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

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| FIRST REPUBLIC BANK, | : | August Term, 2000 |
| Plaintiff | : | |
| | : | No. 147 |
| v. | : | |
| | : | Commerce Case Program |
| STEVEN D. BRAND, et al. | : | |
| Defendants | : | Control No. 040559 |

## OPINION

Plaintiff First Republic Bank ("First Republic") has filed preliminary objections ("Objections") to a counterclaim ("Counterclaim") filed by Defendants Steven D. Brand, James M. Dougherty, Arthur L. Powell, Richard S. Powell, Jon R. Powell, Carol P. Heller, Nancy E. Powell, Harold G. Schaeffer, James R. Schaeffer, Anthony L. Schaeffer and Robert D. Schaeffer (collectively, "Shareholders").[1] The following nonparties to this action have attempted to join the Shareholders in asserting the Counterclaim: Pattie D. Albertson, Margaret R. Baker, Elizabeth R. Baratta, Michael D. Blake, Lawrence W. Corner, Mary F. Dugan, Ann M. Esposito, Thomas M. Fallon, Gina M. Fasolini, William J. Fitzmire, Karen A. Fugok, Brian F. Hill, William Jay, Carrie M. Johnson, Troy F. Kane, Julian F. Loscalzo, John T. McGinley, Catherine A. McMonagle, Sharon McNeil, Gail L. Olinger, Chrisann M. Peake, Kathleen M. Schaeffer and Jean E. Shesney (collectively, "Employees").[2] To

[1] The Shareholders are also referred to in the Parties' filings as the "Counterclaim Plaintiffs."

[2] The Employees appear to be former employees of Fidelity Bond and Mortgage Co. or FBMC Acquisition Corp. and are also referred to in the Parties' filings as "Additional Counterclaim Plaintiffs."

further complicate this procedural morass, the Counterclaim is being asserted against three individuals who likewise are not parties to this action: Jere Young ("Young"), George Rapp ("Rapp") and Harry Madonna ("Madonna") (collectively "Directors").[3] For the reasons set forth in this Opinion, the Court is issuing a contemporaneous order ("Order") sustaining the Objections in part and overruling the Objections in part.

## BACKGROUND

The underlying dispute in this matter arises from a transaction in which the Shareholders, who owned all of the shares of Fidelity Bond and Mortgage Co. ("Fidelity"), sold an eighty percent interest in Fidelity to First Republic and Phoenix Mortgage Company ("Phoenix").[4] In connection with the Transaction, the Shareholders were issued promissory notes in the aggregate principal amount of $1,194,665.00 ("Notes"), with both Fidelity and FBMC assuming liability. The Shareholders allege that they were induced to enter into the Transaction based, in part, on the Notes and First Republic's

[3] The Directors are also referred to in the Parties' filings as "Additional Counterclaim Defendants." According to the Counterclaim, Young was President of First Republic, Rapp was Chief Financial Officer and a director of First Republic and Madonna was Chairman of First Republic's board of directors.

[4] This transaction was structured such that First Republic and Phoenix formed FBMC Acquisition Corp. ("FBMC"), with First Republic contributing cash in exchange for 51% of the common stock of FBMC ("FBMC Stock") and Phoenix purchasing the remaining 49%. FBMC, in turn, purchased all of the Fidelity common stock ("Fidelity Shares") from the Shareholders and issued the Shareholders 20% of the FBMC Stock. The end result was that FBMC owned all of the Fidelity Shares, and that First Republic, Phoenix and the Shareholders owned 41%, 39% and 20%, respectively, of the outstanding FBMC Stock. These events are referred to collectively as the "Transaction."

representations that it would materially augment Fidelity's business[5] and could infuse additional capital, if necessary. After the Transaction's consummation on May 1, 1998, the Shareholders assert that they relinquished all management control of Fidelity and that First Republic assumed control of Fidelity's board of directors ("Board"), as well as Fidelity's management and operations.[6]

Fidelity subsequently suffered several financial reversals, which the Shareholders attribute to the mismanagement of Donald L. Salmon ("Salmon"), Phoenix's Chief Executive Officer prior to the Transaction and Fidelity's President, Chief Executive Officer and Chairman of the Board thereafter. In the aftermath of these events, the Board determined that a sale of Fidelity's assets was the only viable course of action to allow its survival. As a result, FBMC began discussions with Keystone Bank ("Keystone") in November 1998 regarding a possible sale. These discussions culminated in Keystone making an offer on February 9, 1999 to purchase Fidelity's assets for approximately $9,803,000.00, with the possibility of additional amounts if certain targets were met ("Keystone Transaction"). According to the Counterclaim, the Keystone Transaction would have allowed Fidelity to pay its obligations, including amounts owed to the Shareholders on the Notes and certain contractually mandated wages, severance payments and stay bonuses owed to the Employees ("Benefits"). It would have left no funds, however, to repay First Republic, Phoenix or the Shareholders for their equity

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[5] According to the Shareholders, First Republic indicated that it was able to generate mortgages and mortgage servicing through its affiliation with Atlantic Central Bankers Bank and Jackson Hewitt, a tax preparation service.

