IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

HARBOR HOSPITAL SERVICES, INC., CENTURY TEXTILE t/a HARBOR HOSPITAL LAUNDRY SERVICES, HARBOR SERVICE CORP., and EARL WAXMAN	: JULY TERM, 2000 : No. 4830 : Control No. 021440
v.	:
GEM LAUNDRY SERVICES, L.L.C., ROYAL OF PA, INC., ROYAL INSTITUTIONAL SERVICES, INC., MARK JOHNSON, SHAWN RYAN, AND MARK LEIBOVITZ	:
HARBOR HOSPITAL SERVICES, INC.	: AUGUST TERM, 2000
v.	: No. 0207
GEM LAUNDRY SERVICES, L.L.C., ROYAL OF PA, INC., ROYAL INSTITUTIONAL SERVICES, INC., MARK JOHNSON, SHAWN RYAN, AND MARK LEIBOVITZ	: Control No. 021185 :

O R D E R

AND NOW, this 18th day of July 2001, upon consideration of certain defendants' Preliminary Objections to Counts II, III, IV and VIII of the Second Amended Complaint filed in the action, captioned as July Term, 2000, No. 4830, these same defendants' Preliminary Objections to the Amended Complaint in the consolidated case, captioned as August Term, 2000, No. 0207, plaintiffs' responses in opposition to them, the respective memoranda, all other matters of record, and in accord with the Opinion being filed

contemporaneously with this Order, it is hereby **ORDERED** that:

(1) defendants' Preliminary Objections to Counts II and VIII of the Second Amended Complaint in the July action are **Sustained** and these Counts are **Stricken;**

(2) defendants' Preliminary Objections to Count III of the Second Amended Complaint are **Sustained**, **in part**, as to the termination fees and **Overruled**, **in part**, as to all other fees;

(3) defendants' Preliminary Objections to the Second Amended Complaint for failure to attach the Virtua Agreement are **Overruled**, but plaintiffs are directed to provide the written Virtua Agreement;

(4) the remaining Preliminary Objections to the Second Amended Complaint in the July action and the Preliminary Objections to the Amended Complaint in the August action are **Overruled**;

(5) defendants shall file an Answer to Counts III and IV of the Second Amended Complaint in the July action and shall file an Answer to the Amended Complaint in the August action within twenty-two (22) days of entry of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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.....

O P I N I O N

Albert W. Sheppard, Jr., J. ..... July 18, 2001

Presently before this court are two sets of Preliminary Objections: (1) the Preliminary Objections of defendants, Royal of PA, Inc., Royal Institutional Services, Inc., Mark Johnson, Shawn Ryan and Mark Leibovitz, to Counts II, III, IV and VIII of the Second Amended Complaint filed in the action captioned as July Term, 2000, No. 4830; and (2) these same defendants' Preliminary Objections to the Amended

Complaint in the consolidated case, captioned as August Term, 2000, No. 207.[1]

For the reasons set forth, the Preliminary Objections are **sustained** in part and **overruled** in part.

BACKGROUND

This lawsuit arises out of a failed business venture to provide commercial laundry services to Philadelphia-area hospitals.

The lead plaintiff is Harbor Hospital Services, Inc. ("Harbor"), a Pennsylvania corporation engaged in the business of distributing and marketing linen and related products to various healthcare and health services institutions. Also named as plaintiffs are: Harbor Service Corp. ("HSC"), owner of the registered trademark "Harbor Linen"; Century Textile, Inc. trading as Harbor Hospital Laundry Services ("Century"), which was engaged to provide commercial laundry services for Virtua Health System in New Jersey; and Earl Waxman ("Waxman"), the sole shareholder of Harbor, HSC and Century. Plaintiffs are sometimes collectively referred to as "Harbor" or the "Harbor Group." The defendants include GEM Laundry Services, L.L.C. ("GEM"), a Pennsylvania limited liability company, whose members include Harbor and co-defendant, Royal of PA, Inc. ("Royal PA"). Royal PA was formed at the direction of co-defendant, Royal Institutional Services, Inc. ("RISI"), a Massachusetts corporation engaging in the commercial laundry business. RISI is a signatory to the GEM Operating Agreement. Together, RISI and Royal PA are sometimes referred to as the "Royal" entities. Also named as defendants are RISI's shareholders: Mark Johnson ("Johnson"), Shawn Ryan ("Ryan") and Mark Leibovitz ("Leibovitz").

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[1]By this court's Order, dated March 7, 2001, granting the motion to consolidate the two cases, the lead case was designated as the one captioned as July Term, 2000, No. 4830. In this Opinion, the lead case shall be referred to as the "July action" and the consolidated case shall be referred to as the "August action."

