**Control # 51450**
**Control # 50696**

**IN THE COURT OF COMMON PLEAS**

**OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**CIVIL TRIAL DIVISION**

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| **ACME MARKETS, INC.** | : | **February 2000** |
| | : | **No. 1559** |
| **v.** | : | |
| **DUNKIRK ICE CREAM COMPANY,** | : | |
| **WILLIAM C. WELLS,** | : | **Commerce Program** |
| **MID-ATLANTIC ICE CREAM CO.,** | : | |
| **DANIEL DESMOND, and FIELDBROOK** | : | |

**OPINION**

**Introduction**

**Presently before this court are two sets of preliminary objections filed respectively by defendants Dunkirk Ice Cream Company and William C. Wells, on one hand, and by defendants Mid-Atlantic Ice Cream and Daniel Desmond, on the other. Resolution of these objections has been akin to wading through a procedural quagmire of shifting burdens of proof[1] due both to**

[1] The nature of a preliminary objection necessarily affects the burden of proof. As the Superior Court has observed, there are basically two categories of preliminary objections: "those raising questions of fact outside the record and those which may be determined from the facts of record." Chester Upland Dist. v. Yesavage, 653 A.2d 1319, *1325 (Pa. Commw. 1994). If preliminary objections raise issues of fact beyond the record, the failure of the parties to provide requisite evidence does not excuse the court from making further inquiry. Holt Hauling

**the plaintiff's failure to respond to the Motions to Determine the Preliminary Objections and to the defendants' failure to provide the requisite support to resolve the factual questions raised by their objections of lack of in personam jurisdiction or pendency of a prior action.**

**For the reasons set forth below, the objections seeking a more specific complaint are SUSTAINED; the objections of defendants Mid-Atlantic Ice Cream and Daniel Desmond based on pendency of a prior action ARE DISMISSED WITHOUT PREJUDICE for failure to attach the pleading of the allegedly pending matter; the objections of defendants Dunkirk Ice Cream and William C. Wells asserting improper venue and lack of in personam jurisdiction will be held under advisement for 60 days so that the parties may conduct the discovery necessary to resolve the factual issues raised by this jurisdictional objection; the Motion to Strike for Failure to Provide Proper Verification is DISMISSED AS MOOT; the Motion to Strike by Defendants Dunkirk and Desmond is GRANTED as to Paragraph 76 which is stricken; Defendants' Objections as to Improper Joinder are GRANTED to require Acme to present separate causes of actions in separate counts; and all other objections are OVERRULED.**

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& Warehouse Systems v. Aronow Roofing, 309 Pa. Super. 158, 454 A.2d 1131, *1133 (1998).

**A. Threshold Issues: Plaintiffs' Failure to Respond to Defendants' Motions to Determine Preliminary Objections**

**On March 23, 2000, Plaintiff Acme Markets filed a complaint that is charitably characterized as convoluted, and at times inscrutable, against defendants Dunkirk Ice Cream ("Dunkirk"), Fieldbrook Farms ("Fieldbrook"), William C. Wells ("Wells"), Daniel Desmond ("Desmond"), and Mid-Atlantic Ice Cream Co. ("Mid-Atlantic"). In addition to a complicated statement of facts, the complaint consists of two counts that are not denominated as to cause of action but only as to defendants.**

**The defendants filed preliminary objections with the prothonotary, seeking inter alia, dismissal of the complaint on various grounds or, in the alternative, the filing of a more specific complaint. Plaintiff, however, filed a reply only to the Preliminary Objections of defendants Mid-Atlantic and Desmond. The defendants subsequently filed Motions to Determine these preliminary objections pursuant to Phila. Civ. Rule *1028,[2] but plaintiffs filed no response whatsoever. The Pennsylvania Superior Court, however, has held that preliminary objections**

[2] This rule provides that preliminary objections should initially be filed with the Prothonotary, but that within 30 days the objections together with a memorandum of law should be filed with the Motion Court. Phila. Civ. R. *1028(B). These provisions are in accord with Pa.R.C.P. 1028 which contain a Note that local rules may "contain supplementary provisions governing the filing and disposition of preliminary objections." Pa.R.C.P. 1028, Note.

**cannot be summarily dismissed because uncontested.[3] The merits of Acme's complaint must therefore by analyzed with care. B.**

**Preliminary Objections by Defendants Dunkirk and William Wells Asserting Improper Venue and Lack of In Personam Jurisdiction**

**Defendants Dunkirk and Wells assert that the Complaint fails to allege adequately either that there is proper venue as to them or that this court has in personam jurisdiction over them. In the interest of clarity, the arguments as to each defendant will be analyzed separately.**

**1. The Preliminary Objections of Defendant Dunkirk Raise Issues of Fact Which Cannot be Determined on the Present Record**

**Defendant Dunkirk argues that under the venue rules for**

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[3] Schuylkill Navy v. Langbord, 728 A.2d 964, *965 (Pa. Super. 1999)("We hold that preliminary objections should not be sustained solely on the ground that the preliminary objections are uncontested or unopposed"). Rather, "a court must consider the sufficiency of the cause of action alleged in a complaint before granting a party's preliminary objections." Id., 728 A.2d at *968. See generally Smith v. Transportation Workers of America, AFL-CIO Local 234, 116 Pa.Cmwlth. 143, 541 A.2d 420 (1988)(case remanded where trial court granted preliminary objections as uncontested for failure to file memorandum of law); Smith v. McDougall, 365 Pa. Super. 157, 529 A.2d 20, *22 (1987)("court's decision to dismiss the complaint based solely on its uncontested status without considering whether it sufficiently set forth a cause of action amounted to an abuse of discretion"); Harley Davidson Motor Co., Inc. v. Hartman, 296 Pa. Super. 37, 442 A.2d 284, *286 (1982)("trial court abused its discretion when it dismissed the complaint without leave to amend and thereby put appellant out of court without ever considering the sufficiency of the cause of action alleged in the complaint").