[6] Under the terms of the Transaction, First Republic had a right to place two members on the Board. First Republic exercised this right and placed, at various times, Young, Rapp and Madonna as directors.

investment in FBMC. Keystone expressed its desire to complete the Keystone Transaction by the end of February 1999.

The Shareholders and Employees assert that First Republic was aware of the grave consequences of rejecting Keystone's offer and knew that all other options would result in the elimination of the Shareholders' rights under the Notes and the Employees' right to the Benefits.[7] In spite of this awareness, First Republic refused to approve the Keystone Transaction unless it received additional remuneration.

On February 14, 1999, a special meeting of the Board was called. This meeting resulted in an agreement under which additional proceeds of the Keystone Transaction, along with the tax benefits of Fidelity's net operating loss carryforward, would be paid to First Republic ("Valentine's Day Agreement").[8] Two days later, however, First Republic allegedly reneged on the Valentine's Day Agreement and, fully aware of the consequences to the Shareholders and the Employees, withdrew its approval of the Keystone Transaction. According to the Counterclaim, First Republic's actions were based on its desire for additional financial compensation. Without First Republic's support, the Keystone Transaction collapsed, and Fidelity ultimately became insolvent and filed for bankruptcy.

On August 7, 2000, First Republic initiated an action against the Shareholders and subsequently asserted claims for breach of contract, fraudulent misrepresentation, negligent misrepresentation and punitive damages in a complaint ("Complaint"). Neither the Directors nor the Employees were named

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[7] The Counterclaim quotes Young as stating that the only two alternatives facing Fidelity were to "'do the Keystone transaction' or to have the Company face 'disaster.'" Counterclaim at ¶ 53.

[8] The Shareholders assert that First Republic had no right to any part of this carryforward prior to its assignment under the Valentine's Day Agreement.

as parties in any capacity in the Complaint. The Shareholders filed preliminary objections to the Complaint, on the basis of which the Court dismissed First Republic's claims for negligent misrepresentation and punitive damages. See First Republic Bank v. Brand, August Term, 2000, No. 147 (C.P. Phila. Dec. 19, 2000) (Herron, J.).[9]

The Shareholders subsequently filed an answer to the Complaint and new matter February 16, 2001. In addition, the Shareholders, along with the Employees, filed the Counterclaim against First Republic and the Directors, in spite of the fact that neither the Employees nor the Directors were parties to this action.[10] The Counterclaim asserts nine separate causes of action,[11] to which First Republic and the Directors have raised thirty-one preliminary objections ("Objections").[12]

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[9] Available at http://courts.phila.gov/cpcvtcomp.htm. This opinion describes the Transaction and First Republic's allegations in greater detail.

[10] None of the Employees or the Directors was among the original litigants in this matter. In addition, the docket does not indicate that any of the Directors or the Employees has become a party to this action through joinder or intervention.

[11] The Counterclaim asserts the following counts: Count I - Breach of Fiduciary Duty, asserted by the Shareholders and the Employees against First Republic; Count II - Civil Conspiracy, asserted by the Shareholders and the Employees against First Republic and the Directors; Count III - Breach of Fiduciary Duty, asserted by the Employees against Young and Rapp; Count IV - Violation of the Pennsylvania Wage Payment and Collection Law, 43 Pa. C.S. §§ 260.1-260.45, by the Employees against First Republic, Young and Rapp; Count V - Intention Interference with Contractual Relations, asserted by the Employees against the Directors; Count VI - Interference with Prospective Economic Advantage, asserted by the Employees against the Directors; Count VII - Intentional Interference with Contractual Relations, asserted by the Shareholders against First Republic and the Directors; Count VIII - Interference with Prospective Economic Advantage, asserted by the Shareholders against First Republic and the Directors; and Count IX - Fraudulent Misrepresentation, asserted by the Shareholders against First Republic and the Directors.

[12] The Shareholders and the Employees have agreed to the dismissal of Counts VI and VIII. Shareholders' Memorandum at 9 n.6. As a result, they are not discussed in this Opinion.

## DISCUSSION

Because the Employees are not parties in this matter, let alone defendants, they may not file a counterclaim against anyone. Similarly, because the Directors are not plaintiffs in this action, no counterclaim may be asserted against them. The remaining claims that the Shareholders assert against First Republic for breach of fiduciary duty, intentional interference with contractual relations and fraudulent misrepresentation are properly pled. The Shareholders' claim for civil conspiracy, however, is legally insufficient.

