IN THE COURT OF COMMON PLEAS
WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JANINE LITMAN and TIMOTHY MASTROIANNI, individually and jointly,

Plaintiffs,

v.

CANNERY CASINO RESORTS, LLC, a Nevada limited liability company, WASHINGTON TROTTING ASSOCIATION, INC., a Delaware corporation, WTA ACQUISITION CORP., a Delaware corporation, CANNERY CASINO RESORTS, LLC, CANNERY CASINO RESORTS and WASHINGTON TROTTING ASSOCIATION, INC., t/d/b/a THE MEADOWS RACETRACK & CASINO, an unincorporated association, CANNERY CASINO RESORTS, an unincorporated association consisting of one or more yet unidentified natural and/or legal persons, individually and jointly,

Defendants.

CASE NO. 2012-8149

BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFFS' THIRD AMENDED COMPLAINT

Filed on behalf of Defendants, Cannery Casino Resorts, LLC, Washington Trotting Association, Inc., WTA Acquisition Corp., Cannery Casino Resorts, LLC, Cannery Casino Resorts and Washington Trotting Association, Inc. t/d/b/a The Meadows Racetrack & Casino, and Cannery Casino Resorts

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unincorporated association, and Cannery Casino Resorts,[1] by and through their counsel, William L. Stang, Esquire, Benjamin I. Feldman, Esquire, and Fox Rothschild LLP, file this Brief in Support of Preliminary Objections to Plaintiffs' Third Amended Complaint as follows:

I. INTRODUCTION

Plaintiffs commenced this action by the filing of a Complaint in Civil Action which has now been amended three times in response to Defendants' Preliminary Objections. Plaintiffs' Third Amended Complaint in Civil Action (the "Complaint") includes fourteen (14) counts as follows:

(a) Count I - Breach of Oral Contract against all Defendants;

(b) Count II - Breach of Written Contract against all Defendants;

(c) Count III - Breach of Contract Implied in Fact against all Defendants;

(d) Count IV - Unjust Enrichment against all Defendants;

(e) Count V - Breach of Fiduciary Duty against all Defendants;

(f) Count VI - Tortious Interference with Contract and Prospective Business Relations and Advantage against The Meadows;

(g) Count VII - Unfair and Deceptive Trade Practice against all Defendants;

(h) Count VIII -Fraud against all Defendants;

(i) Count IX - Conversion against all Defendants;

(j) Count X - Negligence against all Defendants;

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[1] It is denied that the Defendant identified as "Cannery Casino Resorts" exists as an entity separate and distinct from the Defendant identified as "Cannery Casino Resorts, LLC." Further explanation concerning Plaintiffs' mistaken identification of Defendants will be made subsequent to disposition of these Preliminary Objections.

(k) Count XI - Violation of Gaming, 4 Pa.C.S.A. against all Defendants;

(l) Count XII - Civil Conspiracy against all Defendants;

(m) Count XIII - For an Accounting against all Defendants; and

(n) Count XIV - For Special Damages against all Defendants.

On June 24, 2013 Defendants filed Preliminary Objections to Third Amended Complaint (the "Preliminary Objections") objecting to all 14 counts. The bases for each of the Preliminary Objections are stated in the Preliminary Objections and this Brief in Support of Preliminary Objections. However, from a general perspective it must be noted that although the Complaint contains 108 separate paragraphs, it is surprisingly sparse with respect to material facts which would support the causes of action alleged. This, of course, is a violation of Pa.R.C.P. 1019(a) which states that "(t)he material facts upon which a cause of action or defense is based shall be stated in a concise and summary form." See also, Burnside v. Abbott Laboratories, 505 A.2d 973 (Pa. Super. 1986) (Complaint must give an adverse party notice of the claim being asserted and summarize the facts essential to support that claim). As a result, the Complaint as a whole is seriously deficient and should be stricken in its entirety.

II. LEGAL ARGUMENT

A. Count I must be dismissed for failure to state facts sufficient to support a cause of action for breach of contract.

In Count I of the Complaint Plaintiffs attempt to state a cause of action for breach of an oral contract. In order to state a cause of action for breach of contract, a party must allege "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Core States Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). While not every term of the contract

must be stated in detail, every element of the contract must be stated in the complaint. Id. at 1058, see also, Snaith v. Snaith, 422 A.2d 1379 (Pa. Super. 1980). Also, clarity and specificity is particularly important where an oral contract is alleged. Pennsy Supply, Inc. v. Am. Ash Recycling Corp. of Pa., 895 A.2d 595 (Pa. Super. 2006).