**corporations set forth in Pa.R.C.P. 2179, Acme's complaint fails to allege adequately that venue is proper as to it. Dunkirk argues that venue is improper because the complaint fails to allege that its registered office or principal place of business is located in Philadelphia County, Pa.R.C.P.2179(a)(1), that the cause of action arose in Philadelphia, Pa.R.C.P. 2179(a)(3) or that Philadelphia is the county where a transaction or occurrence took place out of which the cause of action arose, Pa.R.C.P. 2179 (a)(4). While Dunkirk is correct that the complaint fails to allege venue as to it on any of these grounds, its additional argument that the present allegations fail to satisfy the requirement of Pa.R.C.P. 2179 (a)(2) is unpersuasive. Rule 2179 provides that a personal action against a corporation may be brought "in and only in:"**

> **(2) a county where it regularly conducts business. Pa.R.C.P. 2179(a)(2).**
>
> **The Complaint, however, specifically alleges:**
>
> **At all times relevant hereto, Dunkirk did substantial business within Philadelphia County including delivering and supplying ice cream and ice cream products to businesses in Philadelphia County. Complaint, ¶ 4.**

**This allegation that Defendant Dunkirk "did substantial business within Philadelphia County" on its face would appear to satisfy the "regularly conducts business" requirement of Pa.R.C.P. 2179(a)(2). This facial conformity, however, is not**

**conclusive because preliminary objections raising improper venue under Pa.R.C.P. 1028(a)(1) "cannot be determined from facts of record" and thus pose a factual question. See Note, Pa.R.C.P. 1028;Chester Upland School Dist. v. Yescavage, 653 A.2d at *1325.**

**To determine whether a corporation satisfies the "regularly conducts business" requirement for venue, Pennsylvania courts engage in a careful analysis of the nature of the acts the corporation performs in a county: "those acts must be assessed both as to their quantity and quality." Masel v. Glassman, 456 Pa. Super. 41, 689 A.2d 314,**317 (1997). The Pennsylvania Supreme Court has defined the requisite quantity and quality of corporate acts for purposes of Pa.R.C.P. 2179(a)(2):**

> **The term 'quality of acts' means those directly, furthering or essential to, corporate objects; they do not include incidental acts. By quantity of acts is meant those which are so continuous and sufficient to be termed general or habitual. A single act is not enough. Canter v. American Honda Motor Corp., 426 Pa. 38, 231 A.2d 140, **142 (1967)(citations omitted).**

**Deciding whether a particular corporation's business activity in a county satisfies the venue requirement thus depends on the facts of a particular case and courts must frequently analyze facts beyond the pleadings such as those set forth in depositions. See, e.g. Canter v. American Honda Motor Corp., 231 A.2d at * 40-41 (trial court considered deposition of**

**general manager of additional defendant as to its activities in the forum). The Pennsylvania Superior Court has observed that the party challenging venue has the burden of proof which, depending on the case, may not be satisfied solely on the basis of the pleadings where issues of fact arise. See Gale v. Mercy Catholic Medical Center, 698 A.2d 647, *651 (Pa. Super. 1997), app. denied, 552 Pa. 696, 716 A.2d 1249 (1998).**

**Dunkirk, however, has merely set forth its objections without any supporting documentation. At best, Dunkirk has created an issue of fact as to whether its contacts are as substantial as Acme alleges. Under Pa.R.C.P. 1028(c)(2), "if an issue of fact is raised, the court shall consider evidence by depositions or otherwise." See also Chester Upland v. Yesavage, 653 A.2d at *1326. Dunkirk suggests, however, that the issue of venue can be resolved based solely on the pleadings because Acme's complaint (1) fails to set forth any business activity by Dunkirk after 1996; and (2) the complaint states that Dunkirk no longer exists and that Fieldbrook is its successor in interest. Dunkirk argues that these allegations render venue improper because under Pa.R.C.P. 2179(a)(2) it is not enough that the defendant's business is conducted "at some time in the past." Instead, the defendant must be regularly conducting business "at the time the complaint is filed and**

**served." Dunkirk's Memorandum of Law at 10-11.**

**The only appellate case Dunkirk cites to support the proposition that the corporation must be regularly conducting business at the time the complaint is filed is Zalevsky v. Casillo, 421 Pa. 294, 218 A.2d 771 (1966).[4] This case is inapposite for several reasons: it does not deal with venue under Rule 2179, but rather analyzes the validity of service under Rules 2077 and 2079. These rules, moreover, are no longer in effect but were rescinded effective 1986. In addition, the defendant in Zalevsky was not a corporation but was a physician who had entered into a formal partnership dissolution prior to the initiation of the action against him. Zalevsky thus offers little guidance as to the period of time during which a defendant corporation must "regularly conduct business" in a county to establish proper venue.**

**One case which casts some light on this issue is Simmers v. American Cynamid Corp., 394 Pa. Super. 464, 576 A.2d 376 (1990), app. denied, 527 Pa. 649, 593 A.2d 421 (1991), cert. denied sub nom., Chromolloy Pharmaceutical v. Boyer, 502 U.S. 813 (1991). Although this case focuses on an issue of jurisdiction -- and whether the forum related contacts of a predecessor corporation**

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[4] Dunkirk cites a trial court opinion, Collins v. Lewis, 5 Pa. D. & C.2d 517 (Phila.Cty. 1977) as "citing" Zalevsky. See Dunkirk\Wells Memorandum of Law at 10.

**may be attributed to its successor to establish in personam jurisdiction--it is relevant to both Dunkirk's venue and jurisdictional objections. The leap from an analysis of corporate jurisdiction in Simmers to an analysis of corporate venue under Rule 2179(a)(2) is not as great as it might first appear. Such a leap is suggested by the Pennsylvania Supreme Court's analysis of the venue rule in Purcell v. Bryn Mawr Hosp., 525 Pa. 237, 579 A.2d 1282(1990).[5] The Purcell court observed that "Subsection (a)(2) provides a theory of transient jurisdiction by counties in which the corporation is present by virtue of its business activities or contacts."[6] Purcell, 579 A.2d at **1284. It went on to observe:**

**'Substantial relationship' is nothing more than synonymous**

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[5] Indeed, the Pennsylvania Supreme Court in Purcell observed that while jurisdiction and venue are different "legal concepts, " Rule 2179 employs the same procedural tests to determine whether both exist. Consequently, "[o]nce preliminary objections are filed to venue, the issue is treated as a jurisdictional matter and subject to Rule 2179. The term 'doing business,' therefore, has a dual meaning: it is essential to the exercise of jurisdiction and it is essential in determining venue." Purcell, 579 A.2d at *241, n.1.

[6] Purcell, 579 A.2d at **1284. The Pennsylvania Supreme court noted that its earlier decision Shambe v. Delaware & Hudson R.R. Co., 288 Pa. 240, 135 A.755 (1927) had "traced the historical evolution of jurisdiction doctrine in Pennsylvania from the ancient rule requiring actual presence to the modern theory of transient jurisdiction which encompasses the realities of modern corporate practices involving far-flung economic penetration of markets beyond the forum where the corporation is located." Id., 579 A.2d at **1285.