### I. Nonparties May Not Assert a Counterclaim, Nor May a Counterclaim Be Asserted Against a Nonparty

In Pennsylvania, a "defendant may set forth in the answer under the heading 'Counterclaim' any cause of action heretofore asserted in assumpsit or trespass which the defendant has against the plaintiff at the time of filing the answer." Pa. R. Civ. P. 1031(a) ("Rule 1031(a)"). Under Rule 1031(a), however, only a defendant may bring a counterclaim against a plaintiff:

> The . . . counterclaim must be such a demand that the defendant or the additional defendant, in his own name, or in the names of the defendants or the additional defendants sued, without bringing in the name of a stranger to the suit, may maintain an action of debt or indebitatus assumpsit on it, against the party, or all the parties suing, as the case may be.

United Nat'l Ins. Co. v. Cozen, Begier & O'Connor, 337 Pa. Super. 526, 541, 487 A.2d 385, 393 (1985) (citation omitted, emphasis added and brackets removed). See also Dickerson v. Dickersons Overseas Co., 369 Pa. 244, 250, 85 A.2d 102, 105 (1952) ("Rule 1031 does not abrogate one of the essential requisites for set-off, namely, that the set-off or counterclaim and the action must be against and between the same parties and between them in the same capacity"); 6 Standard Pa. Practice § 29:24 ("[o]nly the defendant may assert a counterclaim").

A review of the docket in the instant case reveals that the Employees are not defendants. They therefore are precluded from asserting a counterclaim. As a result, the Employees' claims asserted in the Counterclaim must be dismissed.[13] Likewise, the Directors are not plaintiffs in this action. Consequently, to the extent that the Counterclaim is asserted against them, it is not proper and must be dismissed.[14]

## II. The Objections to the Shareholders' Claim for Breach of Fiduciary Duty Are Overruled

First Republic asserts that the Shareholders' breach of fiduciary claim must fail because, in essence, they are asserting a derivative action and have failed to comply with the requirements for such an action.[15] First Republic also contends that the Counterclaim does not allege that it exercised control over Fidelity.[16] The Court cannot agree with these positions.

Pennsylvania law defines a shareholder's derivative action as an "action or proceeding brought to enforce a secondary right on the part of one or more shareholders of a business corporation against

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[13] Were the Employees to become parties to this action by intervening in accordance with Pennsylvania Rule of Civil Procedure 2328, the Court would have reason to examine the substantive Objections to their claims. At present, however, such an exercise is unnecessary.

[14] The remaining parts of the Counterclaim are the following claims by the Shareholders against First Republic: Count I - Breach of Fiduciary Duty, Count II - Civil Conspiracy, Count VII - Interference with Contract and Count IX - Fraudulent Misrepresentation.

[15] In its Memorandum, First Republic focuses more on how the Shareholders have failed to comply with the requirements for derivative actions than on establishing that the Shareholders' claim in fact accrues as a derivative action. In addition, it is unclear if First Republic believes that the proposed derivative action should be brought on behalf of Fidelity or FBMC.

[16] It is worth noting that First Republic's argument is not based on an absence of allegations that it was a controlling shareholder, but rather a failure to allege that it exercised control over Fidelity.

any present or former officer or director of the corporation because the corporation refuses to enforce rights that may properly be asserted by it." 15 Pa. C.S. § 1782(a). See also Pa. R. Civ. P. 1506(a) (a shareholder's derivative action is one brought "to enforce a secondary right brought by one or more stockholders or members of a corporation or similar entity because the corporation or entity refuses or fails to enforce rights which could be asserted by it").

In Davis v. U.S. Gypsum Co., 451 F.2d 659 (3rd Cir. 1971), the Third Circuit distinguished between a derivative action and an individual action as follows:

> It is hornbook law that claims asserted for the benefit of stockholders qua stockholders in a corporation because of the tortious acts of its officers or those actions in conjunction with them is a class suit, a derivative action, and recovery is for the benefit of the corporation directly and indirectly to its stockholders. It is equally clear that where a corporation, tortiously conspires with others to damage an individual and does so a cause of action arises which belongs to the individual.

451 F.2d at 662. Pennsylvania corporate commentators also recognize this distinction:

> Where there is a breach of the contract existing between the corporation and a shareholder by reason of his status as a shareholder, as distinguished from a breach of a contract between the corporation and a third person; or where there is a breach of the fiduciary duty which the directors, officers, or majority shareholders owe to a shareholder or the minority shareholders, as such, as distinguished from the breach of such a duty owed to the corporation, the shareholder injury by such breach has a direct, personal cause of action.