In the present case, Plaintiffs appear to claim that they had a contract with each of the Defendants identified in the Complaint. However, they have failed to plead facts showing (a) details of the alleged contract between Plaintiffs and any of the Defendants; (b) a breach by any of the Defendants; or (c) damages suffered by Plaintiffs resulting from each of the Defendants' alleged breach of contract. Further, Plaintiffs do not attribute any specific oral statement to any of the Defendants that would constitute an offer. Nor do Plaintiffs attribute any oral statement to themselves that would constitute an acceptance. See Colemand v. Heiple, 30 Som. L.J. 264 (Pa. Ct. Com. Pl. 1975) (holding that in pleading a breach of contract, all of the essential terms of the contract, its promises and terms, must be specifically stated). It is therefore submitted that the allegations of Count I are insufficient to state a cause of action for breach of oral contract against any of the Defendants and Count I should be dismissed.

B. Count II must be dismissed for failure to comply with Pa.R.C.P. 1019(i) and for failure to state facts sufficient to support a cause of action for breach of contract.

In Count II of the Complaint, Plaintiffs attempt to state a cause of action for breach of a written contract, again, against each of the Defendants identified in the Complaint. The elements of a claim for breach of a written contract are the same elements as required for breach of an oral contract, i.e., "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3)

resultant damages." Core States Bank, 723 A.2d at 1058. However, when pleading the breach of a written contract, an additional requirement is imposed by the Pennsylvania Rules of Civil Procedure. Specifically, Pa.R.C.P. 1019(i) provides, in part, that when a claim is based upon a writing, "the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance of the writing."

Plaintiffs have attached copies of advertisements, invitations, promotions, offers and Commonwealth of Pennsylvania records to their Complaint. However, they have failed to attach a copy of any written contract allegedly made by Plaintiffs and any of the Defendants. Nor have Plaintiffs stated that the alleged written contract is not accessible or provided an explanation for not attaching a copy of the alleged contract. For this reason alone, Count II should be dismissed.

Notwithstanding Plaintiffs' failure to comply with Pa.R.C.P. 1019(i), they have also failed to allege the facts necessary to support a claim for breach of a written contract under Pennsylvania law. In particular, Plaintiffs have failed to allege sufficient facts to show (a) the existence of a written contract between Plaintiffs and any of the Defendants; (b) any breach by any of the Defendants; or (c) damages suffered by Plaintiffs resulting from each of the Defendants' alleged breach of contract. See, Presbyterian Med. Center v. Budd, 832 A.2d 1066 (Pa. Super. 2006) (holding that every element of a breach of contract claim must be specifically pleaded in a complaint). As a result, Count II of the Complaint must be dismissed.

C. Count III of the Complaint must be dismissed for failure to state facts sufficient to support a cause of action for breach of an implied contract.

In Count III of the Complaint, Plaintiffs attempt to state a cause of action for breach of an implied contract. Under Pennsylvania law, an implied contract "is an actual contract arising when there is an agreement, but the parties' intentions are inferred from their conduct in light of the circumstances." Ameripro Search, Inc. v. Fleming Steel Co., 787 A.2d 988, 991 (Pa. Super. 2001). Furthermore, an implied contract is found to exist where the surrounding circumstances support a demonstrated intent to contract. Tyco Electronics Corporation v. Davis, 895 A.2d 638, 640 (Pa. Super. 2006).

In Tyco Electronics Corporation, supra., the court found a contract implied in fact where through the parties' course of dealings over several years they had manifested their intentions to pay taxes through a particular arrangement. The court noted that the parties had used this arrangement from the beginning of their relationship and that since one party had paid the other parties' taxes for several years, a contract could be implied in fact.