> **language for minimum contacts which, in turn, bears directly on the meaning of 'regularly doing business.' It furnishes a complimentary interpretation of the quality-quantity test and nothing more. Subsection (a)(2) [of Pa.R.C.P. 2179] provides for general jurisdiction while the remaining provisions of Rule 2179 form the basis of special jurisdiction covering the legal domicile and acts of the corporate enterprise. Purcell, 579 A.2d at **1286.**

**It is thus possible to use the jurisdictional analysis in Simmers v. American Cynamid for guidance as whether the "regularly conducts business" requirement for venue under Pa.R.C.P. 2179(a)(2) can apply to business activity that took place prior to the filing of a cause of action. In Simmers, the Superior Court concluded that a predecessor corporation's activities can be attributed to the successor for jurisdictional purposes. Simmers, 576 A.2d at *381. As a practical matter, the animus in Simmers was determining whether a plaintiff had a cause of action premised on acts in the past by a corporation that ceased to exist. In addition to its subtle analysis of successor liability, the Simmers court necessarily considered whether in personam jurisdiction over a corporation could be premised on acts occurring in the distant past. In this vein, the court observed that "when a foreign corporation, which was subject to the general personal jurisdiction of Pennsylvania tribunals, subsequently ceases to do continuous and systematic business in Pennsylvania or withdraws its qualifications as a**

**foreign corporation in this Commonwealth, Pennsylvania's jurisdiction over the foreign corporation is not defeated with respect to any act, transaction or omission which occurred during the previous period." Id., 576 A.2d at *382. If a successor corporation can be held liable for the past acts of its predecessor under this Simmers rationale then Dunkirk raises an untenable argument when it insists venue is improper merely because Acme's complaint fails to cite business activities by it after 1996. The issue of venue thus devolves into a fact question, which like the issue of jurisdiction, must be resolved by taking extra evidence as to the nature of Dunkirk's activities within Philadelphia County for venue purposes.**

**Dunkirk also argues that this court lacks in personam jurisdiction, but almost as an afterthought with no elaboration other than "the absence of venue amounts to a lack of jurisdiction." Dunkirk's Memorandum at 15. In failing to support its objections with any facts beyond the record, Dunkirk has failed to meet its burden of proof and, at best, has created an issue of fact concerning whether this court has in personam jurisdiction as to it.**

**Preliminary objections that would result in dismissal of a complaint should only be granted when clear from doubt. When presented with preliminary objections asserting lack of in**

**personam jurisdiction, a court must consider the evidence in the light most favorable to the non-moving party. Where preliminary objections raise an issue of fact concerning in personam jurisdiction, a court should not attempt to resolve the disputed facts based on its own view but must receive other evidence through interrogatories, depositions or an evidentiary hearing. Ambrose v. Cross Creek Condominiums, 412 Pa. Super. 1, 602 A.2d 864, *869 (1992)(citations omitted); Chester Upland School Dist. v. Yesavage, 653 A.2d at *1326 ("Pursuant to Rule 1028(c)(2), the trial court was required to take additional evidence through depositions or otherwise to resolve the jurisdictional dispute"). As the Superior Court has cautioned:**

> **The failure of the parties to provide the evidence necessary for a proper determination of the issue does not excuse the court from further inquiry. Thus, it was incumbent on the court below to take evidence to resolve the dispute. Holt Hauling and Warehousing Systems, Inc. v. Aronow Roofing Co., 309 Pa. Super. 158, 454 A.2d 1131, *1133 (1983).**

**Moreover, it is the moving party that "bears the burden of supporting its objections to the court's jurisdiction." Holt, 454 A.2d at **1133. See also Delaware Valley Underwriting Agency, Inc. v. Williams & Sapp, 359 Pa. Super. 368, 518 A.2d 1280, *1283 (1986). A mere allegation that a court lacks in personam jurisdiction does not automatically place the burden on the plaintiff to establish jurisdiction. Instead, the defendant**

**"must first support its challenge to the court's in personam jurisdiction by presenting evidence. Only after the defendant has done so does the burden shift to the plaintiff to adduce sufficient competent evidence to establish the court's jurisdiction." Maleski v. DP Realty Trust, 653 A.2d 54, *61 (1995).**

**It is therefore necessary for Dunkirk to support its objections with additional evidence, but "once the party opposing jurisdiction has supported his objections with competent evidence, the burden shifts to the party asserting jurisdiction to prove that, both statutorily and constitutionally, personal jurisdiction is proper." Hall-Woolford Tank Co.,Inc. v. R.F. Kilns, Inc., 698 A.2d 80, *84 (Pa. Super. 1997); Maleski v. DP Realty Trust, 653 A.2d at *61.**

**2. The Preliminary Objections of Defendant Wells also Raise Issues of Fact**

**Individual defendant William Wells argues that venue is improper and that this court lacks jurisdiction over him because the complaint alleges that he is domiciled in Dunkirk, New York and "there are no averments in the complaint at all to suggest that Wells did anything in Philadelphia that might subject him to a lawsuit in this County." Wells's Preliminary Objections at**

**¶¶ 30-31.**

**In framing his venue argument, Wells relies on Pa.R.C.P. 1006(a) and argues that it provides that venue is proper against an individual only in a county in which an individual may be served, in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose. Wells's Preliminary Objections, ¶ 29. Wells neglects, however, Rule 1006(c) which provides another basis for venue where, as in the instant case, plaintiff seeks to enforce a joint or joint and several liability as to more than one defendant:**

> **An action to enforce a joint or joint and several liability against two or more defendants, except actions in which the Commonwealth is a party defendant, may be brought against all defendants in any county in which the venue may be laid against any one of the defendants under the general rules of Subdivision (a) or (b)[referencing Rule 2179 re corporations]. Pa.R.C.P. 1006(c).**

**For the reasons previously stated, therefore, Well's venue argument raises the factual issues of whether venue can be established as to defendant Dunkirk, and through it, on defendant Wells.**[7]

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[7] See generally Goodrich Amram 2d §1006(c):1 ("The recognized policy behind Rule 1006(c) is to avoid multiplicity of suits and the unnecessary splitting of causes of action because venue might otherwise be unobtainable in the county of the codefendant"). In Ro-Med Construction Co., Inc. v. Bartley, Co., 239 Pa.Super. 311, 361 A.2d 808 (1976), the Superior Court concluded that venue was proper under Rule 1006(c) as to an