W. Edward Sell & William H. Clark, Jr., Pennsylvania Business Corporations (1997) § 1782.2. See also William M. Fletcher, 12B Cyclopedia of the Law of Private Corporations ("Fletcher") § 5911 ("[i]f the injury is one to the plaintiff as a shareholder as an individual, and not to the corporation, as where the action is based on a contract to which the shareholder is a party, . . . it is an individual action").

The Court agrees with the Shareholders that their claims need not be prosecuted as a derivative action. The Shareholders claims arise from First Republic's failure to safeguard the Shareholders' interests in the Notes, which are agreements among Fidelity, FBMC and the Shareholders, by rejecting the Keystone Transaction. This failure affected only those FBMC and Fidelity shareholders who held the Notes, i.e., the Shareholders, and had no impact on any other shareholders or on FBMC or Fidelity themselves. Thus, neither Fidelity nor FBMC has any enforceable rights under the Notes, and the action cannot be brought in the name of either.[17]

First Republic's reliance on Enterra Corp. v. SGS Associates, 600 F. Supp. 678 (E.D. Pa. 1985), to argue that the Shareholders' fiduciary duty claim is a derivative action is misplaced. In Enterra Corp., the court concluded that the plaintiff's claim was a derivative action because it was common to all shareholders. 600 F. Supp. at 689. Here, in contrast, only the Shareholders were affected by the elimination of Fidelity's and FBMC's obligations under the Notes. As a result, the Shareholders' claim for breach of fiduciary duty need not be brought as a derivative action.[18]

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[17] To the extent that First Republic attempts to link the Counterclaim with a derivative action the Shareholders brought in federal court as Powell v. First Republic Bank, Civ. A. No. 00-2506 (E.D. Pa.), the Court observes that the Shareholders' claims in that action were in no way related to the Notes.

[18] For the same reasons that this cannot be considered a derivative action, the Court has reservations about the Shareholders' breach of fiduciary duty claim. In their own words, the Shareholders' claims are based on the Notes. Shareholders' Memorandum at 19. Thus, the Shareholders essentially argue that First Republic's fiduciary duty, arising from its role as the controller of Fidelity and FBMC, extends to all of its interactions with them, regardless of whether such relations arose in a shareholder context or in the context of the Notes. It is unclear if the fiduciary duty a controlling shareholder owes to other shareholders bleeds into the controlling shareholder's conduct in non-shareholder contexts. See, e.g., Riblet Products Corp. v. Nagy, 683 A.2d 37, 40 (Del. 1996) (contractual rights are separate from rights held as a stockholder and, "although majority stockholders have fiduciary duties to minority stockholders qua stockholders, those duties are not implicated when

As a secondary argument, First Republic contends that the Shareholders' "conclusory allegations [of] First Republic's 41% ownership of FBMC . . . and selection of two Directors does [sic] not support the inference that First Republic exercised actual control and direction over" Fidelity. First Republic's Memorandum at 14-15. The Court must reject this argument. The Defendants allege that First Republic owned 41% of FBMC's outstanding shares, and FBMC owned all of Fidelity's outstanding shares. Counterclaim at ¶¶ 33-34. The Shareholders assert that First Republic exercised its right to appoint two members of the Fidelity Board and that, through these two members, it controlled Fidelity, the Board and FBMC. Id. at ¶¶ 34, 45. In addition, based on the allegations that First Republic singlehandedly vetoed the Keystone Transaction, the Court can infer that First Republic effectively dominated the operations and management of Fidelity. Id. at ¶¶ 53-54. Thus, the Counterclaim alleges facts to support the conclusion that First Republic controlled Fidelity and FBMC

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the issue involves the rights of the minority stockholder qua employee under an employment contract" because the duties at issue are contractual); Juran v. Bron, No. Civ. A. 16464, 2000 WL 1521478, at *9 (Del. Ch. Oct. 6, 2000) ("[i]f the minority shareholder/partner/employee is injured in his capacity as a shareholder or partner, the acts against him may be a breach of fiduciary duty. Where, however, the person is injured . . . in a breach of an employment contract situation, his remedy would be under the contract"); Fletcher § 5211 (a "controlling shareholder's fiduciary duty does not expand any specific contractual rights of the creditors, and if the majority shareholder has fully complied with the governing contract provisions, the fiduciary duty claim is not reached"); Id. at § 5211.05 (noting a "distinction between a duty a corporation owes a minority shareholder, as a shareholder, from any duty it might owe a minority shareholder as an employee"). Because First Republic does not object on this ground, however, the Court cannot consider it and must allow the Shareholders to proceed. Cf. Travers v. Cameron Cty. School Dist., 117 Pa. Commw. 606, 611, 544 A.2d 547, 550 (1988) (where defendant did not raise a specific defense in its demurrer, the court could not rely on that defense to dismiss the action); Wojciechowski v. Murray, 345 Pa. Super. 138, 143, 497 A.2d 1342, 1344 (1985) (admonishing trial court for raising a defense on the defendant's behalf).

for the purposes of the Keystone Transaction, and the Shareholders may proceed on their claim for breach of fiduciary duty.