In the present case, Plaintiffs have alleged no course of dealing or relevant circumstances to "support a demonstrated intent to contract" with all or any of the Defendants. Id. at 640. Similarly, they have not alleged the existence of an actual contract that was undocumented with any of the Defendants. Ameripro, 787 A.2d at 991. To the contrary, Plaintiffs simply allege that an implied contract in fact was formed with all Defendants, without explaining how or with which of the Defendants the implied contract was created. Significantly, Plaintiffs fail to state which of the Defendants was

responsible for the alleged breach. As a result, Count III is based upon nothing more than legal conclusions. See, Mellon Bank, N.A. v. National Union Insurance Company of Pittsburgh, 768 A.2d 865 (Pa. Super. 2001) (a legal conclusion is a statement of a legal duty without stating the facts from which the duty arises and has no place in a pleading). It is therefore submitted that Count III must be dismissed.

D. Count IV of the Complaint must be dismissed for failure to allege facts sufficient to establish a cause of action for unjust enrichment.

The doctrine of unjust enrichment is applied when a court determines that there exists a contract implied in law (i.e., a quasi contract) which imposes a duty, not as the result of an agreement, but in spite of the absence of an agreement. Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alts., Inc., 832 A.2d 501 (Pa.Super. 2003). The elements of a cause of action for unjust enrichment are "benefits conferred on Defendant by Plaintiff, appreciation of such benefits by Defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for Defendants to retain the benefit without payment of value." Styer v. Hugo, 619 A.2d 347, 350 (Pa.Super. 1993). In addition, "[T]he most significant element of the doctrine of unjust enrichment is whether the enrichment of the defendant is unjust; the doctrine does not apply simply because a defendant may have benefitted from the acts of a plaintiff." Id.

At paragraph 53 of the Complaint, Plaintiffs state that "(p)laintiffs conferred benefits upon Defendants... by patronizing the Meadows and conducting gambling activities..." This allegation does not provide the specificity required for a claim of unjust enrichment, in part, because it doesn't identify which of the Defendants received the alleged benefit. If Plaintiffs are claiming that each of the Defendants received the

same "unjust enrichment," then Plaintiffs should clearly state that. However, Defendants shouldn't be forced to guess as to which Defendant received the benefit that Plaintiffs are complaining about. Similarly, in order to comply with the pleading requirements of Pennsylvania law, Plaintiffs should be made to identify the benefit that each of the Defendants allegedly unjustly received. See, Amalgamated Transit Union v. Port Authority of Allegheny Cnty., 455 A.2d 1265 (Pa. Cmwlth. 1983) (a complaint which consists of merely argumentative conclusions, as opposed to properly pleaded statements of fact, cannot withstand a demurrer for failure to set forth a cause of action). For the foregoing reasons, it is submitted that Count IV must be dismissed.

E. Count V of the Complaint must be dismissed for failure to allege facts sufficient to support a cause of action for breach of fiduciary duty.

In Count V of the Complaint Plaintiffs attempt to allege a cause of action against all Defendants for breach of fiduciary duty. "Under Pennsylvania law a fiduciary duty will arise in two contexts: (1) in a principal/agent relationship, where the agent is expected to act with the utmost duty of loyalty to the interests of the principal; and (2) where the facts evidence a confidential, or special relationship, such that 'one has the power to take advantage of or exercise undue influence over the other.'" Pratter v. Penn Treaty American Corporation, 11 A.3d 550, 561 (Pa.Cmwlth. 2010) (quoting eToll, Inc. v. Elias/Savion Ad., Inc., 811 A.2d 10, 22-23 (Pa.Super. 2002)).

In the present case, the Plaintiffs haven't alleged the existence of a principal/agent relationship with any of the Defendants (nor did any such relationship exist). See, Lapio v. Robbins, 729 A.2d 1229, 1234 (Pa. Super. 1999) ("The basic elements of agency are the manifestation by the principal that the agent shall act for

him, the agent's acceptance of the undertaking, and the understanding of the parties that the principal is to be in control of the undertaking."). Nor have Plaintiffs alleged facts to support the existence of a special or confidential relationship between either of them and any of the Defendants. See, Commonwealth v. Snyder, 977 A.2d 28 (Pa. Cmwlth. 2009) (In a confidential or special relationship, a fiduciary duty is created only when one party occupies a position of advisor or counselor to the other and inspires confidence that the first party will act in good faith for the other party's interest.).