Harbor has allegedly provided linen supply services for the past twenty-five (25) years to various healthcare facilities in the greater Philadelphia area, including the Jefferson Health System ("Jefferson") and the Virtua Health System ("Virtua"). In March 1998, after extensive discussions and negotiations, Harbor entered into a long-term agreement with Jefferson, whereby Harbor was engaged as the exclusive commercial laundry service provider for identified facilities within the Jefferson system and engaged as the exclusive provider for linen and linen-related products ("the Jefferson Agreement"). See Second Am.Compl., Exhibit A.[2] The Jefferson Agreement contemplated that Harbor may enter into subcontracts to fulfill various obligations under the agreements, such as the laundry services required to be performed by Harbor, since Harbor did not have the capacity to provide laundry services to hospitals. Id. at § 18.

Harbor and its affiliates then had discussions with RISI and the individual defendants, who had experience in hospital laundry services in Massachusetts, about forming a joint venture to perform the laundry services to Harbor's hospital customers in Pennsylvania and New Jersey. These discussions led to the execution of the Operating Agreement, dated July 29, 1998 ("Operating Agreement") and the formation of GEM. See Second Am.Compl., Exhibit B. Pursuant to the Operating Agreement, Harbor was to assign the Jefferson Agreement to GEM as part of its capital contribution. Id. at § 1.2.6.1. In the event that Harbor could not obtain the consent of Jefferson to this assignment, then the Operating Agreement was to be considered a subcontract between Harbor and GEM. Id. at § 1.2.6.1.1. In addition, the Royal entities were to arrange for the necessary capital for the operation of GEM's business

[2]All references in this Opinion to the Second Amended Complaint refers to the complaint filed in the July action. All references to the Amended Complaint refers to the complaint filed in the August action. The term "Exhibits" refers to those exhibits attached to the respective complaints or to the defendants' Preliminary Objections.

activities. Id. at § 6.3. Royal PA, at all times, was also to provide to GEM the supervisory support necessary for the efficient operations of GEM. Id. The payment and performance of Royal PA's obligations under the Operating Agreement were guaranteed by the individual defendants and RISI, as sureties. Id. at 32.

Harbor also entered into a Laundry Services and Marketing Agreement with GEM dated July 29, 1998 ("Marketing Agreement"), pursuant to which Harbor was exclusively engaged to provide certain marketing services for GEM and GEM was obligated to pay Harbor a sales fee based upon a percentage of the GEM's laundry service revenues from all laundry service customers during the term of the agreement. See Second Am.Compl., Exhibit C at § 3(e). This provision was to be binding on GEM's successors and assigns. Id. GEM was also supposed to pay a service fee to Harbor based on "customer support activities" and a percentage of the laundry processed by GEM. Id. at § 3(g). In addition, the Marketing Agreement obligated GEM and the Royal entities to pay Harbor a "termination fee" in the event that any laundry services customer procured by Harbor terminated its laundry services agreement (including the Jefferson Agreement) on account of a deficiency of GEM's services. Id. at § 3(f).

As alleged, the beginning of GEM's operations was delayed due to the negligent actions and inactions of the Royal entities. GEM's services were allegedly substandard and inferior due to the Royal entities' grossly deficient, reckless and wanton management and supervision of GEM's business activities. As alleged, the Royal entities failed to provide for GEM management personnel with expertise in the operation of a commercial laundry for healthcare; failed to properly run the day-to-day operations of GEM in a cost-effective manner; and failed to pay GEM's debts and obligations as they became due. Further, as alleged, the Royal entities efforts had been focused on selling their entire business operations, including

GEM, rather than supervising the daily business affairs of GEM.

By late November 1998, GEM was in a severe cash-flow crisis due allegedly to the Royal entities' conduct. The Royal entities then insisted that Harbor or Waxman make available to GEM on a temporary or "bridge" basis, an emergency loan in the amount of $200,000 which would be repaid from the first proceeds of any alternative financing made available to GEM. On November 24, 1998, Waxman extended this loan to GEM in exchange for a promissory note in the amount of $200,000. See Am.Compl., Exhibit A. RISI, Royal PA and the individual defendants guaranteed, as sureties, GEM's obligations under the note to Waxman. Id. at 2-3.

In July 1999, the Royal entities advised the Harbor group that Royal would abandon its obligations to oversee and supervise the performance of GEM's operations. Thereafter, on August 1, 1999, Harbor was required to arrange for an alternative laundry services provider to fulfill the needs of Harbor's laundry service customers. Certain performance problems with the laundry services provider did not dramatically improve. On October 7, 1999, Jefferson sent written notice to Harbor of its intent to terminate the Jefferson Agreement. Virtua has also elected to terminate Harbor. Harbor has not been paid a termination fee by the defendants, nor has it received any portion of sales fee or services fee. Harbor also has allegedly suffered substantial damage to its name and reputation and has been foreclosed from numerous business opportunities on account of this damage.

