UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: **National Century Financial Enterprises, Inc. Financial Investment Litigation.**	**Case No. 2:03-MD-1565-JLG-MRA** **Judge Graham** **Magistrate Judge Abel**

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Rebecca S. Parrett, Plaintiff, vs. Bank One, N.A., et al., Defendants.	No. CIV-03-541 PHX-MHM

PLAINTIFF REBECCA PARRETT'S CONSOLIDATED RESPONSE TO DEFENDANTS' CONSOLIDATED AND SEPARATE MOTIONS TO DISMISS; and JOINDER WITH THE ARIZONA NOTEHOLDERS' CONSOLIDATED AND SEPARATE RESPONSES TO DEFENDANTS' CONSOLIDATED MOTIONS TO DISMISS

As set forth in the following supporting memorandum, Plaintiff Rebecca S. Parrett ("Parrett"), hereby responds to and opposes the consolidated substantive motions to dismiss filed by Defendants Bank One, N.A., and Bank One Corporation (collectively, "Bank One"), J.P. Morgan Chase & Co., JPMorgan Chase Bank and The Beacon Group, LLC (collectively, "JPMorgan"), The Beacon Group III – Focus Value Fund, L.P. ("Focus Value"), Deloitte & Touche LLP ("D&T"), PricewaterhouseCoopers LLP ("PwC"), Purcell & Scott, Co. L.P.A., Scott & Purcell Co., L.P.A., Cary W. Purcell and Joanne D. Purcell (collectively, "Purcell"), Harold W. Pote, Thomas G. Mendell and Eric R. Wilkinson (collectively "JPM Directors"), and Ayers and E&D Investments, Inc. (collectively, "Ayers"), and the separate substantive motions to dismiss filed by Defendants Credit Suisse First Boston LLC ("CSFB"), and Kuld Corporation, Lance K. Poulsen and Barbara L. Poulsen (collectively, "Poulsen").

Many of the reasons that these Defendants state in their motions to dismiss the complaint in this case are the same or similar to the reasons they also state in their consolidated and/or separate motions to dismiss the complaints in the following cases that are part of this multidistrict litigation: *City of Chandler v. Bank One, N.A.*, No. CIV 03-1220-PHX-ROS (D. Ariz.), *State of Arizona, et al. v. Credit Suisse First Boston Corp., et al.*, No. CIV 03-1618-PHX-FJM (D. Ariz.), *Crown Cork & Seal Company, Inc. Master Retirement Trust, et al. v. Credit Suisse First Boston Corp., et al*., No. 03-CIV-2084-PHX-PGR (D. Ariz.) (collectively, "the AZ Noteholders cases"), *Pharos Capital Partners, L.P. v. Deloite & Touche, LLP, et al.*, No. 2:03cv362 (S.D. Ohio) ("the Pharos case"), *ING Bank, N.V. v. J.P. Morgan Chase Bank, et al.*, No. 03 Civ. 7396 (LAK) (S.D.N.Y.) ("the ING Bank" case), and *Metropolitan Life Ins. Co., et al. v. Bank One, N.A., et al.*, No. CV03-1882 (D.N.J.) and *Lloyds TSB Bank plc v. Bank One, N.A., et al.*, No. CV03-2784 (D.N.J.) (collectively, "the MetLife-Lloyds cases").

Therefore, to the extent that Defendants' motions contain issues common to the complaint in this case and the complaints in these other cases, and except for anything that asserts any wrongdoing or liability on her part, Parrett joins with and incorporates herein by reference the arguments and authority set forth in the following responses that have been filed by the other Plaintiffs with their Docket filing number denoted by "Dk."[1]:

- Arizona Noteholder Plaintiffs' Consolidated Master Brief in Response and Opposition to all Motions to Dismiss Their Claims (Dk. 288/290/293)[2];
- Arizona Noteholder Plaintiffs' Response to The Beacon Group III – Focus Value Fund, L.P.'s Amended Consolidated Motion to Dismiss the Complaints (Dk. 280);
- Arizona Noteholder Plaintiffs' Response to Credit Suisse First Boston's Consolidated Motion to Dismiss (Dk. 281);

[1] For the sake of brevity, following this initial listing of documents by name, these documents will be referred to only by their Docket number.

[2] The AZ Noteholders' master brief apparently was filed three times and automatically assigned three separate Docket filing numbers.

- Arizona Noteholder Plaintiffs' Response to the Founder Defendants' Motions to Dismiss (Dk. 278);

- Arizona Noteholder Plaintiffs' Response to Purcell & Scott LLP's Motion to Dismiss (Dk. 282);

- Arizona Noteholder Plaintiffs' Response to the JPM Directors' Motion to Dismiss (Dk. 283);

- Arizona Noteholder Plaintiffs' Response in Opposition to Deloitte Touche and PricewaterhouseCoopers' Motions to Dismiss (Dk. 284);

- Arizona Noteholder Plaintiffs' Response to Consolidated Motions to Dismiss by JP Morgan Defendants and Bank One Defendants (Dk. 285);

- Plaintiff Pharos Capital Partners, L.P.'s Memorandum of Law in Opposition to Defendant Deloitte & Touche LLP's Consolidated Motion to Dismiss the Complaints (Dk. 269);

- Response of Plaintiff Pharos Capital Partners, L.P. to Defendants Harold W. Pote's, Thomas G. Mendell's, and Eric R. Wilkinson's Consolidated Motion to Dismiss (Dk. 270);

- Response of Plaintiff Pharos Capital Partners, L.P. to Defendant JPMorgan Chase Bank's Consolidated Motion to Dismiss (Dk. 315);

- Response of Plaintiff Pharos Capital Partners, L.P. to Defendant Purcell & Scott's Motion to Dismiss (Dk. 317);

- Consolidated Opposition of Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company and Lloyds TSB Bank PLC to the Motion to Dismiss of Bank One, N.A. (Dk. 258);

- Lloyds TSB Bank PLC's Opposition to Deloitte & Touche LLP's Consolidated Motion to Dismiss the Complaints (Dk. 259);

- Consolidated Opposition of Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company and Lloyds TSB Bank PLC to the Motions to Dismiss of J.P. Morgan Chase & Co., JPMorgan Partners, LLC, JPMorgan Chase Bank, The Beacon Group, LLC, and The Beacon Group III – Focus Value Fund, L.P. (Dk. 260);

- Consolidated Opposition of Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company and Lloyds TSB Bank PLC to the Motion to Dismiss of Defendant Lance K. Poulsen and the Consolidated Motion to Dismiss of Defendants Harold W. Pote, Thomas G. Mendell, and Eric R. Wilkinson (Dk. 261);

- Consolidated Opposition of Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company and Lloyds TSB Bank PLC to the Motions to Dismiss of

Credit Suisse First Boston, Credit Suisse First Boston LLC and Banc One Capital Markets, Inc. (Dk. 262);

- Memorandum of Law of ING Bank N.V. in Opposition to Defendants Harold W. Pote's, Thomas G. Mendell's and Eric R. Wilkinson's Consolidated Motion to Dismiss All Claims (Dk. 286);

- ING Bank N.V.'s Memorandum of Law in Opposition to the Motion of JP Morgan Chase Bank to Dismiss the Complaint (Dk. 287); and

- ING Bank N.V.'s Memorandum of Law in Opposition to Defendant Deloitte & Touche LLP's Consolidated Motion to Dismiss the Complaints (Dk. 289).

MEMORANDUM IN SUPPORT OF PARRETT'S RESPONSE AND JOINDER RELATING TO DEFENDANTS' MOTIONS TO DISMISS

I. *COMMON ISSUES IN DEFENDANTS' CONSOLIDATED MOTIONS TO DISMISS*

In their consolidated motions to dismiss the complaint in this case, as well as the complaints in the AZ Noteholders, Pharos, ING Bank and MetLife/Lloyds cases, Bank One, JPMorgan, Focus Value, D&T, PwC, Purcell, JPM Directors and Ayers list a virtual litany of common reasons why the complaints in all of these cases are deficient. Because many of the underlying factual allegations in these other complaints are virtually identical or very similar in many respects to the underlying factual allegations in the Parrett complaint,[3] the arguments and authority in these other Plaintiffs' consolidated and separate responses to these Defendants' motions to dismiss that address these common issues also apply equally to demonstrate why the Parrett complaint is not deficient. Therefore, Parrett will not waste the Court's time by repeating these common arguments and authority, which already comprise several hundred pages.

Although Parrett's complaint does not allege any securities fraud claims because she was not defrauded by these Defendants as an investor, even those arguments and that authority in the

[3] In fact, the Parrett complaint was the first complaint to be filed arising out of the collapse of National Century Financial Enterprises, Inc. ("NCFE"), and it served as the model and provided the framework for the complaints that the other Plaintiffs subsequently filed.

other Plaintiffs' responses that relate specifically to their securities fraud claims apply by analogy to Parrett's claims. Those issues that these Defendants raise in their respective motions to dismiss that are common to Parrett's complaint and the other complaints, and the respective sections of the other Plaintiffs' responses thereto, including both those that are directly related, and by analogy are related to Parrett's claims, that Parrett joins and adopts, subject to the exceptions noted above, are described more specifically in the following sections.[4]

A. Violation of Rule 8(a)

In their respective motions, many Defendants assert that Parrett's and most of the other Plaintiffs' complaints violate Rule 8(a), Fed. R. Civ. P., which provides that "[a] pleading which sets forth a claim for relief … shall contain … a short and plain statement of the claim showing that the pleader is entitled to relief …." As the AZ Noteholders point out in their Consolidated Master Brief, it is incongruous, to say the least, for these Defendants to argue on one hand that a complaint violates the notice pleading requirements of Rule 8(a), Fed. R. Civ. P., while on the other hand argue that the same complaint does not plead fraud with the sufficient particularity required by Rule 9(b), which is discussed in the following section. Defendants can't have it both ways — they cannot complain that the factual allegations are too long, and at the same time complain that they're too short.

In any event, subject to the exceptions noted above, Parrett responds by adopting, the following sections of the AZ Noteholders, Pharos and MetLife/Lloyds responses, which fully address this issue and are applicable to the objections to her complaint directly and/or by analogy:

[4] In addition to the specific sections of the other Plaintiffs' responses listed in the following sections of this response, subject to the exceptions noted above, Parrett also joins and incorporates herein by reference the introductory, facts, factual background and standard of review sections contained in the other Plaintiffs' responses.

Dk. 278 § I(A); Dk. 280 § II; Dk. 281 § I(A); Dk. 283) § I(A); Dk. 270 § IV(B)(3); Dk. 261 § II(B); and Dk. 262 § II(B).