**Defendant Wells's argument that the complaint lacks any allegations that could support in personam jurisdiction also requires additional factual support. The complaint alleges, for instance, that "at all relevant times" Wells was an officer, employee or owner of Dunkirk and was acting as its agent. Complaint, ¶¶ 10 & 11. The Pennsylvania Commonwealth Court has recently embraced the flexible approach set forth in a line of federal cases. These cases decline to exercise jurisdiction over corporate officer based solely on actions taken in their corporate capacities, but recognize an exception that corporate officers and directors might be "liable for the tortious acts the corporation commits under their direction or with their participation." Maleski v. DP Realty Trust, 653 A.2d at *63 (citing Al Khazraji v. St. Francis College, 784 F.2d 505 (3d Cir. 1986), aff'd, 481 U.S. 604 (1987)). As a consequence, the jurisdictional objections by Wells require additional facts so that the following test can be applied:**

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individual where his corporate co-defendant failed to object to venue. The potentially harsh consequences of allowing the waiver of one defendant to be imposed on another was addressed in McClain v. Arneytown Trucking Co., 370 Pa. Super. 520, 536 A.2d 1388 (1988) where the court concluded that the failure of one defendant to object to venue could not deprive a co-defendant from raising a venue objection. The McClain court distinguished Ro-Med by noting in the earlier case the complaint clearly alleged that the
individual defendant was a resident of the county. No such factual certainty is set forth in the Acme Complaint.

**To determine whether there is jurisdiction over a corporate officer or director whose only contact with Pennsylvania are allegedly tortious acts taken as corporate officers or directors, it is necessary under this case-by-case approach to examine factors such as the officer's role in the corporate structure, the quality of the officer's forum contacts and the extent and nature of the officer's participation in the alleged tortious conduct. By adopting this approach, we take the same common sense view as the federal courts that, unless jurisdiction is obtained over those corporate officers engaged in tortious conduct, they will merely repeat the conduct over and over in other corporate guises. Maleski, 653 A.2d at *63(citations omitted).**

**C. Preliminary Objections of Defendants Mid-Atlantic Ice Cream Co. and Daniel Desmond on the Basis of Pendency of Prior Action Must Be Dismissed Without Prejudice to Refile for Failure to Attach Complaint of Pending Action**

**Defendants Mid-Atlantic and Desmond have filed objections to Acme's complaint pursuant to Pa.R.C.P. 1028(a)(6), alleging that Count II should be dismissed on the basis of a pendency of a prior action. They argue that Acme's claim against them to recover $122,236.94 in billbacks arises from a series of transactions that took place throughout the 1990's involving the marketing of Abbott's ice cream. These same transactions, defendants assert, are at issue in a law suit they filed against Acme bearing the caption Mid-Atlantic Ice Cream, Co. and Daniel**

**Desmond v. Acme Markets, Inc., January 1999, No. 3300. Preliminary Objections, ¶¶ 1-4. Acme filed a counterclaim in that action, defendants maintain, and were therefore required pursuant to Pa.R.C.P. 1020 to join all causes of actions arising from these transactions.**

**On its face, defendants argument is persuasive. Pennsylvania courts have concluded that where a defendant files a counterclaim, he in essence becomes a plaintiff and must join all counterclaims that arise from the same "transaction or occurrence" or suffer waiver. See, e.g., Carringer v. Taylor, 402 Pa. Super. 197, 586 A.2d 928,**932 (1991), app. denied, 533 Pa. 629, 621 A.2d 576 (1992). This facial analysis, however, does not suffice. These preliminary objections premised on the pendency of a prior action raise issues that cannot be resolved on the basis of the record presented. See generally Telestar Corp. v. Berman, 281 Pa. Super. 443, 422 A.2d 551, 554 (1980). At a bare minimum, it is necessary to consider the complaint defendants Mid-Atlantic and Desmond filed against Acme to determine whether the same transaction is involved in that action and Acme's present action. See, e.g. Virginia Mansions Condominium Association v. Lampi, 380 Pa. Super. 452, 552 A.2d 275, **277-78 (1988)(where earlier filed complaint was attached as an exhibit to preliminary objections, the court was able to**

**determine whether claim of lis pendens was valid). The defendants, however, failed to attach a copy of their earlier filed complaint;[8] hence, their preliminary objections under Rule 1028(a)(6) must be dismissed without prejudice to refile with the requisite documentation.**

**D. Defendants' Preliminary Objections Seeking a More Specific Complaint are Granted**

**All of the defendants have objected that the legal claims asserted against them are either legally insufficient (demurrer) or lack the requisite specificity. A preliminary objection in the nature of a demurrer accepts all well pleaded facts as well as reasonable inferences therefrom. Mellon Bank, NA v. Fabinyi, 437 Pa. Super. 559, 650 A.2d 895, 899 (1994). A demurrer does not raise issues of fact; instead, it can be determined based on the pleadings alone. Id., 650 A.2d at 899. A demurrer should be granted only when a plaintiff has clearly failed to state a claim on which relief may be granted; it must be denied if there is any doubt about whether the complaint states a claim for relief under any theory. Sevin v. Kelshaw, 417 Pa. Super. 1, 611 A.2d 1232, 1235 (1992).**

**As the defendants emphasize, the exact nature of the claims**

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[8] Defendants do attach a copy of Acme's complaint, and reference their earlier complaint as Ex. B. Unfortunately, the attached Ex. B is entitled "Lockbox Operating Agreement."

**asserted against them by Acme is unclear because of imprecise and sometimes contradictory allegations. Although defendants hypothesize that plaintiff is asserting claims of fraudulent misrepresentation and civil conspiracy, it is equally possible to discern elements of breach of contract, tortious interference with contractual relations or conversion. A major cause of the complaint's imprecision its it failure to present separate causes of action in separate counts as required by the Rules of Procedure. A reference to the allegations set forth in Acme's complaint illustrates this dilemma.**

**Acme is seeking to recover damages totaling $122,236.94 from the defendants arising from transactions that took place from 1990 through 1996 regarding the marketing of Abbott's ice cream. The complaint sets forth a complex, at times disjointed narrative, although admittedly it is not clear whether this is the result of poor drafting or the nature of the transactions.**

**Dunkirk[9] manufactured ice cream, and its authorized agent was William Wells. Complaint, ¶¶ 9, 18. Sometime around 1990, Mid-Atlantic, and its agent Daniel Desmond, obtained exclusive licensing rights for Abbott's ice cream. Complaint, ¶ 16. Mid-Atlantic and Desmond subsequently entered into a "relationship**

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[9] Fieldbrook is named as the successor corporation of Dunkirk. Complaint, ¶ 7.

