 (C.P. Phila. Feb. 1, 2001) (same).

Section 7.01(d) identifies a tripartite test for determining when demand is excused and a direct action shall proceed. Demand need not occur if (1) it will not expose the corporation or defendants to a multiplicity of actions, (2) the corporation's creditors will

not be prejudiced, and (3) it will not interfere with a fair recovery. Principles, Section 7.01(d). Neither the action nor the recovery aspects of this test are implicated in this case because Rabbie and Marc Sinkow are the only shareholders of Top Quality (Complaint, ¶2). Any derivative actions must be instituted by one of them and any recovery must flow to either of them or the corporation. There is no indication that creditors would be prejudiced by Rabbie proceeding directly. Therefore, Defendants' objection is overruled.

Defendants seek to strike Plaintiffs' request for a jury trial because the Plaintiffs have asserted both legal and equitable claims arising out of the same underlying transactions and occurrences. Plaintiffs concede Defendants' argument, but seek to delay the court's resolution of this issue, pending further factual development of the claim.

The court notes that the Complaint contains both legal and equitable claims. In Count I of the Complaint, for example, Plaintiffs assert claims for Unjust Enrichment, Breach of Fiduciary Duty, Conspiracy to Induce Breach of Fiduciary Duty, Misuse and Misappropriation of Corporate Funds, Equitable Restitution, and for an Accounting. This laundry list method of asserting claims violates Rule 1020 of the Pennsylvania Rules of Civil Procedure. Under Pa. R.C.P. 1020, each cause of action shall be stated in a different count. The court sustains Defendants' objection and strikes Plaintiff's request for a jury trial.

Defendants seek to dismiss the Complaint for asserting both legal and equitable causes of action in the same complaint. This argument is without merit. Pa. R.C.P. 1020 mandates that all causes of action arising out of the same transaction or occurrence be joined in a single action. The case cited by Defendants, Philadelphia v. Pennrose Management Co., 142 Pa. Cmwlth. 627, 598 A.2d 105 (1991), is not to the contrary. The

Commonwealth Court stated that legal and equitable causes of action could not be joined in Pennrose because they did not arise from a single occurrence. Id., at 636. Defendants' objection is overruled.

Defendants seek to strike Plaintiffs' claims for punitive damages under Counts I and II of the Complaint on the basis that these are not the types of claim for which such damages are assessed. Plaintiffs concede they cannot recover punitive damages for a breach of contract, but dispute Defendants' characterization of the other claims.

In Pennsylvania, punitive damages are only awarded for "outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." Viener v. Jacobs, 834 A.2d 546, 560-61 (Pa. Super. 2003). No punitive damages are permitted for breach of contract. See, e.g., Rittenhouse Regency Affiliates v. Passen, 333 Pa. Super. 613, 615, 482 A.2d 1042 (1984). Plaintiffs contend that "the intentional and willful conduct" on the part of Marc Sinkow, Jodi Sinkow, and Does 1-10 entitle them to punitive damages. This recitation does not establish a basis for such an award. Therefore, Defendants' objection is sustained.

BY THE COURT,

GENE D. COHEN, J.