B. Failure to Plead Fraud with Particularly Under Rule 9(b)

In their respective motions, many Defendants assert that the fraud claims alleged in Parrett's and the other Plaintiffs' complaints are not pleaded with sufficient particularity in accordance with Rule 9(b), Fed. R. Civ. P. Again, after having just complained that Parrett's complaint is too long, Defendants turn around and complain that it is too short, that it does not contain enough particularity to sufficiently plead fraud. While the Parrett complaint is shorter than most of the other complaints, it still consists of 50 pages with 185 paragraphs of allegations and nine exhibits comprising a total of some 350 pages, which is more than enough to apprise these Defendants of the particulars of the fraud claims against them.

In any event, subject to the exceptions noted above, Parrett responds by adopting, the following sections of the other Plaintiffs' responses, which fully address this issue and are applicable to the objections to her complaint directly and/or by analogy: Dk. 288/290/293 § III (except subsection D); Dk. 278 § I(B); Dk. 280 § I; Dk. 281 § I(B); Dk. 282 § III(B); Dk. 283 §§ I(B) and II; Dk. 284 § VI(A); Dk. 285 §§ II and VI; Dk. 286 § I; Dk. 289 § III; Dk. 269 § VI(D); Dk. 270 § IV(B); Dk. 259 § III(A); Dk. 261 § II(A); and Dk. 262 §§ II(A) and IV(B).

C. Failure to Plead Misrepresentations, Reliance or Scienter

In their respective motions, many Defendants challenge various claims alleged in Parrett's and the other Plaintiffs' complaints on the grounds that there is a lack of allegations pertaining to these Defendants' misrepresentations and scienter and the Plaintiffs' reliance. Subject to the exceptions noted above, Parrett responds by adopting, the following sections of the other Plaintiffs' responses, which fully address these issues and are applicable to the objections to her complaint directly and/or by analogy: Dk. 288/290/293 § V (except subsection D); Dk. 278 §

I(B); Dk. 280 § I; Dk. 281 §§ I(C) and II; Dk. 282 § III(B) and V; Dk. 283 §§ I and II; Dk. 284 §§ I-V; Dk. 285 §§ II and V; Dk. 259 § III(B); Dk. 261 §§ II(C) and (D), and V(B) and (E); Dk. 262 §§ II(C), (D) and (F), and IV(C); Dk. 269 § VI(D); Dk. 270 § IV(B)(2); Dk. 289 § III; Dk. 315 § IV(B)(2); and Dk. 317 §§ IV(D) and (F).

D. Breach of Fiduciary Duty

In their respective motions, many Defendants challenge the breach of fiduciary claims alleged in the Parrett, and the AZ Noteholders, MetLife/Lloyds and ING Bank complaints. Subject to the exceptions noted above, Parrett responds by adopting the following sections of the other Plaintiffs' responses, which fully address these issues and are applicable to the objections to her complaint directly and/or by analogy: Dk. 278 § I(E); Dk. 281 § VII; Dk. 283 § V(F) and (G); Dk. 284 § X; Dk. 258 §§ II(B) and (D); Dk. 261 § V(C); Dk. 286 § I; and Dk. 287 § II(A).

In addition, it goes without saying that under Ohio law, shareholders, such as Poulsen, Ayers and Focus Value, who control a majority interest, in a close corporation, such as NCFE, owe an even higher fiduciary duty to a minority shareholder, such as Parrett, and that corporate directors, such as Poulsen, Ayers, Pote, Mendell and Wilkinson, also owe shareholders and officers, such as Parrett, a heightened fiduciary duty. *United States v. Byrum*, , 408 U.S. 125, 137 (1972); *Thompson v. Cent. Ohio Cellular, Inc.*, 639 N.E.2d 462, 468 (Ohio Ct. App. 1994) (citing *Crosby v. Beam*, 548 N.E.2d 217, 219-20 (Ohio 1989).

E. Negligence

In their respective motions, many Defendants challenge the negligence claims alleged in Parrett's and the other Plaintiffs' complaints. Subject to the exceptions noted above, Parrett responds by adopting the following sections of the other Plaintiffs' responses, which fully address these issues and are applicable to the objections to her complaint directly and/or by analogy: Dk. 278 § I(I); Dk. 281 § V; Dk. 282 § V; Dk. 283 § V(H) and (I); Dk. 284 § III; Dk. 258 §§

II(C) and (D); Dk. 259 § II; Dk. 261 §§ V(D) and (E); Dk. 262 § IV(C) (except subsection 4); Dk. 269 § VI(B); Dk. 287 § IV; Dk. 289 § II; and Dk. 317 §§ IV(C) and (D).

F. Failure to Adequately Plead Other Common Law or State-Law Claims

In their respective motions, many Defendants challenge the sufficiency of the other Plaintiffs' claims for aiding and abetting and civil conspiracy. Although Parrett's complaint, as it stands at this time, does not contain separate counts for these causes of action, all of the counts of her complaint contain sufficient allegations for the recovery of damages under such theories by alleging that these Defendants knowingly aided and abetted the commission of the wrongs alleged, and that these Defendants knowingly acted in concert with each other to commit the wrongs alleged. (*See* Parrett Compl. ¶¶ 25, 41, 56-58, 71, 78, 83, 86-88, 107, 156, 163, 167, 169-171, 177, 181, 185 and 189).

Therefore, the other Plaintiffs' arguments regarding the sufficiency of their aiding and abetting and civil conspiracy claims apply equally to any attack on Parrett's allegations relating to such theories of recovery. For that reason, Subject to the exceptions noted above, Parrett adopts, the following sections of the other Plaintiffs' responses, which fully address the sufficiency of their aiding and abetting and civil conspiracy claims and are applicable to her complaint directly and/or by analogy: Dk. 288/290/293 §§ XII and XIII; Dk. 278 §§ I(F) and (H); Dk. 280 § IV(B); Dk. 282 §§ IV and VI; Dk. 283 §§ V(B) and (D); Dk. 284 §§ VII and VIII; Dk. 285 § XI; Dk. 269 §§ VI(C), (E) and (F); Dk. 270 § IV(F); Dk. 315 § IV(C); Dk. 286 § II; Dk. 287 § III; Dk. 289 § IV; and Dk. 317 § IV(G).[5]

[5] *See also, Smith ex rel. Estates of Boston Chicken, Inc. v. Arthur Andersen L.L.P.*, 175 F. Supp. 2d 1180 (D. Ariz. 2001) (recognizing that an aiding and abetting a breach of fiduciary claim can be brought against an accounting firm for auditing a company's financial statements); *Southern Union Co. v. Southwest Gas Corp.*, 165 F.Supp.2d 1010, 1016 (D. Ariz. 2001) (recognizing that a corporation's attorney may be liable to a non-client third party for conspiring with the corporation to further his own self-interest).

G. Other Common Issues that Relate to Parrett's Complaint

In their respective motions to dismiss, some Defendants raise issues about choice of law, alter ego liability, liability for acts of subsidiaries and agents (*respondeat superior*), and attorney immunity that are common to Parrett's complaint and the some of the other complaints. Subject to the exceptions noted above, Parrett responds by adopting the following sections of the other Plaintiffs' responses, which fully address these issues and are applicable to the objections to her complaint directly and/or by analogy: Dk. 288/290/293 § XI, Dk. 283 § V(A) (re choice of law); Dk. 278 § I(K) (re alter ego liability); Dk. 280 § IV (re liability for acts of agents); Dk. 285 § XII (re alter ego liability and liability for subsidiary's acts); Dk. 260 § III (re *respondeat superior*); and Dk. 282 § II, and Dk. 317 § IV(C) (re attorney immunity).[6]

H. Failure to Plead the Requisite Elements for Exemplary Damages

In their respective motions, many Defendants attack the AZ Noteholders' separate claims for exemplary damages. Parrett did not set forth a separate count for exemplary damages in her complaint because, as Defendants correctly note in their motions, Arizona law does not recognize such a claim as a separate cause of action, which is why they say that the AZ Noteholders separate claims for exemplary damages in their complaints is defective. Be that as it may, the AZ Noteholders' arguments regarding the sufficiency of their allegations in support of exemplary damages apply equally to any attack on Parrett's allegations for such damages. (*See* Parrett Compl. ¶¶ 99, 103, 156, 163, 166, 171, 172, 177, 181 and 185, and ¶ C of the prayer).

Therefore, Subject to the exceptions noted above, Parrett adopts the following sections of the AZ Noteholders' responses that fully address the issue of exemplary damages: Dk. 288/290/293 § XV; Dk. 278 § I(J); Dk. 281 § VIII; Dk. 283 § VI; Dk. 284 § XII; Dk. 285 § XIII.

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[6] *See also, Southern Union Co., supra* n. 5; *Kremser v. Quarles & Brady, L.L.P.*, 36 P.3d 761 (Ariz. Ct. App. 2001) (re liability of attorney, who represented corporation, to non-client third party).

II. *ISSUES UNIQUE TO PARRETT IN DEFENDANTS' MOTIONS TO DISMISS*

A. Lack of Standing

In their respective motions to dismiss, many Defendants argue that Parrett lacks standing to bring any claims against them because her claims are derivative and enforceable only by the trustee in the NCFE bankruptcy proceedings. However, under Ohio law, assuming for the sake of argument that Ohio law does apply as Defendants contend, Parrett's claims clearly are direct and not derivative in nature. Contrary to the primary case that Defendants cite, *Adair v. Wozniak*, 492 N.E.2d 426 (Ohio 1986), Parrett is not suing anyone for "an injury sustained by, or a wrong done to, [NCFE]." *Id*. at 428. She is not suing these Defendants for depletion of corporate assets, as the shareholders attempted to do in *Adair*. Instead, she is suing these Defendants for injuries that she sustained directly by the wrongful and fraudulent acts of these Defendants. *See Duryee v. Rogers*, No. 74963, 1999 WL 1204875 (Ohio Ct. App. Dec 16, 1999).

The seminal Ohio decision on this issue is *Crosby v. Beam*, 548 N.E.2d 217 (Ohio 1989), where the Ohio Supreme Court held, "claims of a breach of fiduciary duty alleged by minority shareholders against shareholders who control a majority of shares in a close corporation, and use their control to deprive minority shareholders of the benefits of their investment, may be brought as individual or direct actions and are not subject to the provisions of Civ. R. 23.1 [regarding derivative suits]." *Id.* at 219 (emphasis added). The court explained the rationale for its holding as follows:

> [I]f we require a minority shareholder in a close corporation, who alleges that the majority shareholders breached their fiduciary duty to him, to institute an action pursuant to Civ. R. 23.1, then any recovery would accrue to the corporation and remain under the control of the very parties who are defendants in the litigation. Thus, a derivative remedy is not an effective remedy because the wrongdoers would be the principal beneficiaries of the recovery."
>
> Where majority or controlling shareholders in a close corporation breach their heightened fiduciary duty to minority shareholders by utilizing their majority con-

> trol of the corporation to their own advantage, without providing minority shareholders with an equal opportunity to benefit, such breach, absent a legitimate business purpose, is actionable. Where such a breach occurs, the minority shareholder is individually harmed. When such harm can be construed to be individual in nature, then a suit by a minority shareholder against the offending majority or controlling shareholders may proceed as a direct action.