**and/or agreement" with Dunkirk, under which it would deliver Abbott's ice cream to "entities" identified by Mid-Atlantic. Complaint, ¶¶ 17-19. In 1993, Mid-Atlantic "reached an understanding" with Acme; Mid-Atlantic paid Acme $500,000 in exchange for Acme's agreement to carry 500,000 sleeves of Abbotts**

**ice cream in its stores. Complaint, ¶¶20-22.**

**The ice cream, however, was not delivered directly to Acme. Instead, between 1900-1996, Dunkirk delivered the Abbotts ice cream to "Rotelle" but billed Mid-Atlantic. Complaint, ¶¶24-25. Acme then purchased its ice cream from Rotelle, but billed Mid-Atlantic and Desmond $2.50 for each sleeve of ice cream it purchased -- an arrangement the parties refer to as a "billback." Complaint, ¶ 24-27. Acme alleges that in conformity to the custom of the industry, it mailed its invoices for the billbacks to Mid-Atlantic's broker, Hugh T. Gilmore Company. Complaint, ¶31. Acme also charged Mid-Atlantic for advertising. Complaint, ¶34-35.**

**Unfortunately, the level of sales of Abbotts ice cream by Acme never reached expectations. Complaint, ¶ 23. Beginning in December 1994, Mid-Atlantic refused to pay Acme for the billbacks or advertising, for an amount totaling $122,236.94.[10]**

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[10] Complaint, ¶38. This amount also includes Sherbet.

**Meanwhile, the relationship between Dunkirk, Mid-Atlantic, and Desmond became financially troubled; to resolve these difficulties, they negotiated a "lockbox agreement" where monies derived from the sale of the first 60 trailers of Abbotts ice cream would go directly to Dunkirk. The complaint then states that under this agreement, Dunkirk was "obligated to pay Mid-Atlantic $2.50 per unit for all sleeves of Abbotts ice cream Dunkirk delivered to Rotelle which amount was to be remitted to Acme." Complaint, ¶ 43. The complaint then makes two contradictory statements: Acme alleges that Dunkirk failed to make these payments; it then alleges that Dunkirk paid Mid-Atlantic, but that Mid-Atlantic failed to pay Acme. See Complaint, ¶¶ 44-45. Another problem is that the complaint does not set forth facts to demonstrate the relevance of the lockbox to Acme's billback dispute.**

**In January 1996, Acme stopped purchasing Abbotts ice cream; Desmond thereafter "raised a dispute" that Acme was obligated "under an agreement with Desmond and Mid-Atlantic" to purchase a total of 500,000 sleeves of ice cream. Complaint, ¶48.**

**Acme alleges that it was then contacted by the Hugh Gilmore Company, which negotiated a settlement agreement on behalf of Mid-Atlantic, Desmond and Dunkirk. Complaint, ¶ 50-51. Acme notified Desmond, Dunkirk and Mid-Atlantic that it was willing**

**to pay $231,000 to fulfill its obligation to purchase 500,000 sleeves of ice cream; the defendants agreed to this settlement vis a vis Acme's obligation to purchase the ice cream. Complaint, ¶¶ 56, 57-58.**

**Before tendering payment pursuant to this settlement agreement, Acme informed Desmond, Mid-Atlantic and Dunkirk "that it was owed approximately $121,000 because of unpaid advertising and billbacks. Complaint, ¶ 59. Acme alleges that these 3 defendants assured it that once it paid the $231,000, they would tender all the money owed to Acme. Complaint, ¶ 60**

**Acme tendered the $231,000 to Dunkirk, but then makes two contradictory allegations as to the defendants. It alleges:**

> **Desmond and Mid-Atlantic were fully aware that Acme made the payments to Dunkirk. Complaint, ¶ 62**
>
> **Desmond and Mid-Atlantic <u>had no knowledge that Acme made the payments to Dunkirk.</u> Complaint, ¶ 63 (emphasis added).**

**Acme alleges that Dunkirk and Wells "purposely mislead" Acme into believing that it was authorized to accept its checks. Acme also alleges that Desmond and Mid-Atlantic "purposely allowed" Acme to believe that the $231,000 should be paid to Dunkirk. Complaint, ¶¶ 65-66. Acme contends that it justifiably relied on the representations made by Dunkirk, Wells, Desmond and Mid-Atlantic. Complaint, ¶67. Acme appears to be asserting a civil**

**conspiracy claim when it alleges that the four defendants "conspired to mislead Acme about to whom Acme should make payments so that they could wrongfully retain Acme's money." Complaint, ¶72.Acme also appears to be asserting a tortious interference with contract claim since it alleges that Dunkirk and Wells were aware of its settlement agreement with Desmond and Mid-Atlantic and they intentionally interfered with it. Complaint, ¶¶68-69.**

**1. Amendment of Complaint is Required Due to Improper Joinder Under Pa.R.C.P. 1020(a)**

**After setting forth these facts, Acme's complaint presents two counts; Count I is denominated simply "Acme v. Dunkirk and Wells," while Count II is denominated "Acme v. All Defendants." Count I against Dunkirk and Wells, incorporates the prior allegations and also asserts that the actions of Dunkirk and Wells:**

> **Violated the Crimes Code of Pennsylvania;**
>
> **Intentionally interfered with a known existing business relationship**
>
> **Intentionally mislead Acme so that they could illegally and wrongfully obtain $231,6000 from Acme**
>
> **Dunkirk and Wells used the $231,600 for their own benefit. Complaint, ¶¶ 76-79.**

**Each of these four paragraphs in Count I might conceivably**

**set forth a cause of action against Dunkirk and Wells beyond the civil conspiracy or fraudulent misrepresentation claims hypothesized by these two defendants. This imprecision and lumping together of causes of action is problematic for at least two reasons. First, it violates Pa.R.C.P. 1020(a) which requires that "Each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." Second, it fails to "adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and be sufficient to convince the court that the averments are not merely subterfuge." Bash v. Bell Telephone, 411 Pa. Super. 347, 601 A.2d 825, 831 (1992)(citations omitted).**

**Count II likewise violates this mandate since it contains averrals that might support such disparate claims as fraudulent misrepresentation and civil conspiracy. This failure to set forth individual causes of actions in separate counts makes it difficult to determine whether plaintiff has stated viable claims against the defendants. See, e.g., Com., Dept. of Trans. v. Upper Providence Township Municipal Authority, 55 Pa. Cmwlth. 398, 423 A.2d 769, *772 (1980).**

**Rule 1020 requiring that separate causes of action be set forth in separate counts is mandatory, but in sustaining**

**preliminary objections on this ground, courts allow for the amendment of a complaint "to state a separate cause of action in separate counts with respect to each defendant." General State Auth. v. Lawrie Green, 24 Pa. Cmwlth. 407, 356 A.2d 851, *854 (1976). Acme is so ordered, with the particular advice that it identify the count as to the cause of action alleged. Such denomination, though not required by the rules,[11] is a common practice in Philadelphia that adds force and clarity to a complaint while alerting the defendants of the claims asserted against them.**

**2. Demurrer as to Plaintiff's Fraudulent Misrepresentation Claim is Overruled but Request for More Specific Complaint is Sustained**

**Defendants Mid-Atlantic, Desmond, Dunkirk and Wells assert that the fraud claims against them should be dismissed for failure to state a claim. Ironically, because Acme's complaint is so prolix and unclear as to its exact claims, it is not possible at the present time to dismiss any claims without first granting defendants' alternative request for a more specific complaint as to what defendants assume are Acme's claim of**

[11] See, e.g. Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 505 A.2d 973, *980 (1985)("[I]t is not necessary for a plaintiff to identify the specific legal theory underlying the complaint").