It is highly doubtful that Plaintiffs intend to claim that a fiduciary duty existed between Plaintiffs and each of the Defendants. Regardless, it is clear that Plaintiffs haven't alleged that any of the Defendants acted as an advisor or counselor to their interests. Therefore, Plaintiffs' claim for breach of fiduciary duty is legally insufficient as to all Defendants. See, Burton v. Bojazi, 2005 WL 1522040 (Pa.Com.Pl. 2005) (defendants' demurrer to plaintiff's claim for breach of fiduciary duty is granted where the complaint did not allege "weakness, dependence, inferiority, or a disparity in the parties' position giving rise to an abuse of power.") (citation omitted). As a result, it is submitted that Count V must be dismissed.

F. Count VI of the Complaint must be dismissed for failure to allege facts sufficient to establish a cause of action for tortious interference.

In Count VI of the Complaint, Plaintiff Mastroianni attempts to assert a cause of action against The Meadows Racetrack & Casino (the "Meadows") for Tortious Interference with Contract and Prospective Business Relations and Advantage. In order to state a cause of action for tortious interference with existing or prospective contractual relations a plaintiff must allege: "(1) the existence of a contractual, or

prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct." Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997). Significantly, courts require a showing of both harm and improper conduct by the defendant in a cause of action for tortious interference with a contract. This is because some intentionally harmful conduct is done at least in part for the purpose of protecting a legitimate interest which may conflict with a plaintiff's interest. Empire Trucking Company, Inc. v. Reading Anthracite Coal Co., 71 A.3d 923, 934 (Pa. Super. 2013).

In determining whether a defendant's conduct was intentionally harmful, courts consider: (a) the nature of the defendant's conduct; (b) the defendant's motive; (c) the interest of the plaintiff with which the defendant's conduct allegedly interferes; (d) the interest allegedly sought to be advanced by the defendant; (e) the proximity or remoteness of the defendant's conduct to the interference; and (f) the relationship between the parties. Triffin v. Janssen, 626 A.2d 571 (Pa. Super. 1993). Given these considerations, Plaintiff's claim cannot be sustained.

The allegations of Count VI are insufficient to state a claim for tortious interference for a number of reasons. First, Plaintiff fails to adequately plead the existence of an existing or prospective business relation. See, Foster v. UPMC South Side Hosp., 2 A.3d 665 (Pa. Super. 2010) (a "prospective contractual relationship" as required for interference with contractual relationship claim is something less than a

contractual right but something more than a mere hope, and the relationship must have a reasonable likelihood or probability). Certainly, Plaintiff Mastroianni does not substantiate his claim that a true business relationship existed between him and Plaintiff Litman. This is fatal to his claim as Pennsylvania law requires the showing of a contractual relation between the complainant and a third party. See, Reading Radio, Inc. v. Fink, 833 A.2d 199 (Pa. Super. 2003) (an element of a tortious interference claim is the existence of a relationship "between complainant and a third party"). Second, Plaintiff Mastroianni has not pleaded that the Meadows acted intentionally with the specific intention of harming his relationship with Plaintiff Litman. Considering the Triffin factors, it is clear that The Meadows was not acting with the requisite intent to purposefully harm Mastroianni. 626 A.2d at 573. Further, Mastroianni has failed to allege any actual legal damage he suffered as a result of The Meadows's actions.

Finally, Plaintiff Mastroianni has again failed to identify which of the Defendants is responsible for the alleged interference with contractual relations. Given the fact that there appear to be at least five (5) Defendants identified in the pleadings, the Defendants should not be left to wonder which of them needs to defend against this claim.

By virtue of the foregoing, Count VI is legally insufficient and must therefore be dismissed.

G. Count VII of the Complaint must be dismissed for failure to allege facts sufficient to support a claim for unfair and/or deceptive trade practices.

In Count VII of the Third Amended Complaint Plaintiffs allege that Defendants have violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law,

73 P.S. § 201-1 ("Pa. UTPCPL"); the Limited Liability Company Law, 15 Pa.C.S.A. § 8981; and 19 Pa. Code § 17.203(b).

1. The PA UTPCPL Claim

Plaintiffs cannot recover damages under the Pa. UTPCPL because as a matter of law, they were not making a "purchase" or a "lease" at a casino as those terms are interpreted under the statute. See, Gottlieb v. Tropicana Hotel and Casino, 109 F.Supp.2d 324, 331 (E.D.Pa. 2000) ("Ms. Gottlieb did not purchase or lease anything, in the ordinary sense of those words.").