Id. (emphasis added); *accord*, *Yackel v. Kay*, 642 N.E.2d 1107, (Ohio Ct. App. 1994); *Cousins v. Brownfield*, 615 N.E.2d 1064 (Ohio Ct. App. 1992).

NCFE, like the corporation in *Crosby*, is a close corporation because in addition to Parrett, there are only five other shareholders: Pharos Capital Group, LLC, the general partner of Pharos Capital Partners, L.P. (collectively, "Pharos") and Defendants Focus Value Fund, Lance Poulsen, Barbara Poulsen, and Donald Ayers. In addition, Defendants Lance Poulsen, Barbara Poulsen, Don Ayers, Harold Pote, Thomas Mendell and Eric Wilkinson sat on and controlled NCFE's six-member board of directors.

Also as in *Crosby*, Parrett's Complaint is replete with allegations and claims of breaches of fiduciary duty by all of these Defendants, both directly and in concert with each other. Parrett also alleges that JPMorgan committed its own breaches of fiduciary duty and directly participated in and aided and abetted the fiduciary breaches committed by the NCFE shareholder-director-officer Defendants. Most importantly, as *Crosby* instructs, if Parrett's claims were deemed derivative, "any recovery would accrue to [NCFE] and remain under the control of the very parties who are defendants in the litigation. Thus, a derivative remedy is **not** an effective remedy because the wrongdoers would be the principal beneficiaries of the recovery." 548 N.E. 2d at 219 (emphasis added).

Therefore, under *Crosby*, Parrett clearly has the right to maintain this action directly and her claims are not derivative in nature because, contrary to the facts in *Weston v. Weston Paper & Mfg. Co.*, 658 N.E.2d 1058, 1060 (Ohio 1995), which Defendants cite, in addition to the fact

that NCFE has only a handful of shareholders, no other NCFE shareholder is similarly situated. That fact alone negates the cardinal requirement for maintaining a derivative action. As the Ohio Supreme Court explained in *Weston*:

> We hold that the Westons do not have a direct cause of action under *Crosby* for the simple reason that Weston Paper is not a close corporation as was the case in *Crosby*. There was only a handful of shareholders in *Crosby*. Weston Paper has about one hundred shareholders and in March 1991 had 361,533 shares of outstanding stock. Moreover, every other shareholder is situated similarly to appellants and could bring the same action. As we noted in *Crosby*, "if the complaining shareholder is injured in a way that is separate and distinct from an injury to the corporation, then the complaining shareholder has a direct action."

658 N.E. at 1060 (emphasis added).

Because Parrett's claims are not derivative, Parrett clearly has the right to maintain a direct action against these Defendants under Arizona law as well. *See, e.g.*, *Albers v. Edelson Tech. Partners L.P.*, 31 P.3d 821 (Ariz. Ct. App. 2001) (shareholder's claims against third parties for fraud, devaluation of stock and stock options); *Johnson v. Gilbert*, 621 P.2d 916 (Ariz. Ct. App. 1980) (shareholder's claim against third party for its breach of contract with the corporation); *see also Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 917 P.2d 222 (1996) (*vacating* lower court's holding that individual shareholders in a corporation lacked standing to sue for recovery of individual damages that arose solely from acts that caused identical damages to their corporation, which reduced the value of their stock).

In regard to Defendants' argument that because of the nature of Parrett's claims, they can be brought only by the bankruptcy trustee. That argument also fails, of course, because her claims are not derivative. Moreover, *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037 (2nd Cir. 1986), also demonstrates the fallacy of Defendants' argument. In that case, a non-debtor, as opposed to the bankruptcy trustee, sued the president and sole shareholder of a bankrupt corporation to recover misappropriated assets arising out of his fraudulent misrepresentations made on

behalf of the corporation. Over the defendants' objections, the court allowed the non-debtor to pursue the claims.

Finally, what is even more telling about the fallacy of Defendants' argument about lack of standing is that although Pharos's complaint also alleges fraud, negligence, negligent misrepresentation, conspiracy, and aiding and abetting claims against these same Defendants, they have not raised any issue about Pharos's lack of standing due to the allegedly derivative nature of the same or similar claims that Parrett has brought against them, even though Pharos's claims derive out of the fact that it, like Parrett, is also a shareholder of NCFE.

B. Statutes of Limitations

In its motion, CSFB argues that Parrett's AZRAC and fraud claims against it are barred by a three-year statute of limitations, that her tortious interference claim against it is barred by a two-year statute of limitations, and that these statutory time limits began to run in 1995 because that is when she alleges that she knew that NCFE was involved in wrongful activities.

As CSFB states, in Arizona, common law fraud and AZRAC claims are subject to three-year statutes of limitation, A.R.S. §§ 12-543 and 13-2314.04(F), and a tortious interference claim is subject to a two-year statute of limitations, A.R.S. § 12-542. CSFB also admits that none of these causes of action began to accrue, *i.e.*, the statutory time limits do not start to run, until Parrett knew or should have known with reasonable diligence that she had a right to bring such claims. *See*, A.R.S. § 13-2314.04(F) ("the initiation of civil [AZRAC] proceedings … shall be commenced within three years from the date the violation was discovered, or should have been discovered with reasonable diligence ….") (emphasis added); A.R.S. § 12-543 (cause of action [for fraud] shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud ….").

Again, CSFB argues that Parrett's causes of action accrued and these statutes of limitations began to run in 1995 because in her complaint she admits knowing at that time "that NCFE was engaged in improper activities." (CSFB motion at 10). However, when read in its entirety, Parrett's complaint clearly demonstrates that although she may have had questions about some of NCFE's activities beginning around that time, she did not know the true and complete facts about the fraudulent activities, which were concealed from her by CSFB and other Defendants, despite her diligent efforts to try to learn what was going on.

It is a cardinal principle of law of Arizona, the forum state in this case, that a statute of limitations does not begin to run where a defendant commits a positive act tending to conceal the cause of action. *See Tovrea Land & Cattle Co. v. Linsenmeyer* 412 P.2d 47, 63 (Ariz. 1966); *Coronado Dev. Corp. v. Superior Ct.*, 678 P.2d 535, 537 (Ariz. Ct. App. 1984). In other words, when a defendant is involved in the concealment of information that would otherwise have alerted the plaintiff to the existence of a cause of action, the applicable statute of limitations is tolled. *Mohave Elec. Co-op., Inc. v. Byers*, 942 P.2d 451, 469 (Ariz. Ct. App. 1997) ("wrongful concealment will toll the Statute of Limitations."); *see also, Anson v. American Motors Corp.*, 747 P.2d 581, 587 (Ariz. Ct. App. 1987); *Lasley v. Helms*, 880 P.2d 1135, 1138 (Ariz. Ct. App. 1994) ("Constructive fraud … is sufficient to toll the running of a statute of limitations until the plaintiff either knows, or through due diligence should have known, of the fraud.").

In addition, and even more important, before any statutory time limit starts to run, Parrett must have known <u>who</u> committed the acts giving rise to her causes of action <u>and what</u> damages she suffered from those acts. *Mohave Elec. Co-op.*, 942 P.2d at 470. Because of Defendants' concealment of information from her, it was less than two years before she filed this action that she finally learned about the wrongful acts, who committed them and to what extent she had been damaged. Therefore, none of her claims are time-barred.

C. Bank One's, D&T's and PwC's Breaches of Fiduciary Duties

In their respective motions, Bank One, D&T and PwC argue that Parrett's breach of fiduciary claims are defective because they did not have a fiduciary relationship with her. First of all, Parrett has not only alleged that these Defendants directly breached their fiduciary duties to her but that they also "in concert with each other [referring to all Defendants who were part of the massive frauds alleged], with actual or constructive knowledge, intentionally or with gross negligence, unjustifiably, maliciously, wantonly and with reckless disregard of Parrett's rights, … participated in or facilitated the fiduciary breaches of other Defendants." (Parrett Compl. ¶ 163).

In other words, Parrett, like the other Plaintiffs, has alleged that these Defendants aided and abetted, and/or conspired with other Defendants in, the commission of their breaches of fiduciary duties. The sections of the other Plaintiffs' responses that fully address this issue as they relate to their complaints, which Parrett has adopted, as listed above, are equally applicable, either directly or by analogy, to Bank One's, D&T's and PwC's objections made specifically to Parrett's complaint.

As for Bank One's direct breaches of fiduciary duty owed to Parrett, Bank One's argument completely ignores the specific allegations in her complaint about the personal relationship between her and various Bank One employees, who by their representations and assurances to her when they traveled to Arizona to meet with her created a relationship of trust and confidence, and how those Bank One employees violated that trust by lying to her about how Bank One, with the complicity of other Defendants, was handling, or more accurately, mishandling, the NPF XII trust funds. After all, they told her "that as far Bank One was concerned, its due diligence of the NPF funds reflected a high level of integrity and were as clean as could be." (Parrett Compl. ¶¶ 130(c) and (d), 146).

Contrary to Bank One's argument, the fact that Parrett "was not a party to the Indenture," does not mean that "she had 'no benefit or any legal or equitable rights, remedy or claim.'" (Bank One motion at 64). The general rule is that a fiduciary relationship

> connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation as the basis of the transaction; refers to the integrity, the fidelity of the party trusted, rather than his credit or ability. It has been held to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations. It may be defined generally as a relation in which, if a wrong arises, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust.

Brown v. Foulks, 657 P.2d 501, 505-06 (Kan. 1983) (citations omitted) (emphasis added); *accord Eagerton v. Fleming*, 700 P.2d 1389, 1392 (Ariz. Ct. App. 1985) (fiduciary relationship "may be said to exist wherever trust and confidence is imposed in one person in the integrity and fidelity of another."); *Augenstein v. Augenstein*, 737 N.E.2d 613, 617 (Ohio Ct. Com. Pl. 2000).

The allegations in Parrett's complaint, certainly convey the idea of her trust or confidence and reliance in what Bank One's employees told her and, therefore, she sufficiently alleges the basis for a breach of fiduciary claim against Bank One. Instead of lying to her, the Bank One employees had an absolute duty to disclose to her Bank One's and the other Defendants' participation in the fraudulent handling of the NPF XII reserves. *See Fed. Mgt. Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 855 (Ohio Ct. App. 2000). The fact that they did not, is clear evidence of their ulterior motives and breach of trust.