**fraudulent misrepresentation. Philmar Mid-Atlantic, Inc. v. York Street Associates, 389 Pa.Super. 297, 566 A.2d 1253, 1254 (1989)(Because a demurrer should be sustained only in those cases where the plaintiff has clearly failed to state a claim, it should not be sustained if there is any doubt as to whether plaintiff has stated a claim for relief under any theory of law).**

**Pennsylvania is a fact pleading state. Sevin v. Kelshaw, 417 Pa. Super. 1, 611 A.2d 1232, 1235 (1992). The rules of civil procedure require that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. 1019(a). A complaint must also "adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and be sufficient to convince the court that the averments are not merely subterfuge." Id., 611 A.2d at 1235 (citations omitted).**

**Averments of fraud must be set forth with "particularity." Pa.R.C.P. 1019(a). A misrepresentation can be actionable on three different theories: intentional fraud, negligent misrepresentation or innocent misrepresentation. Defendants suggest that Acme is asserting a fraud claim against them without grappling with the exact type of fraud at issue. If Acme is alleging intentional fraud then it must establish (1) a**

**representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation and, (6) the resulting injury was proximately caused by the reliance." Bortz v. Noon, 556 Pa. 489, 729 A.2d 555, *560 (1999)(citing Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994), citing Restatement (Second) of Torts §525 (1977).[12]**

**The precise nature of Acme's fraud claims against the defendants is unclear. As damages, Acme seeks to recover $122,236.94 in "billbacks." Yet this claim is presented in the context of a settlement agreement pursuant to which Acme alleges it fraudulently paid the wrong defendant. To unravel these claims to identify the exact nature of any alleged fraud, it is thus necessary to scrutinize Acme's complaint.**

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[12] Defendants adopt a slightly different, 5-pronged definition of fraud: "(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced not to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result." See Dunkirk\ Wells Memorandum of Law at 17 (citing Delahanty v. First Pennsylvania Bank, 318 Pa. Super. 90, 464 A.2d 124 (1983)); Mid-Atlantic\Desmond Memorandum of Law at 8 (citing Bash v. Bell Tel. Co., 411 Pa. Super. 347, 601 A.2d 825 (1992)). The test set forth in Bortz is preferable on several scores: it is clearer, more easily applied and is more recently presented by the Pennsylvania Supreme Court.

**Acme alleges that it entered into an agreement with Mid-Atlantic and Desmond in 1993 to carry Abbotts ice cream in its stores. The complaint then sets forth a complicated payment scheme. Mid-Atlantic and Desmond paid Acme $500,000 in exchange for Acme's agreement to try to sell 500,000 sleeves of ice cream. Complaint ¶¶20-21. The ice cream, however, was not delivered directly to Acme; instead, the manufacturer, Dunkirk, delivered it to Rotelle and billed Mid-Atlantic and Desmond for it. Whenever Acme purchased ice cream from Rotelle, it billed Desmond and Mid-Atlantic approximately $2.50 per sleeve--which Acme refers to as the billback. Complaint, ¶¶ 20-27.**

**Acme's sales never reached expectations. Beginning in December 1994, Desmond and Mid-Atlantic refused to pay Acme for its billbacks and Acme claims it is presently owed $122,236.94. Complaint, ¶¶36-38. Desmond shortly thereafter raised a "dispute" with Acme claiming that Acme had failed to satisfy its obligations to purchase 500,000 sleeves of ice cream. Acme agreed to settle this dispute after it was contacted by the Hugh T. Gilmore Company on behalf of Desmond, Mid-Atlantic and Dunkirk. Complaint, ¶ 50. Acme agreed to pay $231,000 to settle this dispute. The complaint alleges, however, that "Desmond, Mid-Atlantic and Dunkirk assured Acme that once it paid the settlement amount of $231,600, Acme would then be paid all**

**monies owed to it. Complaint, ¶ 60.**

**Acme then paid Dunkirk $231,600. Complaint, ¶ 61. The complaint is not explicit on this point, but it suggests that this payment went to the wrong party because of the fraudulent behavior of the defendants. See Complaint ¶¶ 61-73.**

**If, as defendants surmise, Acme is asserting a fraud claim based on its improper settlement payment of the $231,600 to Dunkirk and the defendants' failure to tender payment for the billbacks, the complaint lacks the requisite specificity or clarity for several reasons. First, it fails to set forth with the requisite specificity the misrepresentation or action by each of the defendants that led it to make the improper payment to Dunkirk. In paragraph 60, for instance, it fails to set forth adequately the type of assurances that were made to Acme by the defendants: it is not even clear whether they were oral or written. It also fails to set forth how this improper settlement payment is material to its claim to recover the billbacks that were owed to it in the separate arrangement with Mid-Atlantic and Desmond. Acme likewise fails allege that each particular defendant made this representation with the requisite "knowledge of its falsity or recklessness as to whether it was true or false." Bortz v. Noon, 729 A.2d at 560. Indeed, the Complaint is rife with conflicting allegations concerning the**

**defendants' knowledge. In describing its settlement payment of $231,600 to the wrong party, Dunkirk, Acme presents the following contradictory concerning defendants Desmond and Mid-Atlantic:**

> **62. Desmond and Mid-Atlantic were fully aware that Acme made the payments to Dunkirk. ¶ 62**
>
> **63. Desmond and Mid-Atlantic had no knowledge that Acme made the payments to Dunkirk. Complaint, ¶ 63.**

**Although the Complaint does state that "Dunkirk and Wells purposely mislead Acme into believing that it was authorized to accept the checks sent by Acme to Dunkirk as complete satisfaction" of Acme's obligation concerning the purchase of Abbott's ice cream, this statement is conclusory and requires additional facts. Moreover, it is undermined as to defendants Mid-Atlantic and Desmond by the next paragraph which states:**

> **66. Desmond and Mid-Atlantic purposely allowed Acme to believe that it was acceptable for Acme to make the payments of $231,600 to Dunkirk. Complaint.**