## III. The Shareholders Have Stated a Claim for Intentional Interference with Contractual Relations

First Republic next contends that the Shareholders' claim for intentional interference with contractual relations is legally insufficient because they do not plead causation, because they fail to identify or to attach a prospective or existing contract and because First Republic's conduct was privileged. None of these arguments is persuasive.

A successful claim for intentional interference with contractual relations must satisfy four elements:

> (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. Ct. 1997) (citation omitted).

The definition of "privilege" in the context of a claim for intentional interference has proven elusive:

> Unlike other intentional torts such as intentional injury to person or property or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act in the manner stated in [Restatement (Second) of Torts] §§ 766, 766A or 766B.[19]

[19] These sections address intentional interference with performance of contract by a third party, intentional interference with another's performance with his own contract and intentional interference with prospective contractual relations.

Ruffing v. 84 Lumber Co., 410 Pa. Super. 459, 468, 600 A.2d 545, 549 (1992) (quoting Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 433 n.17, 393 A.2d 1175, 1184 n.17 (1978), and Restatement (Second) of Torts § 767 cmt. b). Because of this, Pennsylvania courts have held that "the absence of privilege or justification on the part of the defendant is merely another way of stating that the defendant's conduct must be improper." Cloverleaf Dev., Inc. v. Horizon Fin. F.A., 347 Pa. Super. 75, 83, 500 A.2d 163, 167 (quoting Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 281 Pa. Super. 560, 581 n.11, 422 A.2d 611, 622 n.11 (1980)) (quotation marks omitted). See also Adler, Barish, Daniels, Levin & Creskoff, 482 Pa. at 433 n.17, 393 A.2d at 1184 n.17 (noting that Restatement (Second) of Torts § 767 "focuses upon whether conduct is 'proper,' rather than 'privileged'").

To determine whether a defendant's conduct is improper, a court must weigh the following six factors:

> (a) the nature of the actor's conduct;
> (b) the actor's motive;
> (c) the interests of the other with which the actor's conduct interferes;
> (d) the interests sought to be advanced by the actor;
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
> (f) the proximity or remoteness of the actor's conduct to the interference; and
> (g) the relations between the parties.

Small v. Juniata College, 452 Pa. Super. 410, 418, 682 A.2d 350, 354 (1996) (quoting Restatement (Second) of Torts § 767).

First Republic maintains that its conduct was proper because First Republic's status as an FBMC shareholder allows it to interfere in FBMC's and Fidelity's relations. First Republic's

Memorandum at 27. To support this argument, First Republic directs the Court to Green v. Interstate United Management Corp., 748 F.2d 827 (3rd Cir. 1984), in which the plaintiff accused the defendants of instructing their wholly owned subsidiary not to enter into a lease with the plaintiff. In concluding that the plaintiff's claim was without merit, the court focused on the defendants' legitimate motives for their actions:

> The conduct complained of here is that [Defendants] Interstate and Hanson instructed their wholly-owned subsidiary not to sign a lease tendered by [Plaintiff] Green and his associates. Interstate and Hanson intervened after an independent appraiser had determined that the contract was a bad bargain; their motive, plainly, was to prevent dissipation of the resources of their wholly-owned subsidiary. In this case, "the social interests in protecting the freedom of the actor" outweigh "the contractual interests of the other." [Restatement (Second) of Torts] § 767(e). We hold, therefore, that the interference by Interstate and Hanson was proper, and will order entry of judgment notwithstanding the verdict in their favor on the interference and conspiracy claims.

748 F.2d at 831.

The facts of Green are quite different from the Shareholders' allegations. The Counterclaim asserts that First Republic knew of the Notes and purposefully caused Fidelity not to make payments under the Notes through its refusal to approve the Keystone Transaction. Counterclaim at ¶¶ 86-87. These actions were done "recklessly, willfully and/or maliciously," and with the intent that the Shareholders would not receive the amounts to which they were entitled under the Notes. Id. at ¶¶ 88, 90.[20] If these allegations are correct, there is no social interest in protecting First Republic, and the Shareholders' interests in the Notes, which induced them to enter into the Transaction with First

[20] First Republic contends that these "bare bones conclusions of law" do not meet Pennsylvania's pleading requirements. First Republic's Memorandum at 30. These allegations are proper, however, as Pennsylvania Rule of Civil Procedure 1019(b) permits "[m]alice, intent, knowledge, and other conditions of mind [to] be averred generally."