Moreover, since for purposes of a motion to dismiss, Parrett's allegations must be taken as true, whether or not a fiduciary relationship existed between Parrett and Bank One is a question of fact for a jury to decide. *E.g., Old Colony Ventures I, Inc. v. SMWNPF Holdings, Inc.*, 910 F. Supp. 543, 547 (D. Kan. 1995); *Taeger v. Catholic Family & Community Serv.*, 995 P.2d 721, 726 (Ariz. Ct. App. 1999) ("Whether a confidential relationship exists is a question of fact.").

In regard to D&T's and PwC's argument that an accountant is not a fiduciary to a client, much less to Parrett, again, the other Plaintiffs' responses to D&T's and PwC's motions answer that argument. D&T's and PwC's reliance on case law from Illinois, Massachusetts and New Hampshire is misplaced because the law of those states do not apply here. Moreover, even if those cases did apply, they still do not preclude Parrett's claim against D&T and PwC for breach of fiduciary duties under the circumstances here.

For example, in *Peterson v. H & R Block Tax Serv., Inc.*, 971 F. Supp. 1204 (N.D. Ill. 1997), which D&T cites, the court noted that under Illinois law, an accountant, who does no more than merely preparing a tax return does not have a fiduciary duty. But the accountant may have a fiduciary duty where there are "long-term, ongoing relationships, as well as the [accounting firm's] roles in managing assets, rendering complex investment advice and/or performing audits." *Id.* at 1214 (emphasis added); *accord Smith ex rel. Estates of Boston Chicken, Inc. v. Arthur Andersen L.L.P.*,175 F. Supp. 2d 1180 (D. Ariz. 2001) (recognizing that an aiding and abetting a breach of fiduciary claim can be brought against an accounting firm for auditing a company's financial statements). Even the Arizona authority that PwC cites, *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317 (Ariz. Ct. App. 1996), recognizes that a fiduciary relationship can exist where there is "'peculiar reliance in the trustworthiness of another' …." *Id.* at 335 (quoting *Stewart v. Phoenix Nat'l Bank*, 64 P.2d 101, 106 (1937)); *accord Stone v. Davis*, 419 N.E.2d 1094, 1097 (Ohio 1981).

When read as a whole, Parrett's complaint clearly shows that she placed "peculiar reliance" in the trustworthiness of D&T's and PwC's audits, particularly in light of the fact that although she had been trying to independently obtain the information that would have otherwise disclosed the cooking of NCFE's books by Poulsen and Ayers, to which the JPM Directors and other Defendants were privy, her efforts were for naught because those Defendants continually

stone-walled her and kept her from finding out what was really going on. Therefore, she had no other source to ascertain the accuracy of NCFE's financial statements except to place "peculiar reliance" in the trustworthiness of D&T's and PwC's opinions and blessing of NCFE's financial position and statements.

As for these Defendants' contention that any fiduciary duty they had was owed to NCFE, their client, and not to Parrett, who was not their client but merely a shareholder of NCFE, recent Ohio case law demonstrates that contention is not well-founded, at least in regard to a motion to dismiss. *See Gibson v. City Yellow Cab Co.*, No. 20167, 2001 WL 123467 (Ohio Ct. App. Feb 14, 2001) (*rev'g* trial court's granting of a company's attorney's motion to dismiss and a company's accountant's motion for judgment on the pleadings in a case brought by a minority shareholder in which he alleged, *inter alia*, breach of fiduciary duties to him by both the attorney and the accountant); *Estate of Banfield v. Turner*, 722 N.E.2d 136 (Ohio Ct. App. 1999) (shareholder's breach of fiduciary claim against corporation's accountant).

In addition, much of Parrett's response to Bank One's argument applies to D&T's and PwC's arguments, even though admittedly there are no specific allegations in her complaint about the creation of a relationship of trust and confidence arising out any verbal, face-to-face representations by a D&T or PwC employee to her. Nevertheless, as alleged in her complaint, D&T and PwC acted in concert with, and participated in or facilitated the fiduciary breaches of, other Defendants.

D. AZRAC

In their respective motions, many Defendants argue that Parrett's claim for damages under the Arizona Racketeering ("AZRAC") statute fails because she alleges securities fraud as a predicate offense. Parrett concedes that the statute provides that securities fraud cannot be alleged as a predicate offense unless the defendant has been convicted of that crime, and that

none of these Defendants have actually been convicted of securities fraud, *at least not yet*, she cannot at this time maintain a civil action under AZRAC based on the predicate offense of securities fraud.

However, that is not the only predicate offense that Parrett alleges in her complaint. In Count III of her complaint, she also alleges several other types of illegal acts that are specifically listed under A.R.S. § 13-2301(D)(4)(b) as predicate offenses. When Count III is read with the entire complaint, those statutorily recognized predicate offenses include the following acts that were committed, or aided and abetted, by each of these Defendants, either separately or in concert with others: "Theft"; "Participating in a criminal syndicate"; "Asserting false claims including, but not limited to, false claims asserted through fraud …."; and "A scheme or artifice to defraud."[7] *Id*. (sub-§§ v, xiii, xv and xx).[8] Unlike the statutory limitation on securities fraud as a predicate offense, AZRAC contains no restriction on bringing a civil claim against a defendant based on any of these other predicate offenses unless the defendant has been convicted.

The other objections to Parrett's AZRAC claim raised by some of the Defendants go to her standing to bring this claim in her own right rather than on NCFE's behalf, failing to plead the predicate fraud with particularity, or the immunity of an auditor and accountant. These particular objections have already been discussed elsewhere in this response, and those discussions are equally applicable to the same objections directed specifically to Count III of her complaint.

---

[7] In their motion, the JPM Directors also challenge Parrett's claim based on a violation of A.R.S. § 13-2310, which makes it unlawful to participate in a scheme or artifice to defraud, because there is no private cause of action under that statute. That, of course, like so many of their other arguments, is simply not true. Arizona courts recognize a violation of A.R.S. § 13-2310 as the basis for civil liability and as a predicate offense under AZRAC. *See, e.g., Garvin v. Greenbank*, 856 F.2d 1392, 1396 (9th Cir. 1988); *Ness v. Western Sec. Life Ins. Co.* 851 P.2d 122, 128 (Ariz. Ct. App. 1992).

[8] As pointed out by Focus Value, Parrett also concedes that the predicate offense alleged of money laundering (subsection xxvi) is inapplicable to it, but it certainly applies to Poulsen and Ayers, as well as to Bank One, JPMorgan and the JPM Directors, who, contrary to the latter's bald assertion, Parrett has alleged knew or should have known that such activity was occurring and that they benefited therefrom.

E. Misrepresentations of CSFB, Purcell and Ayers

In their respective motions, CSFB and Ayers argue that they made no misrepresentations to Parrett, and that Parrett could not justifiably have relied on any misrepresentations because she knew about NCFE's fraud. In its motion, Defendant CSFB also argues it did not proximately cause any damages to Parrett, and in its motion, the Purcell Defendants argue that they had no scienter of any misrepresentations. In its motion, CSFB also attacks the Pharos and MetLife/ Lloyds complaints, and Purcell also attacks the Pharos complaint, for essentially the same reasons.

The sections of the other Plaintiffs' responses that fully address these same objections as they relate to their complaints, as listed above, are equally applicable to CSFB's, Purcell's and Ayers' objections made specifically to Parrett's complaint. Furthermore, Parrett and the other Plaintiffs also allege that in addition to specific, direct misrepresentations, these Defendants aided and abetted certain misrepresentations made by other Defendants. Therefore, Subject to the exceptions noted above, Parrett responds to these objections by adopting those sections of the other Plaintiffs' responses listed above, which fully address these issues and are applicable to the objections to her complaint directly and/or by analogy.

More particularly, as for Ayers' objections, Ayers ignores the fact that Parrett alleges in her complaint that he continually refused to disclose to her vital insider information about NCFE's practices and operations when she asked him for this information, which constitutes misrepresentations of material facts by silence or non-disclosure. (*See, e.g.*, Parrett Compl. ¶ 117). And, as for Purcell's objections, Purcell overlooks the fact that Defendant Timothy Kincaid, made numerous fraudulent misrepresentations and non-disclosures of material facts to Parrett, on behalf of Purcell while he was an associate of and employed by Purcell's firm. (*See, e.g.*, Parrett Compl. ¶¶ 13, 42, 43, 47, 90, 130(g)).

F. Professional Negligence of D&T and PwC

In their motions, D&T and PwC argue that Parrett's negligence claim fails because neither owed Parrett any duty. The sections of the other Plaintiffs' responses, as listed above, that fully discuss an accountant's duty to third persons as that relates to their complaints are equally applicable to these Defendants' arguments that are specifically directed towards the Parrett complaint. Therefore, Subject to the exceptions noted above, Parrett responds by adopting those sections of the other Plaintiffs' responses listed above, which fully address this issue and are applicable to the objections to her complaint directly and/or by analogy. *See also Gibson v. City Yellow Cab Co., supra*; *Estate of Banfield v. Turner, supra*.

G. Purcell's Professional Negligence and Breach of Fiduciary Duty

In its motion, Purcell also argues that Parrett "does not explain how the alleged conduct of the defendants fell within the scope of any legal representation of [her] personally – as opposed to their representation of NCFE." (Purcell Motion at 22). That argument, again, totally ignores the allegations about Kincaid's misconduct discussed above, and, again, it confuses the issues of the sufficiency of pleading with the sufficiency of proof.

Regardless, Parrett's complaint clearly alleges that Purcell's conduct did fall within the scope of legal representation of her personally. For example, Parrett has alleged that "Purcell and his firm, Purcell & Scott were, by their own written admission, also acting as her attorney and giving her legal advice regarding NCFE matters until as late as September, 2002, including giving her advice in a manner that supposedly would properly protect her and her interests." (Parrett Compl. ¶ 46). But even, if Parrett were not Purcell's client, as Pharos amply points out in its response (Dk. 317) to Purcell's motion, Purcell can still be liable to her because the acts alleged in her complaint clearly show that the Purcell & Scott attorneys (Carey Purcell and Timothy Kincaid) did not act in good faith, but instead, acted maliciously, and knowingly and

actively participated in the frauds. *See Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 700 (6th Cir. 1996).