RISI, or another corporation owned by some or all of the Royal shareholders or their affiliates, referred to as "Royal Successor," is alleged to be presently engaged by Jefferson to provide commercial laundry services after Harbor was terminated by Jefferson.

With this background, plaintiffs filed both actions against the defendants. First, in the July action, plaintiffs set forth Counts for intentional misrepresentation/fraud, negligence and gross negligence, breach of contract, breach of fiduciary duty, unjust enrichment, conversion, and tortious interference/violation of corporate opportunities. Second Am.Compl., Counts I-VIII. Royal PA, RISI and the individual defendants filed Preliminary Objections, in the form of a demurrer to Counts II, III, IV and VIII of the complaint, as well as moving to strike the complaint for failing to attach any writing which reflects that any of the plaintiffs were engaged to provide laundry services to Virtua.[3]

Additionally, Harbor commenced the August action by filing a Complaint in Confessed Judgment, to recover on the promissory note. Defendants initially filed a Petition to Strike Off and/or Open the Confessed Judgment. On November 28, 2000, this Court ordered the confessed judgment stricken in its entirety as to all defendants.[4] Harbor then filed an Amended Complaint against the same defendants, seeking to recover under the Note. Royal PA, RISI and the individual defendants, also referred to as the "guarantor defendants" filed Preliminary Objections to this complaint, asserting Harbor's lack of standing to enforce the guaranty and the failure to attach any written assignment.

This court will address both sets of objections *seriatim*.

LEGAL STANDARD

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows for preliminary

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[3]GEM does not appear to have joined the other defendants in their objections, but rather, GEM filed an Answer to Counts V, VI and VII of the Second Amended Complaint. RISI and the other defendants also filed Answers to Counts I, V, VI and VII.

[4]See Harbor Hospital Services, Inc. v. GEM Laundry Services, L.L.C., et al., August Term, 2000, No. 207 (C.P. Phila. Nov. 28, 2000)(Herron, J.).

objections based on legal insufficiency of a pleading or a demurrer. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000)(citation omitted). Moreover,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa.Super.Ct. 1999). However, the pleaders' conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. Giordano v. Ridge, 737 A.2d 350, 352 (Pa.Commw.Ct. 1999), aff'd. 559 Pa. 283, 739 A.2d 1052 (1999), cert. denied, 121 S.Ct. 307 (U.S. 2000). In addition, it is not necessary to accept as true averments in the complaint which conflict with exhibits attached to the complaint. Philmar Mid-Atlantic, Inc. v. York Street Associates II, 389 Pa.Super. 297, 300, 566 A.2d 1253, 12 (1989).

Applying this standard, this court finds that plaintiffs have failed to state causes of action for negligence and for tortious interference with corporate opportunity or prospective contractual relations. However, the court finds that plaintiffs have sufficiently stated causes of action for breach of contract and breach of fiduciary duty. The court further finds that plaintiff, Harbor, does have standing to sue on the

promissory note as against the guarantor defendants. Thus, the Preliminary Objections will be sustained in part and overruled in part.

DISCUSSION

I. PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT - JULY ACTION

A. Count II - Negligence and Gross Negligence

Defendants demur to Count II on the grounds that Pennsylvania does not recognize a cause of action for negligent breach of contract.[5] This court agrees.

Our Superior Court has stated the following rule regarding the "gist of the action" doctrine: "to be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral . . . a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly." Phico Ins. Co. v. Presbyterian Medical Servs. Corp., 444 Pa.Super. 221, 229, 663 A.2d 753, 757 (1995)(holding that policy exclusion for contractually based claims precluded coverage under insurance policy, notwithstanding allegations that medical corporation engaged in gross negligence or willful misconduct in the administration and management of the nursing home resulting in a breach of the management agreement). The main inquiry for applying the doctrine is the source of the duties that the defendant violated. Id. A tort action arises from the breach of a duty imposed as a matter of social policy while a contract action arises from the breach of a duty imposed by agreement or mutual consensus of the parties. Id. See also, Redevelopment Auth. of Cambria County v. International

[5]Defendants also assert that plaintiffs lack standing to hold the Royal entities and the individual defendants liable for negligent breach of contract. However, this court is sustaining the objections to Count II on other grounds and need not now address this argument.

Ins. Co., 454 Pa.Super. 374, 394-96, 685 A.2d 581, 591-92 (1996)(holding that general liability insurer had no duty to defend or indemnify public authority in underlying suit which essentially alleged a breach of contractual duties since liability did not stem from negligent behavior).