In the alternative, in order to establish that a defendant engaged in fraudulent or deceptive conduct in violation of the Pa. UTPCPL, a plaintiff must prove all of the elements of common law fraud. Skurnowicz v. Lucci, 798 A.2d 788, 791 (Pa.Super. 2002).[2] In other words, a plaintiff must allege: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994). Further, Pa.R.C.P. 1019(b) requires averments of fraud to be plead with particularity. Plaintiffs have not alleged any of the above elements of fraud, and have certainly not done so with particularity. As such, Plaintiffs' PA UTPCPL claim should be dismissed.

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[2] This case was reversed by statute on unrelated grounds. However, the legal proposition for which the case is cited above remains valid and binding precedent. See, Burkholder v. Cherry, 607 A.2d 745 (Pa. Super. 1992) (holding that the PA UTPCPL does not apply absent evidence of fraud).

2. The 15 Pa.C.S.A. Section 8981 Claim

In Count VII of the Third Amended Complaint Plaintiffs also attempt to state a cause of action against Defendants for an alleged failure to qualify to do business within the Commonwealth of Pennsylvania. Specifically, Plaintiffs allege at paragraph 80 that Defendants are in violation of 15 Pa.C.S.A. § 8981 *et. seq.* This claim has no merit whatsoever.

15 Pa.C.S.A. § 8981 titled "Foreign limited liability companies," states, in part, that "(a) foreign limited liability company shall be subject to Subchapter K of Chapter 85 (relating to foreign limited partnerships) as if it were a foreign limited partnership" except in three limited aspects which are not applicable here. However, Subchapter K of Chapter 85 includes 15 Pa.C.S.A. § 8588 titled "Action by Attorney General" which states that "(t)he Attorney General may bring an action to restrain a foreign limited partnership from doing business in this Commonwealth in violation of this subchapter." This is relevant, because the statute expressly permits action to be taken by the Attorney General and makes no allowance for a private cause of action.

The United States Supreme Court has articulated three narrow circumstances where a private cause of action might be read into a statute which does not expressly provide for one: (1) where the plaintiff is one of a class for whose special benefit the statute was enacted; (2) there is proof of legislative intent to create a private cause of action; and (3) a private cause of action would be consistent with the underlying purpose of the legislative scheme. Witthoeft v. Kiskaddon, 733 A.2d 623 262 (Pa. 1999) (citing Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975)). None of those

circumstances are found in the present case. As a result, the alleged violation of 15 Pa.C.S.A. § 8981 does not give rise to a private cause of action.

The sole remedy for an alleged violation of 15 Pa.C.S.A. § 8981 is for the Attorney General to bring an action to restrain the business entity from doing business in Pennsylvania. Accordingly, the claim that Defendants violated 15 Pa.C.S.A. § 8981 *et. seq.* must be dismissed.

3. Demurrer to Claim for Violation of Fictitious Names Act

In Count VII of the Complaint, Plaintiffs also allege that Defendants have failed to comply with the requirements of 19 Pa. Code § 17.203(b). This section of the Pennsylvania Code relates to the Pennsylvania Fictitious Names Act, 54 Pa.C.S. § 303(b). In support of this claim, Plaintiffs quote 19 Pa. Code § 17.203(b) and allege that "Defendants failed to comply with Pennsylvania law, thereby cloaking and misleading the identity of [the] operator of The Meadows from the Pennsylvania Gaming Commission." (Third Amended Complaint, ¶ 82).

Contrary to Plaintiffs' allegations, Defendants have fully complied with the Pennsylvania Fictitious Names Act and 19 Pa. Code § 17.203(b). In fact, Exhibit 5 attached to Plaintiffs' Third Amended Complaint plainly shows that "The Meadows Racetrack & Casino" is a registered fictitious name and that the owners are Defendants WTA Acquisition Corp. and Washington Trotting Association, Inc. In the alternative, it is submitted that for the reasons stated at Section II.G.2. of this brief (above), the alleged violation of the Pennsylvania Fictitious Names Act and/or 19 Pa. Code § 17.203(b) does not give rise to a private cause of action.