Republic in the first place, are paramount. Consequently, the reasons for which the Green court found privilege are not found in the Counterclaim, and the Court cannot conclude that First Republic's behavior is privileged as a matter of law. Cf. Shared Communications Servs. Of 1800-80 JFK Boulevard Inc. v. Bell Atl. Props. Inc., 692 A.2d 570, 575-76 (Pa. Super. Ct. 1997) (declining to adopt the rule that a parent corporation may, under certain circumstances, direct a subsidiary to breach a contract without liability and finding that the parent corporation did not act to protect a legitimate concern).

First Republic's contention that the Shareholders have not pled a contract is also without merit, as the Counterclaim describes the Notes, which are existing contracts, in detail. Counterclaim at ¶¶ 37, 41-42.[21] There is no need to attach the Notes because they do not form the basis for the Shareholders' claims. See Pa. R. Civ. P. 1019(i) ("[w]hen any claim or defense is based upon a writing, the pleader shall attach copy of the writing"). Cf. DeGenova v. Ansel, 382 Pa. Super. 213, 220, 555 A.2d 147, 150 (1988) (where plaintiff's claims were brought in tort, he had no obligation to attach a copy of his insurance agreement to his complaint); Commonwealth, Dept. of Transp. v. Bethlehem Steel Corp., 33 Pa. Commw. 1, 15, 380 A.2d 1308, 1315 (1977) (Pennsylvania Rules of Civil Procedure "only require a document to be attached when it forms the basis for the claim"). In addition, the Counterclaim supports an inference of direct and proximate causation. Counterclaim at ¶¶ 53-54, 86-87, 91. As a result, the Counterclaim pleads a complete cause of action for intentional interference with contractual relations against First Republic.

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[21] First Republic appears to believe that the contractual relation on which the Shareholders rely is the prospective agreement with Keystone. See First Republic's Memorandum at 28-29.

## IV. The Counterclaim States a Claim for Fraudulent Misrepresentation

To support a claim for fraudulent misrepresentation, a complaint 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) resulting injury proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999). These allegations must be pled with particularity, i.e., they must "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and be "sufficient to convince the court that the averments are not merely subterfuge." Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (citing Pa. R. Civ. P. 1019(b)). See also Maleski v. DP Realty Trust, 653 A.2d 54, 65 (Pa. Commw. Ct. 1995) (to determine whether fraud has been pled with particularity, a court must "look to the complaint as a whole"). According to First Republic, the Counterclaim does not allege a misrepresentation or justifiable reliance, is not sufficiently particular and is properly brought as a derivative action.

First Republic's assertions are belied by the Counterclaim itself:

> 38. The Fidelity Shareholders were induced to enter into the Merger Transaction based, in material part, upon the representations of First Republic that it could and would materially augment the Company's business in the form of a mortgage generation and mortgage servicing through, among many other things, its affiliation with Atlantic Central Bankers Bank, a banking consortium with substantial new mortgage generation capabilities, and its affiliation with Jackson Hewitt tax preparation services, which also was represented to be an excellent source of certain mortgage generation. First Republic also represented that, in its capacity as a commercial bank, it could and would generate substantial mortgages and that it would transfer the servicing of said mortgages to the Company, in addition to providing the Company with unique mortgage programs to differentiate itself in the marketplace.

> 39. First Republic also represented to the Fidelity Shareholders that it had sufficient wherewithal to infuse additional capital into the Company should the Company require same if, for example, interest rates declined, which would inevitably result in a run off of the Company's mortgage servicing portfolio and thus have a negative financial impact on the Company.

Counterclaim at ¶¶ 38-39. These paragraphs allege numerous misrepresentations and justifiable reliance.[22] They also allow First Republic to prepare a defense and convince the Court that the allegations are more than mere subterfuge. In addition, the Court can infer that the misrepresentations were made to the Shareholders only and not to other FBMC shareholders, precluding them from forming the basis of a derivative action. As a result, the Shareholders may proceed on their fraudulent misrepresentation claim.

**V. The Counterclaim Does Not Assert a Complete Count for Civil Conspiracy**

To state a claim for civil conspiracy, a plaintiff must show "that two or more persons combined or agreed with intent to do an unlawful act or to do an 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. Ass'n, Inc., 547 Pa. 224, 235, 690 A.2d 169, 174 (1997) (quotation marks and citation omitted).[23] The Shareholders allege that First Republic conspired with the Directors to deprive them of the payments due under the Notes.

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[22] First Republic does not contend that the agreement on which the Transaction was based incorporated these representations into a final integrated document.