Plaintiffs rely on Hirsch v. Mount Carmel District Indus. Fund, Inc., 363 Pa.Super. 433, 436-37, 526 A.2d 422, 424 (1987) for the proposition that Pennsylvania law allows for a negligent breach of contract where the plaintiff alleges an improper performance of a contract rather than a nonperformance. However, the court in Hirsch relied on Raab v. Keystone Ins. Co., 271 Pa.Super 185, 187-88, 412 A.2d 638, 639 (1979) for the misfeasance/nonfeasance distinction. This distinction was implicitly overruled by Phico Ins. Co., 444 Pa.Super. at 228, 663 A.2d at 757. Therefore, Hirsch should no longer be controlling on this point.

Here, in Count II, plaintiffs allege that "[t]he acts of the Royal Group defendants in negligently and grossly mismanaging the commercial laundry obligations of GEM as required pursuant to the GEM Operating Agreement constitute negligence, gross negligence, reckless or intentional misconduct." Second Am.Compl. at ¶ 47. Plaintiffs also allege that damages flowed from this alleged negligent and gross mismanagement of the commercial laundry obligations in that: (1) Harbor had to forfeit its rights to perform laundry services under the Jefferson Agreement; (2) Century had to forfeit its rights to perform laundry services under the Virtua Agreement; (3) Harbor did not receive the marketing, sales and termination fees that it was owed pursuant to the Marketing Agreement on account of the termination of the Jefferson and Virtua Agreements; (4) Harbor would not realize the distribution of cash flows from the anticipated profits of GEM; (5) Harbor has been obligated to issue credit adjustments to Jefferson and Virtua Health Systems; (6) Harbor's and Waxman's business and professional reputations have been injured; (7) Harbor has been

compelled to defend claims of creditors of GEM and incur expenses; and (8) Harbor has been obligated to satisfy various obligations of GEM. Id. at ¶ 48.

Clearly, these allegations reflect that plaintiffs are relying on the GEM Operating Agreement and the Marketing Agreement to set forth their claim for negligence and gross negligence. Their proper redress belongs in contract, not in tort, pursuant to the "gist of the action" doctrine. Therefore, the Preliminary Objections to Count II are sustained. Count II is stricken from the complaint.

B. Count III - Breach of Contract

Defendants demur, on several grounds, to Count III, which purportedly seeks payment of sales fees, service fees and termination fees. As to the sales fees, defendants contend that plaintiffs are not entitled to the sales fees under the Operating and Marketing Agreements since sales fees were never intended to apply to the Jefferson Agreement but were to apply to customers who actually entered into laundry service agreements with GEM and that plaintiffs make only conclusory allegations that RISI is the "successor" or "assign" of GEM. As to the service fees, defendants argue that GEM never entered into a laundry services agreement with Jefferson, and, therefore, neither it nor its successor would be liable for service fees. Defendants contend that plaintiffs' claim as to service fees fails for lack of consideration. As to termination fees, defendants assert that GEM's liability for termination fees arises only after certain conditions precedent are satisfied and that these conditions were not met in the present instance since Harbor failed to assign the Jefferson Agreement to GEM and no laundry service customer ever alleged that it had terminated its agreement with GEM, but, rather, Jefferson and Virtua had terminated the agreements they had with Harbor and Century. Defendants also argue that this court lacks jurisdiction to decide whether the laundry service agreement was terminated for cause.

This court concludes that the demurrer should be overruled with respect to the sales fees and service fees, but sustained with respect to the termination fees.

In Count III of the Second Amended Complaint, plaintiffs seek sales fees and service fees pursuant to certain provisions of the Operating Agreement and related Marketing Agreement, which are alleged to be a continuing obligation of GEM or any entity succeeding to GEM's assets or business who continues to perform laundry services for a laundry customer procured during the term of the agreement(s). See Second Am.Compl. at ¶¶ 42, 50. Plaintiffs implicitly seek termination fees which defendants are allegedly obligated to pay them under the Marketing Agreement on account of Jefferson's termination of Harbor which is attributable to defendants' alleged performance deficiencies. Id. at ¶¶ 38-40; 48(d), (e). Plaintiffs also allege that RISI or Royal Successor has succeeded to the laundry service operations of GEM and continues to owe GEM's obligations to pay Harbor these fees. Id. at ¶ 51. Further, plaintiffs allege that defendants Royal PA, RISI and the individual defendants, who were guarantors of GEM's performance, breached the Operating Agreement and related Marketing Agreement by failing to secure GEM management personnel with sufficient experience in the laundry business or properly and efficiently run the daily operations of GEM. Id. at ¶¶ 28-30, 52-55. In addition to the alleged fees owed to them, plaintiffs allege that they have suffered damages in their name, reputation and goodwill on account of defendants' actions and inactions. Id. at ¶ 43.