By virtue of the foregoing, it is submitted that Count VII of the Third Amended Complaint must be dismissed in its entirety.

H. Count VIII of the Complaint must be dismissed for failure to allege facts sufficient to establish a cause of action for fraud.

The Pennsylvania Rules of Civil Procedure impose, in any claim for fraud, a heightened standard of pleading, requiring that allegations of fraud be pled with "particularity." Pa.R.C.P. 1019(b). To state a claim for fraud under Pennsylvania law, a plaintiff must allege: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

The allegations of fraud as set forth in the Third Amended Complaint are insufficiently specific to satisfy the particularity requirement of Rule 1019(b) and/or the pleading requirements of Pennsylvania law. For example, Plaintiffs have failed to specify the misrepresentation allegedly made and to identify which Defendant was responsible for making the alleged misrepresentation. Similarly, Plaintiffs have failed to identify the specific injury or harm that was caused by their reliance on the alleged misrepresentation. Plaintiffs seem to focus on the claim that the Defendants were "intentionally identifying... the operator of The Meadows as sourced by a "Las Vegas" casino to bait customers." (Complaint, par. 86). However, even if this allegation was true, Plaintiffs fail to show that they relied upon or were injured by this type of statement. Similarly, Plaintiffs claim that "senior citizens" are patrons of the The Meadows does

nothing to show that Plaintiffs justifiably relied on a false statement or were harmed as a result.

Plaintiffs' conclusory statements concerning Defendants alleged fraud are insufficient as a matter of law. See Amalgamated Transit Union v. Port Authority of Allegheny Cnty., 455 A.2d 1265 (Pa. Cmwlth. 1983) (a complaint which consists of merely argumentative conclusions, as opposed to properly pleaded statements of fact, cannot withstand a demurrer for failure to set forth a cause of action). For this reason, Count VIII of the Complaint must be dismissed.

I. Count IX of the Complaint must be dismissed for failure to allege facts sufficient to establish a cause of action for conversion.

In paragraph IX of the Complaint Plaintiffs attempt to state a cause of action for conversion. Conversion is "a tort by which a defendant deprives a plaintiff of his or her right to a chattel and interferes with a plaintiff's use or possession of a chattel without the plaintiff's consent and without lawful justification." Chrysler Credit Corp. v. Smith, 643 A.2d 1098, 1101 (Pa.Super. 1994). Similarly, conversion is "an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession." Norriton East Realty Corp. v. Central-Penn Nat'l Bank, 254 A.2d 637, 638 (Pa. 1969). Finally, under Pennsylvania law, sums of money paid voluntarily cannot be made the subject of a claim for conversion. Corporate Plaza Partners, Ltd. v. American Employers Insurance Company, 1996 WL 180696 at *2 (U.S.D.C. E.D. Pa.) ("To hold otherwise would blur the line between contract and tort, turning every unpaid debt into a conversion, "a step Pennsylvania's state and federal courts alike have refused to take."" (internal citations omitted).

In the present case, Plaintiffs have failed to allege that any of the Defendants have taken control or possession of any chattel or goods belonging to the Plaintiffs. Similarly, Plaintiffs have failed to identify any chattel or goods that were allegedly wrongfully taken by Defendants. To the contrary, they have only complained that money voluntarily spent should now be returned. This is not a conversion. As such, Count IX must be dismissed.

J. Count X of the Complaint must be dismissed for failure to allege facts sufficient to establish a cause of action for negligence.

Under Pennsylvania law, to state a cause of action for negligence, "a plaintiff must allege facts which establish the breach of a legally recognized duty or obligation of the Defendant that is causally connected to actual damages suffered by the plaintiff." Scampone v. Highland Park Care Center, LLC, 57 A.3d 582, 596 (Pa. 2012). However, it is also well established that mere general allegations of negligence or carelessness, or that a defendant acted in a reckless, careless and negligent manner, without stating what the defendant did or omitted to do which amounted to a breach of duty are insufficient. Connor v. Allegheny General Hospital, 461 A.2d 600, 602 n. 3 (Pa. 1983), see also, Flurer v. Pocono Medical Center, 15 Pa. D&C 4th 645 (C.P. Monroe 1992) (Pennsylvania courts view general allegations of negligence with disfavor).