[23] At least one Pennsylvania case states that a civil conspiracy claim also requires an overt act. See Strickland v. University of Scranton, 700 A.2d 979, 988 (Pa. Super. Ct. 1997) (requiring "an overt act done in pursuance of the common purpose").

First Republic contends that the Shareholders' civil conspiracy claim must fail because "officers or directors of a company acting in their corporate capacity cannot conspire with the corporation." First Republic's Memorandum at 16. In making this claim, First Republic relies on Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466 (1979), where the court rejected claims that a corporation could conspire with its sole shareholder, director and officer and embraced the concept of intracorporate immunity. While Thompson Coal Co.'s holding has been narrowed recently,[24] it has been cited for the principle asserted by First Republic. See Denenberg v. American Family Corp., 566 F. Supp. 1242, 1253 (E.D. Pa. 1983) (citing Thompson Coal Co. to find that a corporation could not conspire with the chairman of its board of directors and chief executive director). See also Tyler v. O'Neill, 994 F. Supp. 603, 613 (E.D. Pa. 1998) ("[g]enerally under Pennsylvania law, a corporation cannot conspire with itself, nor with its officers and agents when they act solely for the corporation and not on their own behalf").

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[24] In Shared Communications Services of 1800-80 JFK Boulevard Inc. v. Bell Atlantic Properties Inc., 692 A.2d 570 (Pa. Super. Ct. 1997), the Superior Court held as follows:

> In Thompson Coal, our Supreme Court held that a sole shareholder, director, and officer of a corporation could not conspire with his corporation as a matter of law. Id. at 212-13, 412 A.2d at 473. Instantly, however, we are not dealing with an individual and his corporation, but with a corporate parent and its corporate subsidiary. Unlike a sole shareholder/officer/director, who is necessarily involved in every intimate aspect of his corporation, a corporate parent may have varying degrees of involvement with its corporate subsidiary. While it is certainly possible to find a parent/subsidiary arrangement that is as close as the individual/corporate relationship in Thompson Coal, it is equally as possible to find a parent/subsidiary relationship that is entirely distant. Thus, we must conclude that the per se rule of Thompson Coal is inappropriate in the more complex parent/subsidiary context.

692 A.2d at 574.

The concept of intracorporate immunity is not without exceptions. Implicit in the principle is the inference that, when officers and directors "act on their own behalf they are legally capable of conspiring with the corporation because, in such cases, there exists at least two conspirators--that is, a corporation and one or more individuals who, although technically agents for the corporation, are actually acting for their own benefit." Sanzone v. Phoenix Techs., Inc., No. Civ. A. 89-5397, 1990 WL 50732, at *10 (E.D. Pa. 1990) (citations omitted). Cf. Rocking Horse Child Care Centers of Amer. v. Carneal, No. Civ. A. 94-7606, 1995 WL 216947, at *5 (E.D. Pa. 1995) ("individual officers or directors of a corporation can conspire with each other or the corporation if they act solely to injure the plaintiff"); Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1328 (E.D. Pa. 1994) (corporate civil conspiracy may exist "where agents or employees act outside of their roles as officers and employees of the corporation even in the absence of a co-conspirator from outside the corporation").[25]

The Shareholders maintain that the Directors were acting outside the scope of their corporate authority and that the exception to intracorporate immunity applies. Specifically, they contend that the

[25] In many other jurisdictions, this inference has never been explicitly stated, explored or applied. Compare Tufano v. One Toms Point Lane Corp., 64 F. Supp. 2d 119, 125 (E.D.N.Y. 1999) ("officers, agents and employees of a single corporate entity are legally incapable of conspiring together"), Hellman v. Murray's Steaks, Inc., 742 F. Supp. 860, 883 (D. Del. 1990) ("officers and directors of a corporation cannot conspire with the corporation"), and Alta Anesthesia Assocs. of Ga., P.C. v. Gibbons, 537 S.E.2d 388, 394 (Ga. Ct. App. 2001) ("a corporation cannot conspire with itself and . . . employees of a corporation are considered to be part of the corporate entity") with Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 787 (9th Cir. 1996) (corporation and its officers could engage in RICO conspiracy), Sadighi v. Daghighfekr, 36 F. Supp. 2d 279, 297 n.15 (D.S.C. 1999) (noting Fourth Circuit cases holding that a corporation can conspire with its officers when the officer has a personal stake in achieving the illegal objective or when the officer's acts are unauthorized), and Diaz v. Allstate Ins. Group, 185 F.R.D. 581, 591 (C.D. Cal. 1998) (noting exceptions to intracorporate immunity).