To maintain a cause of action for breach of contract, the plaintiff must allege and ultimately prove (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super. 1999)(citations omitted). "While not every term of a contract must be stated in complete detail, every

element must be specifically pleaded." Id. at 1058. Further, to recover on a breach of contract claim, a plaintiff must generally aver that all conditions precedent have been performed or occurred. See Britt v. Chestnut Hill College, 429 Pa.Super. 263, 269, 632 A.2d 557, 560 (1993). See also, Pa.R.C.P. 1019(c).

Our Superior Court explains this principle here:

> when the consideration of the defendant's contract was executory, or his performance was to depend on some act to be done or forborne by the plaintiff, or some other event, the plaintiff must aver the fulfillment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or any other person, or must show some excuse for the nonperformance . . . .

Zeller v. Wunder, 1908 WL 3639, at *3 (Pa.Super.Ct. Nov. 14, 1907).

In analyzing plaintiffs' breach of contract claim, this court must look to various provisions of the Operating and Marketing Agreement to see whether plaintiffs are barred, as a matter of law, from recovering sales fees, service fees and/or termination fees for failure of a condition precedent and/or lack of consideration.[6] First, the fact that the Jefferson Agreement may not have been assigned to GEM is not fatal to plaintiffs' claim. The Operating Agreement provided, in pertinent part, that:

> [i]n the event, notwithstanding Harbor's best efforts, as aforesaid, Harbor cannot obtain the consent of the Jefferson Health System to the assignment of the Jefferson Services Agreement by Harbor to [GEM], this Agreement shall not be considered under the Jefferson Services Agreement as an assignment, but instead, as contemplated by Section 18 of the Jefferson Services Agreement, this Agreement shall constitute a subcontract between Harbor and [GEM] pursuant to which [GEM] shall be engaged to perform and fulfill on behalf of Harbor all of Harbor's obligations for the performance of Laundry Services . . . to the Jefferson Health System . . . and [GEM] shall be entitled to receive all compensation paid by the Jefferson Health System under such Agreement for the performance of such Laundry Services, to the same extent as if the Jefferson Services

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[6]Interpretation of the Operating and Marketing Agreement is a matter of law for the court, and not a question of fact. Onofrey v. Wolliver, 351 Pa. 18, 21, 40 A.2d 35, 37 (1944); Mellon Bank, N.A. v. National Union Ins. Co. of Pittsburgh, 768 A.2d 865, 868 (Pa.Super.Ct. 2001).

Agreement were actually assigned to the Company. . . .

Second Am.Compl., Exhibit B at § 1.2.6.1.1. Plaintiffs alleged that GEM was engaged to perform the laundry services required to be performed by Harbor under the Jefferson Agreement. Second Am.Compl. at ¶ 20. Therefore, this court may reasonably infer that Harbor performed its initial task of contributing to GEM the right to perform the laundry services under the Jefferson Agreement.

In addition, the Operating Agreement stated that "the Sales Fee (as defined under the Harbor Services Agreement) is a continuing obligation of [GEM] for so long as [GEM] (or any successor or assign to all or a substantial portion of [GEM's] business) performs Laundry Services for any such Laundry Service customer's facility. . . ." Second Am.Compl., Exhibit B at § 6.2.1.1 (emphasis added). Prior to any sale of the GEM's assets, the members, i.e., Harbor and Royal, had to agree to this continuing obligation to Harbor. Id. Under the Operating Agreement, RISI and Royal PA were to arrange for the availability to GEM of all necessary capital for the operation of GEM's business activities and Royal PA was to provide GEM with all supervisory support necessary for its operations. Id. at § 6.3. Further, on the signature page of the Operating Agreement, RISI and the individual defendants guaranteed, as surety, in favor of Harbor, the payment and performance of all of Royal PA's obligations under the agreement. Id. at 32. It is not clear from the broad language of section 6.2.1.1 that the sales fee(s) were only intended for laundry customers procured by Harbor, other than Jefferson.

Moreover, under the Marketing Agreement, executed on the same day as the Operating Agreement, Harbor was engaged as GEM's exclusive sales and marketing representative and Harbor was to use its best efforts to procure laundry services customers for GEM. Second Am.Compl., Exhibit C at § 3(a). The exclusivity provision would not apply if Harbor does not procure, within the eighteen (18)

month period following GEM's commencement of the Jefferson Agreement, commitments for GEM to perform laundry services for an additional 7.25 million pounds weight per year of laundry. Id. at § 3(a)(ii). In such event, GEM could solicit and procure laundry service customers directly. Id. In consideration of Harbor's performance, Harbor was to receive a sales fee at the rate of 3.5% of the net collected revenues collected by GEM (and its successors and assigns). Id. at § 3(e).