**Purposely "allowing" Acme to make improper payments does not satisfy the requirement that plaintiff allege a false statement or misrepresentation made with knowledge or recklessness. Bortz, 729 A.2d at 560. Although Acme generally avers that it "justifiably relied upon the representations made by Dunkirk, Wells, Desmond and Mid-Atlantic and their agents, servants and**

**employees when it made payments of $231,600 to Dunkirk," it fails to present material facts in support. Complaint, ¶ 67. Those representations must be set forth as well as allegations concerning defendants' knowledge of their falsity and intent to induce reliance. In all of these ways, the Complaint fails to set forth with the requisite specificity the misrepresentations made by the defendants. See, e.g., ¶¶ 65 & 66.**

**There is, however, a more serious problem with Acme's potential fraud claim. The gravamen of Acme's fraud claim seems to be that it was misled into paying Dunkirk $231,600. The exact consequences of this mistaken payment to Dunkirk--or how it is "material" to Acme's claim to recover its billbacks--remain unclear. The complaint does not allege, for instance, that this $231,600 payment did not settle the disputed claims concerning Acme's obligation to purchase more ice cream. Moreover, the exact relation between Acme's payment to Dunkirk of $231,600 and Acme's attempt to recover $122,236 in billbacks also needs clarification. First, it is not clear which defendant--or defendants--allegedly owes the billbacks; while paragraph 37 suggests that Desmond and Mid-Atlantic owed the billbacks, Acme alleges in paragraph 59 that it informed Desmond, Mid-Atlantic and Dunkirk that it was owed these billbacks while negotiating the dispute as over Acme's**

**obligation to purchase 500,000 sleeves of ice cream. The complaint suggests that Acme was enticed into paying the $231,600 in response to a promise by the defendants that Acme would then be paid for its billbacks. Complaint, ¶ 59-60. If this is, in fact, the thrust of Acme's fraud claim it would be insufficient as a matter of law. It is well established that a fraud claim cannot be premised on breach of a promise to do something in the future.[13] A claim for fraud has been recognized, however, if it can be shown--or alleged--that a person making a promise intended at the time not to perform but instead used the promise to procure a contract.[14]**

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[13] Nissenbaum v. Farley, 380 Pa. 257, 110 A.2d 230, 233 (1955)("Mere promises to do something made at the time of executing a contract and not statements of existing facts which are untrue, do not in themselves constitute fraud though they are not subsequently complied with"); Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (1997)("It is well established that breach of a promise to something in the future is not actionable in fraud") Bash v. Bell Telephone Co., 411 Pa. Super. 347, 601 A.2d 825, *832 (1992)("an unperformed promise does not give rise to a presumption that the promisor intended not to perform when the promise was made"); Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 563 A.2d 1182, 1187 (1989)(oral representation that corporation would assume a debt obligation in return for moratorium on payments and forbearance of legal action was a promise to do something in the future not a basis for fraud claim).

[14] Tonkin v. Tonkin, 172 Pa. Super. 552, 94 A.2d 192, *196 (1953)(Deed declared void for fraud where deceased grantee's name was deleted based on untrue representation that remaining grantee would hold land in trust for the deceased grantee's family); Brentwater Homes v. Weibley, 471 Pa. 17, 369 A.2d 1172(1977)(Specific performance denied due to fraud where buyer

**For all of these reasons, plaintiff is ordered to file a more specific amended complaint as to its fraudulent misrepresentation claim within twenty days.**

**3. Defendants' Demurrer as to Plaintiff's Civil Conspiracy Claim is Overruled but the Request for More Specific Complaint is Granted**

**Defendants suggest that Acme is setting forth a claim for civil conspiracy against them which should be dismissed by demurrer or set forth with greater specificity. This court agrees that the allegations are vague and, if Acme is, in fact, asserting a claim for civil conspiracy, it must amend its complaint to set it forth with the requisite specificity and in a separate count.**

**To set forth a claim for civil conspiracy, a plaintiff must allege that "two or more persons combined or agreed with intent to do an unlawful act or to do any otherwise lawful act by unlawful means. Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." Skipworth v. Lead Indus. Assoc., 547 Pa. 224, 690 A.2d 169, *174 (1997)(citations omitted). Another element of civil conspiracy is "some overt act is done in pursuance of the common purpose or design. . . and actual legal damage occurs." Rutherfoord v. Presbyterian-**

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misrepresented to seller of tract of land that it would be developed as single family homes).

**University Hospital, 417 Pa. Super. 316, 612 A.2d 500, 508 (Pa.Super. 1992).**

**Acme's allegations fail to meet this standard. The complaint sets forth two conspiracies. It alleges that "[i]n bad faith, Wells, Dunkirk,Desmond and Mid-Atlantic conspired to mislead Acme about to whom Acme should make payments so they could wrongfully retain Acme's money." Complaint, ¶ 72. It also alleges that "as part of the illegal conspiracy, Desmond and Dunkirk have refused to pay monies owed and promised to Acme in the amount of $122,236." Complaint, ¶ 73.**

**In terms of the alleged conspiracy regarding the payments to Dunkirk, Acme must establish a concert of action between Mid-Atlantic and Dunkirk. It cannot rely on any concerted action as between Dunkirk and Wells,on one hand, or Mid-Atlantic and Desmond, on the other, because the complaint alleges that these two individuals were corporate officers, employees, owners or agents of the respective corporate defendants Dunkirk and Mid-Atlantic. Complaint,¶¶ 10 & 13. Indeed, the Complaint alleges that Wells was acting as the agent of Desmond, Dunkirk and Mid-Atlantic. Complaint, ¶¶ 9 & 11. As the Pennsylvania Superior Court has observed, "[a] single entity cannot conspire with itself and similarly, agents of a single entity cannot conspire among themselves." Rutherfoord, supra, 612 A.2d at *508**

**(emphasis added). See also Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 473 (1966); Nix v. Temple Univ., 408 Pa. Super. 369, 596 A.2d 1132, **1138, n.3 (1991). But see Gordan v. Lancaster Osteopathic Hosp. Assoc., 340 Pa.Super. 253, 489 A.2d 1364, 1372 (1985)(setting forth an apparent exception to this rule where the alleged agent is conspiring in matters beyond the scope of employ).**

**This leaves Mid-Atlantic and Dunkirk as the sole potential parties to an alleged conspiracy to induce Acme to tender its payments to Dunkirk. However, plaintiff makes contradictory statements concerning Mid-Atlantic's knowledge and even alleges that "Desmond and Mid-Atlantic had no knowledge that Acme made the payments to Dunkirk." Complaint, ¶ 63. If one of the two alleged corporate conspirators lacked knowledge of the improperly induced payments, Acme has failed to allege the requisite concerted action and malice. Acme's allegations as to Mid-Atlantic and Dunkirk are thus vague and inadequate in failing to allege the requisite malice.**