Purcell also argues that Parrett's allegations of violations of ethical rules do not constitute malpractice and, incredulously, that "[a]n attorney does not owe a fiduciary duty to a client simply by virtue of the attorney's representation of the client." (Purcell Motion at 23). As for the contention about violations of ethical rules, Purcell's reliance on the cases cited is misplaced because those cases merely hold that there is no separate private cause of action against an attorney for the violation of those rules. However, Parrett has not alleged any such violation as a separate cause of action against Purcell. Instead she merely refers to these ethics rules violations (both Ohio's and Arizona's) as evidence of Purcell's actionable conduct. *See, e.g.*, *McElhanon v. Hing*, 728 P.2d 273, 279-80 (Ariz. 1986), *cert. denied*, 481 U.S. 1030 (1987).

As for Purcell's contention about an attorney's fiduciary duty, of course, *Gibson v. City Yellow Cab Co., supra*, holds otherwise, as do *Paul ex rel. Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988); and *In re Neville*, 708 P.2d 1297, 1302 (Ariz. 1985).

H. Tortious Interference

In their respective motions, many Defendants argue that Parrett's tortious interference claims fail because she has not identified any, and there were no, contractual relationships between them and her. That argument fails for two reasons.

First, Parrett has identified in her complaint at least two contractual or business relationships that these Defendants' intentional and wrongful acts interfered with: (1) Parrett's contractual and business relationships with, and her economic expectancies relating to, NCFE and its subsidiaries; and (2) Parrett's contractual and business relationship with, and her economic expectancies relating to, NCFE as a shareholder.

Second, contrary to Defendants' faulty premise, "the existence of a contract is not an element of a claim for tortious interference with business relations." *Bruce Church, Inc. v. United Farm Workers of America, AFL-CIO*, 816 P.2d 919, 931 (Ariz. Ct. App. 1991) (emphasis added). A claim for tortious interference lies not only for wrongfully interfering with a person's contract or contractual relationship with another, but also for wrongfully interfering with a person's economic or business expectancies.

> To make out a claim for tortious interference, a plaintiff must establish "(1) [t]he existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted."

American Family Mut. Ins. Co. v. Zavala, 302 F. Supp. 2d 1108, 1117 (D. Ariz. 2003) (emphasis added) (quoting *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1041 (Ariz. 1985)).

As for the second element, these Defendants' knowledge of Parrett's expectancies, the allegations of her complaint clearly demonstrate, or at least infer, that each and every one of these Defendants knew or should have known what expectancies she had as a shareholder and employee of NCFE. And, again, the Defendants confuse what a plaintiff has to allege to state a claim upon which relief can be granted with what a plaintiff has to prove that claim. Like many of the Defendants' other challenges, as the authority cited in this section clearly hold, whether or not these Defendants knew about Parrett's expectancies is a question of fact and a matter of proof.

As for the third element, "intentional interference" means interference by improper means, which "includes fraudulent or inequitable conduct." *Brooks Fiber Communications of Tucson, Inc. v. GST Tucson Lightwave, Inc.*, 992 F. Supp. 1124, 1131 (D. Ariz. 1997) (citing *Bar J Bar Cattle Co., Inc. v. Pace*, 763 P.2d 545, 548 (Ariz. Ct. App. 1988). Parrett's complaint is

replete with allegations of Defendants' fraudulent or inequitable conduct, which constitute the requisite improper means for a claim of tortious interference.

Moreover,

> To determine whether a particular action is improper, seven factors are considered:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

Southern Union Co. v. Southwest Gas Corp., 165 F. Supp. 2d 1010, 1040 (D. Ariz. 2001). Based on the allegations of Parrett's complaint, all of these factors militate against all these Defendants.[9]

The fourth element, damages, is self-evident from the allegations of Parrett's complaint and needs no further discussion other than to say that it, too, is a question of fact and a matter of proof.

I. Deceptive Business Practices

In their respective motions, many Defendants argue that a private claim for deceptive trade practices is not recognized under either Arizona or Ohio law.

[9] To support its argument that Parrett has not alleged any wrongful conduct on its part, which, of course, completely flies in the face of the allegations in her complaint, Focus Value makes the additional bald assertion that it "was duped by Parrett into paying her $3 million for her worthless shares." That is ridiculous! While Focus Value acquired a 20% equity position in NCFE, it certainly did not pay Parrett $3 million for her stock. In fact, Focus Value's buy-in diluted her ownership interest in NCFE and enabled the continuation of the frauds that have been alleged, and as a result, actually helped exacerbate her ultimate loss.

Contrary to these Defendants' contentions, there certainly is authority to support Parrett's claim of deceptive business practices in Arizona. In *Flower World of Am., Inc. v. Wenzel*, 594 P.2d 1015 (Ariz. Ct. App. 1978), the court recognized that at least a colorable claim for damages under Arizona's Consumer Fraud Act, A.R.S. §§ 44-1521, *et seq.*, based on a defendant's deceptive business practices, which does not include the sale of goods, can be pleaded by a plaintiff who is not a "consumer" in the traditional sense of the term.

Contrary to some Defendants' bald assertions, under the Act's broad definitions of "consumer" and "merchandise," Parrett qualifies as a "consumer" and these Defendants' services qualify as "merchandise," and therefore, she can assert such a claim against these Defendants based on the facts that give rise to her common law claims. *See* A.R.S. § 44-1521(5) and (6); *Flower World* at 1017.

However, despite the fact that in light of this authority, Parrett's deceptive business practices claim is warranted by existing Arizona law, because this particular claim is relative minor in the grand scheme of these Defendants' massive fraud and breaches of duty, and because Parrett's recovery of damages under her other claims include any damages that she could recover under this claim, she has no objection to dismissing Count VII of her complaint.

J. Declaratory Relief

In its motion, Poulsen baldly asserts that Parrett's claim for declaratory relief "is not cognizable under Arizona's substantive or procedural law." (Poulsen Motion at 12). However, the statute that Parrett cites in Count VIII of her complaint upon which she relies for the declaratory relief requested, A.R.S. § 12-1832, expressly provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordi-

> nance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The language of the statute is clear, and Arizona courts recognize that a plaintiff is can is entitled to declaratory judgment to reform documents when fraud or misrepresentations has led to the creation of those documents. *See, e.g., Starkovich v. Noye*, 529 P.2d 698 (Ariz. 1974). That is all that Parrett is asking for in Count VIII of her complaint — the reformation of the documents described therein. Contrary to Poulsen's contention, as *Starkovich* instructs, she is entitled to have a court do precisely that.

K. Claims Against Joanne Purcell

Finally, in its motion, Purcell also argues that Parrett has not pleaded any viable claims against Joanne Purcell. She, and the wives of other Defendants (except for Lance Poulsen's wife, Barbara Poulsen) were named as defendants in this action, which was filed in Arizona, a community property state, because it is standard practice in Arizona, and in fact, could be malpractice not, to include a defendant's wife in light of the fact that if she is not joined or named as a defendant, a successful plaintiff may be limited to enforcing a judgment against only the husband's sole and separate property. *See, e.g., C&J Travel, Inc. v. Shumway*, 161 Ariz. 33, 775 P.2d 1097 (Ct. App. 1989); *Vikse v. Johnson*, 137 Ariz. 528, 672 P.2d 193 (Ct. App. 1983).

However, if Joanne and her husband Carey Purcell affirm that they do not own any property, or have any property interests, in Arizona, Parrett has no objection to dismissing her without prejudice, subject, of course, to Parrett's being allowed to reinstate the claims against her should that situation change prior to entry of judgment. The same dismissal without prejudice under the same conditions applies to any other wife who has been named as a defendant in the complaint solely on the grounds that she is the spouse of an individual who committed wrongful acts that injured Parrett, provided those married Defendants also affirm that they do not own any

property, or have any property interests, in Arizona. This, offer of dismissal, of course, does not apply to Defendant Barbara Poulsen, who is liable in her own right for her own complicity.

III. *AMENDING COMPLAINT TO MAKE IT MORE DEFINITE AND CERTAIN*

In its motion to dismiss, Ayers argues that in the alternative, Parrett and the AZ Noteholders should be required to amend their complaints to provide a more definite statement of their respective claims. In its motion, Bank One makes the same argument, except that it is directed only to the AZ Noteholders and not to Parrett. (*See* Bank One Motion at 60, n.84). Therefore, Parrett responds by adopting section XV of Dk. 285, which fully addresses this issue and is applicable to Ayers' alternative request for a more definite statement of her claims.

However, Parrett has no objection to, but at the appropriate time, amending her complaint to include additional facts and possibly additional claims that are included in the complaints in the other cases listed above (*e.g.*, aiding and abetting and civil conspiracy). In fact, she fully intends to do so, but not until discovery is underway so as not to add to the paper that is piling up in this litigation by having to amend her complaint again. Parrett understands that in certain instances, Sixth Circuit case law requires or at least suggests that a plaintiff should file a proposed amended complaint in response to a motion to dismiss, but that is generally not required unless the plaintiff has previously amended her complaint numerous times or there has been a long delay, unexplained between the filing of the original complaint and the motion to dismiss. (*See* AZ Noteholders' Motion to Amend (Dk. 279) and cases cited therein).

Here, Parrett has never amended her complaint and the delay between the filing of her complaint and the substantive motions to dismiss is explained by the fact that in the interim, her case was removed from State court, she filed a remand motion in Arizona, Defendants then initiated proceedings to have this case transferred by the Judicial Panel on Multidistrict Litigation, after the transfer was ordered, she filed a renewed motion to remand pursuant to this Court's

order and schedule, there have been several motions to dismiss and responses filed regarding service of process and jurisdiction, and the present motions and this response were filed in accordance with the schedule, as amended, established by this Court. Moreover, there is authority to the effect that by amending a complaint in a case that has been removed from State court, the plaintiff may be held to have waived any right to remand. (*Id.*).

Therefore, Parrett's position in this regard, not only from the standpoint of judicial economy, but from the standpoint of practicality, is that it would make more sense for her to save her proposed amendments until after these motions, as well as her remand motions, are ruled on and until after meaningful discovery has been conducted. In regard to discovery, Parrett needs sufficient time to review and to investigate the pending amendments proposed by both the AZ Noteholders and the MetLife/Lloyds Plaintiffs to determine to what extent those proposed additional allegations of fact apply to and support her claims against these same Defendants. Moreover, how and to what extent she will amend her complaint is intertwined with her amendment to her answers that she has already filed in those cases in which she is a Defendant, *i.e.*, the AZ Noteholder cases and *New York City Employees' Retirement Sys. v. Bank One, N.A.*, No. 03-CV-9973 (S.D.N.Y.), to add cross-claims against these same Defendants because those cross-claims essentially will be the same as the claims alleged in her complaint.