It is not clear that the sales fee provision was not triggered simply because GEM may not have formally entered into an agreement with Jefferson or another laundry service customer. Further, it is not clear that Royal Successor or some other corporation who succeeded to GEM's assets could not be obligated to Harbor to pay them a sales fee for laundry services performed for Jefferson. The extent of sales fees that may be owed to Harbor may depend on the term of the respective agreements, but this factual issue cannot be determined at this point. Therefore, the demurrer to the breach of contract claim as to the sales fee provisions is overruled.

As to services fees, the Marketing Agreement obligated Harbor to perform certain long-term customer relationship activities to the extent required under each Laundry Service Agreement entered into by GEM. Id. at § 3(g). In exchange for its performance, Harbor was to receive a service fee under each Laundry Services Agreement at the rate of $.005 per pound of soiled linen processed by the Laundry Facility for the healthcare customers. Id. The service fee was payable by GEM to Harbor on a monthly basis. Id. It is not clear that the fact that no service agreement may have been formally entered into by GEM bars Harbor's recovery of a service fee, when read in conjunction with the Operating Agreement and the treatment of GEM as a subcontractor. Therefore, the demurrer to the breach of contract claim as to the service fee provisions is also overruled.

As to the termination fees, GEM and Royal agreed that "in the event any Laundry Service Customer procured by Harbor alleges that it has terminated its Laundry Service Agreement with [GEM] on account of a deficiency in [GEM's] quality of Laundry Services (referred to herein as a '**for cause termination**') during the initial . . . term of any such Laundry Service Agreement (including without limitation, the Jefferson Services Agreement), [GEM] shall pay to Harbor within ten (10) days following the effective termination date of any such Laundry Service Agreement, a termination fee. . . ." Id. at § 3(f) (emphasis in original). However, Harbor's right to the termination fee was subject to the condition that representatives of GEM and Royal have the opportunity to interact with the laundry service customer and discuss the customer's complaints prior to the effective termination date. Id. at § 3(f)(ii)(1). Further, in the event of a dispute between the parties concerning whether a customer's termination of a laundry service agreement was a "for cause termination," such dispute shall be finally settled by arbitration in accordance with the Rules of the American Arbitration Association.

Plaintiffs fail to allege that GEM or Royal had the opportunity to discuss Jefferson's complaints. Rather, Harbor, on its own, appears to have undertaken the complaints of the laundry service customers. Second Am.Compl. at ¶¶ 31-32. Failure to aver the performance of this condition precedent bars plaintiffs from recovering termination fees.[7] Therefore, the demurrer as to termination fees is sustained.

Since this court cannot conclude with certainty that plaintiffs have failed to state a cause of action for breach of contract in Count III in order to recover sales fees or services fees, the demurrer to Count III is overruled as to those fees.

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[7]Having determined this issue, this court need not address whether it lacks jurisdiction to determine whether the termination by Jefferson was "for cause".

C. Count IV - Breach of Fiduciary Duty

Defendants demur to Count IV on the grounds (1) that all of the plaintiffs lack standing to sue a co-member of the limited liability company for breach of fiduciary duty; (2) the type of misconduct on which plaintiff's claim is predicated is not within the scope of fiduciary duty established by 15 Pa.C.S.A. § 8943(a); and (3) that plaintiffs are no different than creditors of GEM with respect to their contract damages. This court disagrees with respect to Harbor, but not as to the other named plaintiffs.

In Count IV of the Second Amended Complaint, plaintiffs set forth the following allegations:

> 57. GEM was an entity created to effect a joint venture between plaintiffs and defendants.
>
> 58. As a result of the defendants' breach of contract, negligence, gross negligence, severe, inefficient and willful or reckless mismanagement and otherwise, defendants violated the fiduciary duty owed among members of a limited liability company or among its partners.
>
> 59. It was reasonably foreseeable to these defendants that the entities comprising the Harbor Group would have an expectation of trust that defendants would provide the necessary supervisory support and oversight to cause GEM to operate efficiently and to provide laundry services at least in a manner reasonably consistent with commercial healthcare industry standards. This is particularly the case due to the following language in the Marketing Agreement (Exhibit C, p.7 ¶ (i)):
>
> > a. ... Laundry Co. [GEM] acknowledges that Harbor [HHS] has entered into this Agreement in reliance upon [GEM's] and [GEM's] principal members,' [Royal PA], representations and reputations of high quality of service. [GEM] acknowledges that quality of service at a competitive price is of paramount importance to Laundry Service Customers and Harbor has entered into this
> > Agreement based upon Laundry Co.'s guaranty that it will be able to satisfy such Laundry Service Customers' demands with respect to such matters.
>
> 60. The aforementioned defendants breached this fiduciary duty owed to the Harbor Group. The defendants were also willfully, recklessly or grossly negligent by

misrepresenting their ability to perform the responsibilities and undertakings in the joint venture.