**In addition,the complaint fails to set forth the material facts and overt acts taken in pursuit of this conspiracy. For instance, instead of overt acts, Acme vaguely alleges that one of the conspirators "allowed" the improper payment: "Desmond and Mid-Atlantic purposely allowed Acme to believe that it was**

**acceptable for Acme to make the payments of $231,6000 to Dunkirk." Complaint, ¶ 67.**

**Acme also contends that as part of the illegal conspiracy, defendants Desmond and Dunkirk "have refused to pay monies owed and promised to Acme in the amount of $122,236.94." Complaint, ¶ 73. This allegation is deficient in failing to set forth the requisite malice for civil conspiracy as to Acme's claim for the billbacks of $122,236.**

**In light of these inconsistencies and ambiguities, Acme is therefore ordered to file an amended complaint within 20 days as to its civil conspiracy claim.**

**E. Motion to Strike Allegations of Criminal Statute Violations by Defendants Dunkirk and Wells is Granted**

**Defendants Dunkirk and Wells argue that Acme's allegations that they violated three Pennsylvania Criminal Statutes should be stricken as impertinent, scandalous and unfounded pursuant to Pa.R.C. P. 1017(b). There is, however, no subsection (b) to Rule 1017. They also assert that these statutes cannot apply as a matter of law and do not support a civil conspiracy claim, but they present no precedent to support such a claim. The gist of their argument, instead, is factual: they assert that the allegations in Acme's complaint do not satisfy the elements of the 18 Pa.C.S. §3921 ("Theft by Unlawful Taking"), 18 Pa. C.S.**

**§ 3922 ("Theft by Deception") and 18 Pa. C.S. §3927 ("Theft by Failure to Make Required Disposition of Funds Received"). See Dunkirk/Wells Memorandum of Law at 26-27.**

**Focusing only on the narrow issue raised of whether the allegations satisfy the statutory elements, this court concludes that these elements are satisfied as follows: paragraphs 65, 75, 78, 79 and 82 satisfy the requirements of 18 Pa.C.S. § 3921; paragraphs 65, 75 78, 81 satisfy the elements of 18 Pa.C.S. § 3922; and paragraphs 52, 61, 65, 67, 70, 72 and 78 satisfy the elements of 18 Pa.C.S. §3927. This conclusion is limited to Acme's averrals concerning the payment of $231,600 to Dunkirk.**

**A more complicated issue suggested, but not developed, by these objections is whether the conclusory allegation that a defendant has violated a criminal statute can be the basis for a civil conspiracy claim. The practical problems inherent in premising a civil conspiracy claim on violation of a criminal statute are obvious. Not only does a different burden of proof apply but criminal actions are prosecuted by the state. At trial, therefore, would a plaintiff have to submit evidence of an actual criminal conviction to establish this aspect of its claim? Would he have to assume the prosecutorial role and burden of proof?**

**As previously discussed the standard for civil conspiracy**

**requires "proof of an intent to do an unlawful act," [15] which would conceivably encompass criminal acts. In Pellagatti v. Cohen, 370 Pa. Super. 422, 536 A.2d 1337, **1342, app. denied, 519 Pa. 667, 548 A.2d 206 (1988), however, the Pennsylvania Superior Court observed that "absent a civil cause of action for a particular action, there can be no cause of action for civil conspiracy to commit that act." In Pellagati, the "appellant conceded, through lack of argument, that there is no civil cause of action for 'obstruction of justice' per se." Id., 536 A.2d at **1342. The same applies here; Acme, through lack of argument, has failed to establish a civil cause of action for the violations of criminal statutes set forth in paragraph 76; consequently, this paragraph is stricken. This does not mean, however, that plaintiff has failed to set forth facts which might constitute a civil cause of action as a basis for a civil conspiracy claim.**

**F. Defendants' Motion to Strike Claim for Punitive Damages is Overruled without Prejudice**

**Defendant Mid-Atlantic argues that Acme's claim for punitive damages should be stricken because the only claim it is asserting is breach of contract for which punitive damages may not be awarded. Mid-Atlantic/Desmond Memorandum at 14. Since**

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[15] Skipworth v. Lead Indus. Assoc., 547 Pa. 224, 690 A.2d at 174.

**Acme has been given an opportunity to amend its complaint as to claims of civil conspiracy or fraudulent misrepresentation, Mid-Atlantic's objection cannot be sustained.**

**Defendant Dunkirk, in contrast, argues that the claim for punitive damages must be stricken for failure to allege facts in support of punitive damages. Dunkirk/Wells Memorandum at 21. As Dunkirk suggests, punitive damages may be awarded "for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Gray v. H.C. Duke & Sons, Inc., 387 Pa.Super. 95, 563 A.2d 1201, 1205 (1989), app. denied, 525 Pa. 583, 575 A.2d 114 (1990)(citing Restatement (Second) of Torts § 908). Although the present complaint alleges "purposeful and intentional" actions by the defendants, this does not rise to the level of "outrageous" or "evil motive." Nonetheless, in light of this court's order allowing to amend its complaint, this court will deny the motion to strike without prejudice to defendants' right to reassert this objection to an Amended Complaint**

**G. Motion to Strike Verification by Attorney is OVERRULED as Moot**

**Finally, defendants ask this court to dismiss the complaint because the verification was improperly verified by plaintiff's attorney. Although this verification is defective in various**

**ways, it is unnecessary to analyze those defects, because plaintiff filed a substitute verification by praecipe dated April 28, 2000.[16] This verification is by Ron Mendes, as Director of Regulatory Compliance of Albertson's, Inc., who states that he "is authorized to execute this Verification to Acme Markets Inc.'s Complaint."**

**None of the defendants have objected to this verification. The issue of its adequacy is therefore not before this court at the present time. See Goodrich-Amram 2d §1024(a):6 (1991)(failure to object to verification constitutes waiver and a court may not raise a defect sua sponte). As a practical matter, since plaintiff has been ordered to file an amended complaint defendants will have an opportunity to object to any verification attached to the amended complaint.**

**BY THE COURT:**

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**John W. Herron, J.**

**DATED: September 18, 2000**

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[16] Plaintiff also attached a copy of this verification as Ex. A to its Reply to the Preliminary Objections of Defendants Mid-Atlantic and Desmond. Since Pa.R.C.P. 126 dictates that the rules should be liberally construed, the verification filed in response to defendants' preliminary objections should be considered as replacing the prior verification.