

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

AGE INSTITUTE HOLDINGS, <i>et al.</i>	: MAY TERM, 2002
Plaintiffs,	: No. 4028
v.	: Commerce Program
KPMG, LLP, <i>et al.</i>	:
Defendants,	:
v.	:
CAROL A. TSCHOP, HARRY D. MADONNA, and ANN D. JABRO,	:
Additional Defendants.	:
	: Control No. 031185

ORDER

AND NOW, this 13th day of June 2003, upon consideration of additional defendants' Preliminary Objections to the defendants' Additional Complaint, defendants' response in opposition, additional defendants' reply, the respective memoranda, all matters of record and Rule 2252(a) of the Pennsylvania Rules of Civil Procedure, it is hereby **ORDERED** that the preliminary objections are **Overruled**.¹

¹ As to Count I of the Additional Complaint, alleging Indemnity and Contribution against the additional defendant directors of the plaintiff corporations, this court is cognizant of additional defendants' objection that defendant is merely claiming that the additional defendants breached their fiduciary duties owed to plaintiffs, and that defendants lack standing to enforce such derivative claims.

Additional defendants are instructed to answer the Additional Complaint within twenty-two (22) days of the entry of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

Footnote 1 - continued

See Memorandum in Support of Preliminary Objections, pp. 6-7; See also 15 Pa.C.S. §§ 1717, 5717 (“Limitation on Standing”); F.S.A. §§ 607.07401, 617.0834 (“Shareholders’ Derivative Actions” and “Immunity from Civil Liability”); M.G.L. 156B § 65 (“Good Faith and Prudence As Defense”). This court agrees with defendants that the cases cited by additional defendants do not address the issue of whether a non-shareholder defendant may join a breach of fiduciary duty claim against an additional defendant director; rather, the cited cases address only that procedural scenario where a plaintiff sues a defendant director for breach of fiduciary duty. See Memorandum in Support of Preliminary Objections, pp. 6-7. Thus, at this stage of the proceedings, in view of the liberal standard for determining preliminary objections, and based on Pa. R. Civ. P. 2252(a), pursuant to which a defendant may join an additional defendant who may be liable to that defendant on a cause of action arising out of the transaction or occurrence upon which the plaintiff’s cause of action is based, this court will allow the joinder of additional defendant directors for indemnity and contribution. See Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. 1999) (standard for preliminary objections); Galdo v. First Pennsylvania Bank, 250 Pa. Super. 385, 391, 378 A.2d 990, 993 (1977) (defendant permitted to join additional defendant officers on claims in assumpsit and trespass that officers caused plaintiffs’ loss by mismanagement of corporation); Harker v. Farmers Trust Co., 248 Pa. Super. 427, 430, 375 A.2d 171, 173 (1977) (defendant permitted to join additional defendant officer on claim that officer caused plaintiff’s harm by consenting to repossession of corporate assets and mismanaging corporation).

As to Count II of the Additional Complaint, alleging misrepresentation against Carol A. Tschop, additional defendants made the same objections as for Count I. See Preliminary Objections, ¶¶ 16-20. Later, in their Reply Memorandum, additional defendants stated that Ms. Tschop could be joined on the misrepresentation claim, but only as it related to plaintiff AGE Institute of Florida, Inc. and only as to audits that could have been addressed by Ms. Tschop’s letter dated April 17, 1998, because the only representation defendant specifically alleged was the letter dated April 17, 1998. See Reply Memorandum, pp. 6-7. Additional defendants failed to raise this objection in the Preliminary Objections, however, and it is therefore waived. Statewide Bldg. Maintenance, Inc. v. Pennsylvania Convention Center Authority, 160 Pa. Commw. 544, 557 n. 13, 635 A.2d 691, 698 n. 13 (1993).