Second Am.Compl. at ¶¶ 57-60.

In analyzing the demurrer to this Count, the court notes that no Pennsylvania case has addressed whether one member of a limited liability company may hold another member liable for breach of fiduciary duty. Defendants refer to International Flavors and Textures, L.L.C. v. Gardner, 966 F.Supp. 552, 554 (W.D. Mich. 1997), for the proposition that a member owes a fiduciary duty to the limited liability company, but not to its members. Since that case was interpreting Michigan law on limited liability companies, this court does not find it helpful or applicable.

Certain provisions of the "Limited Liability Company Law of 1994," codified at 15 Pa.C.S.A. §§ 8901 et seq., are relevant for deciding this issue.[8] First, Section 8904 states, in pertinent part, that:

> **(a) General Rule.** - Unless otherwise provided in the certificate of organization, in any case not provided for in this chapter:
>
> > (1) If the certificate of organization does not contain a statement to the effect that the limited liability company shall be managed by managers, the provisions of Chapter 81 (relating to general provision) and 83 (relating to general partnerships) govern, and the members shall be deemed to be general partners for purposes of applying the provisions of those chapters . . .
>
> **(b) Basis for determining liability of members, etc. -** Except as otherwise provided in section 110 (relating to supplementary general principles of law applicable), the liability of members, managers and employees of a company shall at all times be determined solely and exclusively by the provisions of this chapter.

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[8]Plaintiffs explicitly alleged that GEM is a limited liability company. Second Am.Compl. at ¶ 6. Therefore, notwithstanding plaintiffs' characterization of GEM as a "joint venture" in paragraph 57 of the Second Amended Complaint, this court will treat GEM as a limited liability company.

15 Pa.C.S.A. § 8904 (emphasis added).[9] Further, Section 8922(a) provides that "[n]either the members of a limited liability company nor the managers of a company managed by one or more managers are liable, solely by reason of being a member or a manager, under an order of a court or in any other manner for a debt, obligation or liability of the company of any kind or for the acts or omissions of any other member, manager, agent or employee of the company." 15 Pa.C.S.A. § 8922(a) (emphasis added). A reasonable interpretation of this section does not connote that members are immune from liability, in all circumstances, but means that members are not liable simply because of their status as members. In addition, Section 8943, which governs when a limited liability company is not to be managed by managers, obligates every member to "account to the company for any benefit and hold as trustee any profits derived by him without the consent of the other members from any transaction connected with the organization, conduct or winding up of the company or any use by him of its property." 15 Pa.C.S.A. § 8943. The 1994 Committee Comment to Section 8943 relates the following:

> . . . members who do not act as managers, like corporate shareholders and limited partners, do not have the fiduciary duties of managers. Even if a member is not involved in management, however, the member has no right to appropriate for personal use property belonging to the company. It is intended that the courts will fashion rules in appropriate circumstances by analogy to principles of corporate or partnership law to deal with situations such as oppression of minority members, actions taken in bad faith, etc. . . .

[9]Section 110 provides that "[u]nless displaced by the particular provisions of this title, the principles of law and equity, including, but not limited to, the law relating to principal and agent, estoppel, waiver, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause, shall supplement its provisions. 15 Pa.C.S.A. § 110.

These sections, taken together, authorize this court to look to principles of partnership law and/or corporate law. Under the Uniform Partnership Act ("UPA"), a partner is accountable to the partnership as a fiduciary for the profits derived by him without consent of the other partners in the conduct of the partnership or from any use of the partnership's property. 15 Pa.C.S.A. § 8334(a). The UPA also applies to limited liability companies. 15 Pa.C.S.A. § 8311(b). Further, partners stand in a fiduciary relationship to each other. See Clement v. Clement, 436 Pa. 466, 468, 260 A.2d 728, 729 (1970); Bracht v. Bracht, 313 Pa. 397, 402, 170 A. 297, 298 (1933). As stated in Clement

> partners owe a fiduciary duty one to another. . . . One should not have to deal with his partners as though he were the opposite party in an arms-length transaction. One should be allowed to trust his partner, to expect that he is pursuing a common goal and not working at cross-purposes.