In their Complaint, Plaintiffs assert, "Defendants breached their duty of care and Plaintiffs have been injured thereby. Defendants [*sic*] acts and/or failure to act when required proximately caused the injury to the Plaintiffs." (Complaint, ¶¶ 97, 98). These are exactly the type of allegations that the Pennsylvania Supreme Court has held to be legally insufficient. See, Connor, supra.; See also Mellon Bank, N.A. v. National Union Ins. Co., 768 A.2d 865 (Pa. Super. 2001) (a legal conclusion is a statement of a legal

duty without stating the facts from which the duty arises and has no place in a pleading). As such, it is submitted that Count X must be dismissed.

K. Count XI of the Complaint must be dismissed for failure to allege facts sufficient to establish that a violation of Pennsylvania Gaming Laws actually occurred.

Count XI of Plaintiffs' Complaint is titled "Violation of Gaming, 4 Pa.C.S.A." In paragraph 100 of this Count, Plaintiffs state that "(b)y the acts averred and incorporated into this Count, Defendant has violated the Pennsylvania Gaming Laws and related regulations, 4 Pa.C.S.A., et. seq., including but not limited to 58 Pa.Code et. seq." This statement is insufficient to support any type of claim.

Defendants have already explained that as a matter of law, the allegations of a Complaint must disclose the material facts necessary for an adverse party to prepare its defense. Smith v. Wagner, 588 A.2d 1308 (Pa.Super. 1991); see also, Burnside v. Abbott Labs., 505 A.2d 973 (Pa. Super. 1985) (a complaint must give notice to the defendants of the claim being asserted and must also summarize the essential facts that support the claim). In this respect, the allegation that Defendants have violated Pennsylvania Gaming Laws by "the acts averred and incorporated into this Count" is insufficiently specific. It is a simple conclusion of law. Plaintiffs have not alleged which parts of the "Pennsylvania Gaming Laws" the Defendants allegedly violated, nor which Defendant committed the alleged wrongful act. Clearly, Plaintiffs have not disclosed the material facts necessary to allow the Defendants to understand (a) the claims being brought against them, (b) which section of Title 4 Pa.C.S.A. was allegedly violated, or (c) which defendant is alleged to have made the violation. In re: The Barnes Foundation, 661 A.2d 889, 895 (Pa. Super. 1995) (a pleading should fully summarize

the material facts and at a minimum set forth concisely the facts upon which a cause of action is based).

Given the lack of detail found in Count XI of the Complaint, Defendants cannot be expected to evaluate or address this claim. It is therefore submitted that Count XI of the Complaint must be dismissed.

L. Count XII of the Complaint must be dismissed for failure to allege facts sufficient to establish a cause of action for civil conspiracy.

A civil conspiracy is a combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose. Raneri v. DePolo, 441 A.2d 1373 (Pa. Commw. Ct. 1982). To state a cause of action for civil conspiracy, a Complaint must allege "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." McKeeman v. Cove States Bank, N.A., 751 A.2d 655, 660 (Pa.Super. 2000). Moreover, proof of malice or intent to injure is essential to a cause of action for civil conspiracy. Goldstein v. Phillip Morris, Inc., 854 A.2d 585 (Pa. Super. 2004); Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. 1997).

Under Pennsylvania law, "in order for a claim of civil conspiracy to proceed, a plaintiff must 'allege the existence of all elements necessary to such a cause of action.'" Grose v. Proctor and Gamble Paper Products, 866 A.2d 437, 440 (Pa.Super. 2005) (citing Rutherford v. Presbyterian University Hospital, 612 A.2d 500, 508 (Pa.Super. 1992)).

In its present state the Complaint lacks the specificity required to state a cause of action for civil conspiracy. In particular, Plaintiffs have failed to allege that any particular

Defendant acted with the requisite intent, i.e. malice or intent to injure, to support an action for civil conspiracy. See, e.g., Reading Radio, Inc. v. Fink, 833 A.2d 199 (Pa.Super. 2003). Similarly, Plaintiffs have failed to allege an overt act done in pursuance of a common purpose and/or actual legal damage. McKeeman, 751 A.2d at 660. Nor have they alleged what unlawful act or unlawful purpose Defendants committed or pursued. Raneri, 441 A.2d at 1373. As such, Plaintiffs' claim for civil conspiracy fails to give Defendants notice of the facts essential to support its claim. This claim should therefore be dismissed. See, Burnside, 505 A.2d at 973.