IV. CONCLUSION

For the reasons set forth above and in the other Plaintiffs' responses to similar arguments made by these same Defendants to dismiss their complaints, Parrett's complaint is sufficient to withstand each of these Defendants' motions to dismiss, subject to the minor exceptions noted above, such as the two offenses alleged that do not constitute predicate offenses for a civil damages claim under AZRAC, the naming of Joanne Purcell as a defendant, and possibly the

claim for deceptive business practices. Otherwise, her complaint is sufficient and the motions to dismiss should be denied.

Parrett does not deny that her complaint may not contain allegations of every single fact needed, or that she even has at this time sufficient evidence, to prove every element of her claims at trial. But that is what discovery is for, and to date, there has been no discovery conducted, due in large part to these Defendants' deluge of paper in a futile, and in some instances, sanctionable, effort to weasel out of having to face a jury. Regardless, Parrett's complaint sufficiently puts every one of these Defendants on fair notice of what her claims are and the grounds upon which they rest. That is all that is required to withstand a motion to dismiss. *See Conley v. Gibson*, 335 U.S. 41, 48 (1957).

This is particularly true when the complaint in the Parrett case is read in conjunction with the complaints in the AZ Noteholders, Pharos, ING Bank and MetLife/Lloyds cases, all of which have been consolidated in this litigation. All of these complaints allege similar facts and include many of the same claims, and therefore, it is ludicrous for these Defendants to contend that they do not know what they have to defend against. If after the completion of discovery there is insufficient evidence for Parrett to sustain her burden of proof of her claims, to the extent that these Defendants would be entitled to judgment as a matter of law, then they are certainly entitled to file appropriate motions for summary judgment. But at this point, the allegations, on their face, clearly raise sufficient questions of fact and law to withstand these Defendants' motions to dismiss.

DATED: May 17, 2004

Respectfully submitted,

s/ **William A. Miller**

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2004, I electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel who have registered as CM/ECF participants, and I hereby certify that on the same date, I mailed by United States Postal Service this document to the following non-CM/ECF participants:

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APPENDIX OF UNPUBLISHED CASES

Not Reported in N.E.2d
(Cite as: 1999 WL 1204875 (Ohio App. 8 Dist.))

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

Harold T. DURYEE Plaintiff-appellee
James P. BOEDEKER, M.D., et al.
Plaintiffs-appellants
v.
Larry E. ROGERS, et al. Defendants-appellees

No. 74963.

Dec. 16, 1999.

Character of Proceeding Civil appeal from Cuyahoga Court of Common Pleas Case No. CV-345,715. Affirmed in Part; Vacated in Part; Dismissed in Part; Reversed and Remanded.

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JOURNAL ENTRY and OPINION

ROCCO, J.

***1** This case is before the court on appeal from an order of the Cuyahoga County Court of Common Pleas dismissing the individual plaintiffs' claims and transferring this action to the Franklin County, Ohio, Court of Common Pleas. In three assignments of error, the individual plaintiffs contend:

I. THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFFS' INDIVIDUAL CLAIMS.

II. THE TRIAL COURT ERRED BY ORDERING A TRANSFER TO THE FRANKLIN COUNTY COURT OF COMMON PLEAS.

III. THE TRIAL COURT ERRED BY RULING ON THE MERITS OF A MOTION MADE BY CERTAIN DEFENDANTS WHO HAD PREVIOUSLY BEEN VOLUNTARILY DISMISSED FROM THE CASE.

For the following reasons, the court finds the order transferring this action to Franklin County is not final and appealable. Accordingly, this court lacks jurisdiction over the individual plaintiffs' appeal to the extent it challenges the order of transfer.

We find the trial court lacked jurisdiction to rule on the motion of certain director defendants to dismiss the claims against them because plaintiffs voluntarily dismissed those claims without prejudice. Consequently, we vacate the second order dismissing the claims against these defendants and reinstate the prior order of dismissal without prejudice.

The dismissal of the plaintiffs' other individual claims was a final and appealable order, so we will address the merits of that ruling. The court properly dismissed plaintiffs' claims for conversion and for violation of Ohio's insurance laws. Those claims did not allege the defendants violated any duty owed to plaintiffs. However, plaintiffs' claims against the defendant officers and directors for tortious interference with contractual relations and breach of fiduciary duty, and their claim against KPMG for

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professional negligence, did allege the violation of duties that defendants owed directly to plaintiffs. Therefore, the dismissal of these claims must be reversed.

PROCEEDINGS BELOW

Plaintiffs James P. Boedeker, M.D., Barbara Walsh, and Blase Pignotti filed this action on December 22, 1997, on behalf of themselves and other similarly situated policyholders of P.I.E. Mutual Insurance Co. ("PIE"). They also sued derivatively on behalf of PIE.

In an amended complaint filed on April 21, 1998, [FN1] plaintiffs claimed that PIE's chief executive officer (Larry E. Rogers), chief financial officer (James M. Marietta III), general counsel (Warren L. Udisky), board of directors, and auditor (KPMG Peat Marwick LLP) mismanaged the financial affairs of the company and misrepresented its financial condition to policyholders and state regulators. They sought to maintain a class action on behalf of themselves and other similarly situated policyholders, claiming defendants caused PIE to breach its contract to provide them insurance coverage, made deceptive and false entries in PIE's books and reports, converted PIE's assets to their own use, breached fiduciary duties, committed malpractice, and tortiously interfered with the contractual relationship between PIE and its insureds. In addition, plaintiffs alleged derivative claims on behalf of PIE, asserting it would have been futile to demand action by the officers or directors of PIE or the superintendent of insurance, Harold Duryee. [FN2]

FN1. A second amended complaint filed May 27, 1998 was withdrawn by the plaintiffs on June 26, 1998.

FN2. At the time the amended complaint was filed, Duryee had been appointed as the rehabilitator of PIE. Later, the Franklin County Court of Common Pleas appointed him as PIE's liquidator.
Duryee was succeeded in office by David Meyer, and subsequently by J. Lee Covington, II. For the sake of consistency and clarity, however, the court refers to the superintendent as Duryee, as did the parties and the trial court.

***2** Duryee, who had not been named as a party, filed a motion to intervene in this action on March 12, 1998; on April 3, he moved to be substituted as the sole plaintiff. Defendants Herbert S. Bell, M.D., Marietta, KPMG and "certain director defendants" (including all but four [FN3] named members of PIE's board of directors) all moved the court to dismiss the claims against them.

FN3. The four directors who were not parties to this motion were defendants Bell and Marietta, who filed separate motions to dismiss, and Rogers and Udisky.

On June 5, 1998, plaintiffs filed a notice voluntarily dismissing their claims against "certain director defendants," without prejudice. The court so ordered on June 25, 1998.

On June 30, 1998, the trial court entered an order allowing Duryee to intervene in this action as PIE's liquidator but denying his request to be substituted as the sole party plaintiff. [FN4] The trial court also dismissed the plaintiffs' individual and class action claims, finding that these claims alleged a common injury among shareholders as a result of defendants' wrongful actions toward PIE. Therefore, the court held, the plaintiffs' "individual claims are duplicative of any cause of action maintainable by P.I.E." Finally, the court transferred the action to the Franklin County, Ohio, Court of Common Pleas "in the interest of judicial economy."

FN4. This order is the subject of a separate appeal now pending before this Court, App. No. 74929.

In a separate half-sheet entry, entered simultaneously, the court stated:

> Journal entry and order entered in accordance with Civ.R. 54(B) there being no just reason for delay. OSJ.

LAW AND ANALYSIS

I. *Jurisdiction.*

The interlocutory nature of the trial court's order demands that we consider whether it is a final and appealable order under R.C. 2505.02. As amended

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effective July 22, 1998, [FN5] this statute provides:

> FN5. This section applies to and governs any action, including an appeal, that is pending in any court on the effective date of this amendment and all claims filed or actions commenced on or after the effective date of this amendment [July 22, 1998], notwithstanding any provision of any prior statute or rule of law of this state. R.C. 2505.02(D). The common pleas court action was pending on the effective date of the statute; these appeals were filed thereafter, on July 23 and July 30, 1998, respectively.

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
> (3) An order that vacates or sets aside a judgment or grants a new trial;
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims and parties in the action.
> (5) An order that determines that an action may or may not be maintained as a class action.

Construction of the amended statute appears to be a matter of first impression in this district; only a handful of other cases have addressed the matter to date. [FN6] However, the language of the amended statute tracks that of its predecessor in many cases; therefore, the construction of the statute prior to the 1998 amendments frequently will be instructive, if not dispositive.

> FN6. *Chamberlain v. AK Steel Corp.* (1998), 82 Ohio St.3d 389; *Sorg v. Montgomery Ward & Co.* (Dec. 17, 1998), Erie App. No. E-98-057, unreported; *Ralston v. Chrysler Credit Corp.* (Nov. 25, 1998), Lucas App. No. L-98-1312, unreported; *American Process Design, Inc. v. DeBoer* (Oct. 30, 1998), Hamilton App. No. C-971045, unreported; *Reis v. The Bernstein Group, Inc.* (Oct. 23, 1998), Hamilton App. No. C970927, unreported; *Myers v. Basobas* (Oct. 15, 1998), Franklin App. No. 98AP-161.

***3** A court order is final and appealable only if the requirements of R.C. 2505.02 and (if applicable) Civ.R. 54(B) are met. *Chef Italiano Corp. v. Kent State University* (1989), 44 Ohio St.3d 86. The judgment against plaintiffs on their individual claims plainly meets both of these requirements as it (1) determines plaintiffs' claims and prevents them from obtaining a judgment on their own behalf or on behalf of the alleged class and (2) includes the Civ.R. 54(B) language. *Id.;* R.C. 2505.02(B)(1).

However, the trial court's order of transfer stands on a different footing. First, this is not an order which "determines the action and prevents a judgment." R.C. 2505.02(B)(1). It is procedural; it does not decide any claim.

Manifestly, the order of transfer is not an order which "vacate[s] or set[s] aside a judgment or grant[s] a new trial" or "determine[s] that an action may or may not be maintained as a class action." R.C. 2505.02(B)(3) and (5). Consequently, it is not final and appealable orders under these provisions.

Moreover, it is not an order that affects a substantial right made in a special proceeding, which is made final and appealable by R.C. 2505.02(B)(2). The definition of a special proceeding in amended R.C. 2505.02(A) is substantively equivalent to the definition previously developed by case law:

> "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

Compare *Polikoff v. Adam* (1993), 67 Ohio St.3d 100.

"[A] proceeding for change of venue is not a special proceeding * * *." *State, ex rel. Starner v.*

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DeHoff (1985), 18 Ohio St.3d 163, 165; *State, ex rel. Lyons v. Zaleski* (1996), 75 Ohio St.3d 623, 625. Therefore, the order transferring the action to the Franklin County Court of Common Pleas is not final and appealable under R.C. 2505.02(B)(2). Cf. *State ex rel. Banc One v. Walker* (1999), 86 Ohio St.3d 169, 173 (appeal following final judgment is adequate legal remedy for challenge to decision on motion to change venue).