Directors "acted on their own and decided to reject the Keystone deal based on their own self-interest, rather than what was in the best interest of the Company, even though they knew that to do so would be 'disaster.'" Shareholders' Memorandum at 30. None of the allegations in the Counterclaim, however, support the conclusion that the Directors acted on their own behalf or that they had a personal stake in the Keystone Transaction. Indeed, the fact that the Directors conditioned support for the Keystone Transaction on additional financial benefits for First Republic indicates that they were acting for First Republic's benefit, not their own. See, e.g., Counterclaim at ¶ 61 (the aim of First Republic and the Directors' conspiracy was "to cause First Republic to obtain financial gain to which it was not lawfully entitled"). On this basis, the Court finds that the Directors were acting in their capacity as representatives of First Republic and not in conspiracy with First Republic. Thus, the Shareholders' claim for civil conspiracy must be dismissed.[26]

## VI. The Shareholders May File an Amended Counterclaim

In Pennsylvania, "parties are liberally granted leave to amend their pleadings." Frey v. Pennsylvania Elec. Co., 414 Pa. Super. 535, 538, 607 A.2d 796, 797 (1992). See also Werner v. Zazyczny, 545 Pa. 570, 584, 681 A.2d 1331, 1338 (1996) (leave to amend a pleading "should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party"). The Shareholders have specifically requested leave to amend Counterclaim. Shareholders' Memorandum at 2 n.3. Because allowing the Shareholders to file an amended

[26] Because the Counterclaim does not allege a conspiracy by two or more persons, the Court need not consider First Republic's arguments as to the Shareholders' failure to plead malice, an unlawful object and adequate facts to support their claim.

counterclaim will not lead to an error of law or prejudice First Republic, the Court is granting this request.

**CONCLUSION**

All claims asserted by the Employees, as well as those claims asserted against the Directors, are dismissed. The Shareholders may proceed against First Republic on their claims for breach of fiduciary duty, intentional interference with contractual relations and fraudulent misrepresentation, but their claim for civil conspiracy is dismissed.

BY THE COURT:

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JOHN W. HERRON, J.

Date: June 1, 2001

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

| | | |
|---|---|---|
| FIRST REPUBLIC BANK, | : | August Term, 2000 |
| Plaintiff | : | |
| | : | No. 147 |
| v. | : | |
| | : | Commerce Case Program |
| STEVEN D. BRAND, et al. | : | |
| Defendants | : | Control No. 040559 |

**ORDER**

AND NOW, this 1st day of June, 2001, upon consideration of the Preliminary Objections of Plaintiff First Republic Bank and the Directors[1] to the Counterclaim of the Defendants[2] and the Employees,[3] and the response thereto by the Defendants and the Employees, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

[1] The "Directors," also referred to in the Parties' filings as "Additional Counterclaim Defendants," are Jere Young, George Rapp and Harry Madonna.

[2] The Defendants, also referred to in the Parties' filings as the "Counterclaim Plaintiffs," are Steven D. Brand, James M. Dougherty, Arthur L. Powell, Richard S. Powell, Jon R. Powell, Carol P. Heller, Nancy E. Powell, Harold G. Schaeffer, James R. Schaeffer, Anthony L. Schaeffer and Robert D. Schaeffer.

[3] The "Employees," also referred to in the Parties' filings as "Additional Counterclaim Plaintiffs," are Pattie D. Albertson, Margaret R. Baker, Elizabeth R. Baratta, Michael D. Blake, Lawrence W. Corner, Mary F. Dugan, Ann M. Esposito, Thomas M. Fallon, Gina M. Fasolini, William J. Fitzmire, Karen A. Fugok, Brian F. Hill, William Jay, Carrie M. Johnson, Troy F. Kane, Julian F. Loscalzo, John T. McGinley, Catherine A. McMonagle, Sharon McNeil, Gail L. Olinger, Chrisann M. Peake, Kathleen M. Schaeffer and Jean E. Shesney.

1. The Preliminary Objections to Count II - Civil Conspiracy, Count III - Breach of Fiduciary Duty, Count IV - Violation of the Pennsylvania Wage Payment and Collection Law, Count V - Intentional Interference with Contractual Relations, Count VI - Interference with Prospective Economic Advantage and Count VIII - Interference with Prospective Economic Advantage are SUSTAINED, and Counts II, III, IV, V, VI and VIII are DISMISSED in their entirety;

2. The Preliminary Objections to the Employees' claims asserted in Count I - Breach of Fiduciary Duty are SUSTAINED, and the Employees' claims asserted in Count I are DISMISSED;

3. The Directors' Preliminary Objections to Count VII - Intentional Interference with Contractual Relations and Count IX - Fraudulent Misrepresentation are SUSTAINED, and Counts VII and IX are DISMISSED as to the Directors only;

4. The remaining Preliminary Objections are OVERRULED; and

5. The Defendants are directed to file an amended counterclaim within twenty days of this Order.

BY THE COURT:

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JOHN W. HERRON, J.