M. Count XIII of the Complaint must be dismissed for failure to allege facts sufficient to support the request for an accounting.

For the reasons set forth in Defendants' Preliminary Objections and this brief, it is apparent that Plaintiffs are not entitled to any relief whatsoever. This includes the request for an accounting made at Count XIII.

Until the court has determined which claims, if any, the Defendants must address, and the Plaintiffs have provided to Defendants the relevant factual information that is required by Pennsylvania law, the court cannot determine whether Plaintiffs are entitled to any type of accounting. Defendants deny that Plaintiffs are entitled to any relief, including the request for an accounting. However, in the alternative that the court determines an accounting should be made, the Plaintiffs should first be directed to state which of the Defendants should make the accounting and why that Defendant should be directed to do so. Otherwise, the Plaintiffs request for an accounting turns into a fishing expedition which is simply not permitted under Pennsylvania law.

N. Count XIV of the Complaint must be dismissed, because a request for "special damages" is not recognized as an independent cause of action under Pennsylvania law.

Under Pennsylvania law, "special damages" are damages which are not the usual or ordinary consequences of an alleged wrongful act. A request for "special damages" is not recognized as an independent cause of action under Pennsylvania law. To the contrary, special damages are an item of relief that may be requested as part of the demand for relief in a recognized cause of action. For this reason alone, Count XIV must be stricken.

It is also noted that Pa.R.C.P. 1019(f) requires that averments of items of special damage "shall be specifically stated." Similarly, Rule 1020(a) provides, in part, that "(e)ach cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." Pa.R.C.P. 1020(a) (2012). In this respect, Plaintiffs have failed to state with particularity any special circumstances or specific facts that would give rise to or permit an award of special damages. Similarly, Plaintiffs have failed to state with the requisite particularity the items of special damages allegedly sustained. For these reasons, Count XIV must be dismissed.

O. Plaintiffs' requests for punitive damages must be dismissed.

Plaintiffs have requested punitive damages in each of the 14 Counts contained in the Complaint. However, as a matter of law punitive damages are not permitted in an action for breach of contract or based on breach of contract. Reliance Universal, Inc. v. Ernest Renda Contracting, Co., 454 A.2d 34, 44 (Pa. Super. 1982). Accordingly, the request for punitive damages must be stricken from Counts I, II, III, IV and XIII.

It is also noted that punitive damages are permitted in common law tort claims only when the acts complained of are intentional, willful, wonton and/or committed with reckless indifference to the rights of others. Delahanty v. First Penn. Bank, 464 A.2d 1234, 1263-64 (Pa. Super. 1983). However, review of the Complaint shows that Plaintiffs have failed to allege with the requisite particularity any conduct that would permit an award of punitive damages under any circumstance. Accordingly, each of Plaintiffs' remaining requests for punitive damages must be dismissed.

P. To the extent that Plaintiffs' contract claims are not dismissed, all tort claims must be dismissed by virtue of the "gist of the action" doctrine.

Plaintiffs' Third Amended Complaint includes causes of action based upon breach of contract and causes of action sounding in tort. Further, each of the tort claims alleged in the Third Amended Complaint is interwoven with the contract claims.

Under Pennsylvania law, the "gist of the action doctrine" precludes parties from recasting contract claims into tort claims. In other words, where the gist of a tort claim is based upon a claim for breach of contract, the tort claim must be dismissed. See, Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10 (Pa.Super. 2002).

For the reasons stated in this brief, Defendants assert that all of Plaintiffs' breach of contract claims must be dismissed. However, in the alternative that the Plaintiffs' breach of contract claims are not dismissed, it is clear that the tort claims included in the Complaint are interwoven with those contract claims. And as a result, the tort claims must be dismissed.

The gist of Plaintiffs' tort claims are that Defendants engaged in tortious activities during the course of the parties' contractual relationships. Therefore, each of Plaintiffs' tort claims are barred by the gist of the action doctrine and must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of Preliminary Objections to Plaintiffs' Third Amended Complaint was served upon counsel as addressed below via e-mail and regular mail on the 23 day of September, 2013:

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