The only remaining issues are raised by amended R.C. 2505.02(B)(4). This subsection is new to R.C. 2505.02. It renders final and appealable the grant or denial of a "provisional remedy" under certain circumstances.

The first issue presented by R.C. 2505.02(B)(4) is whether the order of transfer grants or denies a "provisional remedy." The term "provisional remedy" is defined in R.C. 2505.02(A)(3):

> "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence.

The statutory definition does not specifically refer to proceedings to transfer venue nor are any of the listed proceedings akin to a proceeding to transfer venue. Consequently, a closer examination of the concept of a provisional remedy is in order.

***4** A provisional remedy is generally defined as:

> A remedy provided for present need or for the immediate occasion; one adapted to meet a particular exigency. Particularly, a temporary process available to a plaintiff in a civil action, which secures him against loss, irreparable injury, dissipation of the property, etc., while the action is pending. Such include the remedies of injunction, appointment of a receiver, attachment, or arrest.

Black's Law Dictionary (5th Ed.1979) 1102.

> A remedy of a party to an action, not intended as means of reaching a determination and adjudication of the issue or issues, but as a means whereby the party who invokes it successfully prevents the adverse party from taking steps during the course of the action which would thwart the enforcement of a judgment obtained in the action. Not a special proceeding, but a merely collateral proceeding permitted only in connection with a regular action, and as one of its incidents.

Ballentine's Law Dictionary (3d Ed.1969) 1016-17.

A recurring theme in these definitions is that a provisional remedy protects one party against irreparable harm by another party during the pendency of the litigation. Transfer of venue is not consonant with this theme. It does not involve protection of a party's ability to enforce a final judgment or preservation of the *status quo* during the pendency of the action.

Accordingly, this court finds the trial court's order transferring of this action to Franklin County is not a final appealable order. For this reason, this appeal is dismissed to the extent it challenges the order of transfer. However, the court will address the merits of plaintiffs' appeal from the dismissal of their individual claims.

II. *Dismissal of Individual Claims.*

Two assignments of error relate to the dismissal of plaintiffs' individual claims:

> I. THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFFS' INDIVIDUAL CLAIMS.
>
> * * *
>
> III. THE TRIAL COURT ERRED BY RULING ON THE MERITS OF A MOTION MADE BY CERTAIN DEFENDANTS WHO HAD PREVIOUSLY BEEN VOLUNTARILY DISMISSED FROM THE CASE.

A. *Dismissal of Claims Against Voluntarily Dismissed Parties*

Plaintiffs claim the trial court erred by granting the motion to dismiss filed by certain defendants whom plaintiffs voluntarily dismissed from the case without prejudice. Plaintiffs argue the trial court lost jurisdiction to rule on those defendants' motions once the claims against them were dismissed.

The Ohio Supreme Court's recent decision in *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, is dispositive of this issue. In *Denham*, the supreme court ruled that a plaintiff may voluntarily dismiss fewer than all named defendants pursuant to Civ.R. 41(A)(1) without dismissing the entire action. If a plaintiff does voluntarily dismiss all claims against a defendant without prejudice, it will be treated as if

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no action had been brought against that defendant.

If no action had been brought against the dismissed defendants, their motion to dismiss would have been a nullity. Therefore, the trial court lacked jurisdiction to rule on the motion. Accordingly, the court sustains appellants' third assignment of error. The court will vacate the second order dismissing plaintiffs' claims against certain director defendants, and reinstate the order dismissing those claims without prejudice.

B. *Dismissal of Plaintiffs' Other Individual Claims*

***5** Finally, we consider the trial court's order dismissing plaintiffs' claims against the remaining defendants. The trial court concluded that plaintiffs' claims on their own behalf were duplicative of causes of action maintainable by PIE and, therefore, plaintiffs had no independent cause of action, citing *Adair v. Wozniak* (1986), 23 Ohio St.3d 174. In *Adair,* individual shareholders filed suit against a third party for losses resulting from the third party's allegedly fraudulent equipment sale and lease-back arrangement with the corporation. Plaintiffs claimed they suffered an individual loss because they had guaranteed loans to the corporation and became personally liable on those guarantees. The court found the defendants owed no duty to the plaintiff shareholders, noting particularly that the plaintiffs had no independent contractual relationship with the defendants.

The complaint here alleges plaintiffs themselves had relationships with defendants from which legal duties arose. The claims here are, therefore, distinguishable from the claims at issue in *Adair,* where the only legally cognizable relationship existed among the defendants and the corporation.

In their first and seventh causes of action, [FN7] for example, plaintiffs claimed the defendant officers and directors caused PIE to breach its contractual obligations to repay loans and to provide insurance coverage and pay for the defense of covered claims. These are, in effect, claims for tortious interference with a contractual relationship, a claim recognized by Ohio law. *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415. Plaintiffs may have to show that the defendants exceeded their privilege as officers and directors to interfere with PIE's contracts in furtherance of their legitimate business interests. However, this is a matter of proof not appropriate for disposition on a motion to dismiss. Cf. *Dorricott v. Fairhill Center for Aging* (N.D. OH 1998), 2 F.Supp.2d 982, 990; *Bell v. Le- Ge, Inc.* (1985), 20 Ohio App.3d 127.

FN7. It is not clear how these two claims differ.

The fourth and fifth counts allege breaches of fiduciary duties that the defendant directors and officers owed to plaintiffs as shareholders. Unlike *Adair,* these claims allege the officers and directors of PIE violated duties owed directly to plaintiffs.

Similarly, plaintiffs have alleged that KPMG breached a duty owed directly to them. In their sixth count, plaintiffs claimed KPMG failed to perform its accounting work for PIE competently, with reasonable care and due diligence. Plaintiffs further alleged the shareholders were a limited class of persons whose reliance on KPMG's accounting work was foreseeable. In *Haddon View Investment Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154, the Ohio Supreme Court held that an accountant may be held liable to a third party for professional negligence if the "third party is a member of a limited class whose reliance on the accountant's representations is specifically foreseen." Thus, plaintiffs have alleged the breach of a duty that KPMG owed directly to them.

***6** However, we agree with the trial court that plaintiffs' conversion claim was duplicative of the derivative claim they filed on PIE's behalf. Plaintiffs claimed the defendants converted PIE's assets, not plaintiffs'. Defendants' alleged wrongdoing therefore caused damage to the corporation, not to the plaintiff-shareholders individually. *Adair,* 23 Ohio St.3d at 178.

Plaintiffs' claim for violation of Ohio's insurance laws also does not allege the breach of any duty owed to plaintiffs. This claim alleged defendants made false entries and concealed facts in order to deceive public officials, not plaintiffs. Therefore, this claim was properly dismissed.

CONCLUSION

For the foregoing reasons, we find the trial court's

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order transferring this action to Franklin County is not final and appealable. Therefore, we dismiss this appeal to the extent it challenges the order of transfer.

We vacate the trial court's order to the extent it granted the motion of certain director defendants to dismiss the claims against them. We affirm the trial court's dismissal of counts 2 and 3 of the amended complaint against the remaining defendants, but reverse its dismissal of counts 1, 4, 5, 6, and 7 of the amended complaint and remand this matter to the common pleas court. We leave the trial court to decide, in the first instance, whether venue over these claims should remain in Cuyahoga County or be transferred to Franklin County.

This appeal is dismissed to the extent it challenges the trial court's order transferring this case to the Franklin County Court of Common Pleas. The trial court's order of June 30, 1998 is vacated to the extent it granted the motion of certain director defendants to dismiss. With respect to the remaining defendants, the June 30, 1998 order is affirmed to the extent it dismissed counts 2 and 3 of the amended complaint and is reversed to the extent it dismissed counts 1, 4, 5, 6, and 7 of the amended complaint. This cause is remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that each party shall bear his or its own costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TERRENCE O'DONNELL, P.J. and DIANE KARPINSKI, J., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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(Cite as: 2001 WL 123467 (Ohio App. 9 Dist.))

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Summit County.

William J. GIBSON, II, Appellant,
v.
CITY YELLOW CAB CO., et al., Appellees.

No. 20167.

Feb. 14, 2001.

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio, Case No. CV 1999 11 4803.

R. Scott Haley, Attorney at Law, Akron, OH, for appellant.

Richard G. Witkowski, Attorney at Law, Cleveland, OH, John T. McLandrich, Attorney at Law, Solon, OH, Richard V. Zurz, Jr., Attorney at Law, Akron, OH, for appellees.

DECISION AND JOURNAL ENTRY

SLABY.

***1** Appellant, William J. Gibson, II ("Gibson") appeals from the decision of the Summit County Court of Common Pleas granting the Civ .R. 12(B)(6) motion to dismiss of appellee, Richard Ashley ("Ashley"), and the Civ.R. 12(C) motion for judgment on the pleadings of appellees, Winer & Bevilacqua, Inc. and Frank Bevilacqua ("Bevilacqua"). We reverse in part.

On November 23, 1999, Gibson filed a complaint in his capacity as a minority shareholder of City Yellow Cab Company, Inc. ("City Yellow"). Named in the complaint were the other five shareholders of City Yellow; Ashley, the corporate attorney; and Bevilacqua, the corporate accountants. On February 8, 2000, Ashley filed a motion to dismiss, pursuant to Civ.R. 12(B)(6), asserting that Gibson failed to state a claim upon which relief could be granted. On February 17, 2000, Bevilacqua filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C) . Gibson opposed both motions. On March 2, 2000, Gibson filed an amended complaint ("complaint"), after which time Ashley and Bevilacqua orally renewed their respective motions. On May 11, 2000, the trial court granted the motions and dismissed Gibson's claims against Ashley and Bevilacqua. The trial court noted that it assumed that all the allegations in the complaint were true and it concluded that Gibson could prove no facts entitling him to recovery. Thereafter, Gibson settled his claims against the other shareholders of City Yellow and dismissed any remaining claims. Gibson timely appealed and has raised one assignment of error for review.

ASSIGNMENT OF ERROR I

> The trial court erred as a matter of law in dismissing [appellant's] amended complaint against [appellees] where [appellant] had established a prima facie case against [appellees] sufficient to overcome a motion to dismiss and a motion for judgment on the pleadings.

In his sole assignment of error, Gibson contends that the trial court erred in granting Ashley's motion to dismiss and Bevilacqua's motion for judgment on the pleadings. Specifically, Gibson argues in his brief that he set forth sufficient facts to state claims against appellees for which relief can be granted as to the counts of civil conspiracy, tortious interference with contract, and his request for an accounting. [FN1] We agree in part.

> FN1. In connection with the civil conspiracy charge, Gibson has argued that the alternate underlying offenses of breach of fiduciary duty and tortious interference

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with contract were properly supported and should not have been dismissed.

A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted, and the same standard of review is applied to both motions. *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163, 644 N.E.2d 731. The trial court's inquiry is restricted to the material allegations in the pleadings. *Id.* Furthermore, the trial court must accept material allegations in the pleadings and all reasonable inferences as true. *Id.* A reviewing court will reverse judgment on the pleadings if the plaintiff can prove any set of facts which will entitle it to relief. *Id.* Evidence in any form cannot be considered. *Conant v. Johnson* (1964), 1 Ohio App.2d 133, 135, 204 N.E.2d 100. Here, the trial court had before it Gibson's complaint with City Yellow's Articles of Incorporation and Code of Regulations attached thereto as Exhibits A and B, respectively.

***2** Additionally, we note that the concept of "notice pleading" employed by the Ohio Rules of Civil Procedure does not usually require any great degree of specificity; only that notice be given as to the nature of the action. See *Gall v. Dye* (Sept. 8, 1999), Lorain App. No 9800CA7183, unreported, at 8. Except for certain special matters set forth in Civ.R. 9, parties need only set out a short and plain statement showing that they are entitled to relief. Civ.R. 8(A).

A. Tortious Interference with Contract

Gibson argues that the trial court erred in dismissing his claim of tortious interference with contract against Ashley and Bevilacqua. We disagree.

"The elements of the tort of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 707 N.E.2d 853, paragraph one of the syllabus. "In the event a complaint fails to provide allegations regarding each of these elements, the complaint can properly be dismissed for failure to state a claim upon which relief can be granted." *Schiavoni v. Steel City Corp.* (1999), 133 Ohio App.3d 314, 317, 727 N.E.2d 967.

Gibson's complaint claims, in relevant part, that a City Yellow shareholder's meeting occurred on March 2, 1999, at Bevilacqua's office. Gibson alleges that upon solicitation for nominations for the Board of Directors, he nominated himself. The other shareholders objected and indicated that the board was limited to three members, while Gibson argued the board was comprised of four members. Gibson claims that "Ashley (who was then in attendance at the meeting as attorney for the corporation) unilaterally and without motion suspended the stockholders meeting" and left to obtain corporate records from his office next door. Gibson's complaint further alleges that upon Ashley's return, Ashley confirmed that the number was four, but advised the majority shareholders that "they could keep [Gibson] off the Board" by moving to amend the corporate articles and by-laws, which they proceeded to do. Finally, Gibson's complaint contends that Ashley and Bevilacqua, among others, "acted in conspiracy to injure [Gibson] by tortiously interfering with his contact [*sic.*] rights as a shareholders in [City Yellow], and under the Articles of Incorporation and Code of Regulations of [City Yellow]."

The Code of Regulations for City Yellow, attached to the complaint as Exhibit B, states in relevant part:

> ARTICLE III--BOARD OF DIRECTORS
> *Section 1. Number of Directors:* * * * The number of directors may be fixed or changed by resolution at any annual meeting or at any special meeting called for that purpose, by the affirmative vote of the holders of a majority of the shares present in person or by proxy, entitling them to vote on such proposal[.] * * *

***3** The trial court found that Gibson's allegation did not state a cause of action because the complaint did not "delineate what contract was allegedly interfered with or how." We agree with the result, but for different reasons than those stated by the trial court.

As against Ashley, Gibson does not state a claim for tortious interference with contract because he has failed to provide allegations regarding an intentional procurement of the contract's breach, the

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third required element for tortious interference with contract. Gibson alleges that Ashley interfered with his contract rights as a shareholder as provided in City Yellow's Articles of Incorporation and Code of Regulations. However, even liberally construing the Code of Regulations as a contract, the Regulations allow the majority shareholders to do exactly what they did, i.e., change the number of directors at the shareholder's meeting by an affirmative vote. Ashley merely advised the majority shareholders as to what the Regulations allowed. Therefore, accepting Gibson's material allegations in the pleadings as true, we cannot reasonably infer Ashley's intentional procurement of a contract breach since there was no breach.

Likewise, Gibson does not state a claim of tortious interference with contract against Bevilacqua. Gibson's complaint does not provide allegations regarding Bevilacqua's knowledge of the alleged contract, intentional procurement of the contract's breach, or a lack of justification, three of the required elements for civil conspiracy. The complaint does not allege that Bevilacqua was present at the shareholder's meeting in question nor does it allege any participation on Bevilacqua's part in the decision to amend the Articles of Incorporation. Therefore, assuming the assertions made by Gibson to be true, as we must for purposes of this review, we find the instant case presents a situation whereby Gibson is unable to prove any set of facts which would entitle him to relief on his claim of tortious interference with contract against Bevilacqua.

Having independently and thoroughly examined Gibson's complaint and having construed the facts and all inferences therefrom as being true, this Court finds that the trial court properly dismissed the count of tortious interference with contract of Gibson's complaint pursuant to Civ.R. 12(B)(6) and 12(C). This portion of Gibson's assignment of error is overruled.

B. Civil Conspiracy

Gibson also argues that the trial court erred in dismissing his claim of civil conspiracy against Ashley and Bevilacqua. We agree.

The elements of a civil conspiracy claim include: (1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself. *Universal Coach, Inc. v. New York City Transit Auth., Inc.* (1993), 90 Ohio App.3d 284, 292, 629 N.E.2d 28. The malice portion of the tort is "that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another." *Gosden v. Lewis* (1996), 116 Ohio App.3d 195, 219, 687 N.E.2d 481. In *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 475, 700 N.E.2d 859, the Ohio Supreme Court stated the following:

> ***4** In a conspiracy, the acts of coconspirators are attributable to each other. See Prosser & Keeton on Torts (5 Ed.1984) 323, Section 46 ("All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's act done for their benefit, are equally liable." [Footnotes omitted.]).

Gibson's complaint alleged that the majority shareholders acted in concert with Ashley and Bevilacqua "to injure [Gibson] by diverting corporate assets of [City Yellow] and by acting in conspiracy to deny [Gibson] a fair and complete participation in the corporate opportunities and profits in and from [City Yellow.]" Further, Gibson alleged two potential unlawful acts underlying the civil conspiracy claim: tortious interference with contract and breach of fiduciary duty. We will examine each potential underlying claim separately.

1. Underlying Claim of Breach of Fiduciary Duty

Gibson alleges that he sufficiently pled facts to support the claim that Ashley, Bevilacqua, and the majority shareholders of City Yellow conspired to commit a breach of fiduciary duty that damaged Gibson. We agree

The trial court found that Ashley and Bevilacqua, as counsel and accountants for the corporation owed a fiduciary duty to the corporation, but not to the individual shareholders. Further, it concluded that Gibson's complaint alleged only that the majority shareholders breached their fiduciary duties, and since Ashley and Bevilacqua were not majority shareholders, the breach of fiduciary duty claim did not entitle Gibson to relief. We conclude that Gibson's complaint as to the civil conspiracy claim with the underlying unlawful act of breach of

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fiduciary duty was sufficient to withstand the Civ.R. 12(B)(6) and 12(C) motions for dismissal.

Assuming all the facts alleged in Gibson's complaint and all reasonable inferences as true, this Court must hold that the complaint addresses all of the elements of a civil conspiracy action. In pleading the first two elements of his claim, Gibson alleged that at least two persons, including Ashley, Bevilacqua, and each of the majority shareholders in their individual capacities, acted in concert to prevent Gibson from participating in the corporation and improperly divert corporate assets, thereby injuring Gibson. Gibson meets the third element of his claim when he alleges that the conspiracy caused him damages in excess of $150,000.

The fourth and final element is the alleged breach of fiduciary duty of the majority shareholders. Although it is undisputed that Ashley and Bevilacqua are not majority shareholders of City Yellow, they were not the parties alleged to have committed the unlawful act required by the fourth element. Ashley and Bevilacqua's alleged role in the conspiracy was to lend "aid, assistance and expert advice" to the majority shareholders, who allegedly accepted that aid to commit a breach of fiduciary duty owed to Gibson, the minority shareholder. In sum, the reasonable inference is that Gibson alleges that the majority shareholders committed the injury and Ashley and Bevilacqua conspired with them to accomplish it.

***5** We hold that the allegation for civil conspiracy in the complaint, accepted as true, does state a claim against appellees, which if proven, is actionable. Therefore, based upon the record before us, this count of Gibson's complaint was not in a posture to have been disposed of on a Civ.R. 12(B)(6) or 12(C) motion. This portion of Gibson's assignment of error is sustained.

2. Underlying Claim of Tortious Interference with Contract

In the alternative, Gibson alleges that he sufficiently pled tortious interference with contract as the unlawful act underlying the civil conspiracy claim. A cause of action may exist for conspiracy to tortiously interfere with a contractual relationship. See *Scanlon v. Stofer & Bro. Co.* (June 22, 1989), Cuyahoga App. No. 55467 & 55472, unreported, 1989 Ohio App. LEXIS 2528, at *42. However, we previously determined that the trial court properly dismissed Gibson's claim of tortious interference with contract. Without the existence of the underlying unlawful act of tortious interference with contract on the part of appellees, there could be no claim for civil conspiracy against appellees. Therefore, the trial court properly dismissed Gibson's claim for civil conspiracy with the underlying claim of tortious interference with contract. This portion of Gibson's assignment of error is without merit.

C. Accounting

With respect to Gibson's request for an accounting, his complaint requested a full accounting from Ashley and Bevilacqua, among others. The trial court found that even if Gibson was entitled to an accounting, Ashley and Bevilacqua would not have access to the necessary documentation.

In order to sustain appellees' motions to dismiss, the trial court reviewed matters outside of the pleadings. It was not apparent from the pleadings which parties would have possession of the documentation required for an accounting. The trial court went beyond the face of the complaint and considered a question of fact. Therefore, we conclude that the court erred procedurally in dismissing this count of the complaint, but we do not reach the merits of Gibson's request for an accounting. This portion of Gibson's assignment of error is sustained.

Gibson's sole assignment of error is sustained in part and overruled in part. The cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part, and remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the County of Summit, Court of Common Pleas, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it

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shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

***6** Costs taxed to equally to both parties.

Exceptions.

BAIRD, P.J., concurs.

CARR, J., concurs in part and dissents in part saying:

I would reverse entirely and reinstate the whole complaint.

2001 WL 123467 (Ohio App. 9 Dist.)

END OF DOCUMENT

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