Id. at 468, 260 A.2d at 729. See also, Haymond v. Lundy, 2000 WL 804432, at *14 (E.D.Pa. June 22, 2000)(finding that the fiduciary of duty between partners has limits and does not always apply to every interaction merely by the existence of a partnership); Haydinger v. Freedman, 2000 WL 748055, at *8 (E.D.Pa. June 8, 2000)(determining that Pennsylvania law allows a limited partner to bring an action against a general partner for breach of fiduciary duties). Cf. Kenworthy v. Hargrove, 855 F.Supp. 101, 105 (E.D.Pa. 1994).

Here, the Operating Agreement provides that the management of GEM shall be vested in the members. Second Am.Compl., Exhibit B at § 3.3.1. Therefore, this court should treat the members of GEM (i.e., Harbor and Royal) like partners. Further, the Operating Agreement includes the following provision with respect to liability of members:

> To the Company and Other Members. Each Member shall be obligated to perform all promises and covenants to contribute all monies and property undertaken by such Member

> set forth herein. Notwithstanding the foregoing and except as limited by the Act, any such obligation to make a contribution and/or perform services may be compromised and/or waived by a Super Majority Vote of the Members, other than the Member responsible for such obligation.

Id. at § 4.3.2. Since Royal PA was allegedly obligated to supply experienced personnel for GEM and supervise the laundry services and since Royal PA allegedly failed to properly run the daily operations of GEM, it may ultimately be held liable for breach of fiduciary duty as a co-member of GEM.

Nonetheless, this court finds that plaintiffs, Waxman and Century, do not have standing to sue Royal PA, RISI or the individual defendants for breach of fiduciary duty since neither plaintiff is a member of GEM.[10]

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[10]Though Waxman is the sole shareholder of Harbor and Century, this fact alone does not give him standing to sue Royal PA or the other defendants for an indirect injury to Harbor or to GEM, itself. See, e.g., Kelly v. Thomas, 234 Pa. 419, 427-28, 83 A. 307. 310 (1912)(relating the general rule that the right of an individual stockholder to act for the corporation to remedy a wrong done to the corporation is exceptional and usually arises after the corporation has refused to sue upon demand of the stockholder); Burdon v. Erskine, 264 Pa.Super. 584, 586, 401 A.2d 369, 370 (1979)(holding that sole stockholder of corporation could not bring derivative action on behalf of corporation seeking restitution since injury is too indirect).

This court previously recognized an exception to the shareholder-demand requirement in the case of the closely-held corporation. See Levin v. Schiffman, July 2000, No. 4442, slip op. at 13-14 (C.P. Phila. Feb. 1, 2001)(Sheppard, J.) and Baron v. Pritzker, August 2000, No. 1574, slip op. at 10-12 (C.P. Phila. Mar. 6, 2001)(Sheppard, J.). In both cases, this court relied on § 7.01(d) of the ALI Principles of Corporate Governance to hold that a shareholder's derivative claim against a fellow shareholder may be treated as a direct claim in the case of a closely held corporation if it (i) will not unfairly expose the corporation or defendants to a multiplicity of suits; (ii) materially prejudice the interests of the corporation's creditors; or (iii) interfere with a fair distribution or recovery among all interested parties.

Here, if Harbor's claim against Royal PA is construed as a "derivative" claim, this court may treat it as a direct claim since Harbor and Royal PA are the only members of GEM. However, Waxman, though Harbor's principal, is too far removed to bring a claim for breach of fiduciary duty against Royal PA. The duty, if any, would be between the members of GEM, not between the

Since this court cannot say with certainty that Harbor has not stated a claim against Royal PA for breach of fiduciary duty, the demurrer to Count IV is overruled.

D. Count VIII - Tortious Interference/Corporate Opportunity

Defendants demur to Count VIII on the grounds that (1) plaintiffs have failed to allege an intentional interference with plaintiffs' prospective contractual relations and that (2) plaintiffs have failed to identify any prospective contractual relationship. This court agrees as to the first point.

To establish a cause of action for intentional interference with contractual relations, the plaintiffs must allege the following: (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 a 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. Shiner v. Moriarty, 706 A.2d 1228, 1238 (Pa.Super.Ct. 1998).

As to the second element of this tort, "intent extends both to the desired consequences and to the consequences substantially certain to follow from the act." Field v Philadelphia Elec. Co., 388 Pa.Super. 400, 416, 565 A.2d 1170, 1178 (1989); Restatement (Second) of Torts § 8A (stating that "intent" means "that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it."). As noted in the comment to Section 766 of the Restatement (Second) of Torts, this tort can apply to "an interference that is incidental to the actor's independent

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(Footnote 10 - continued)
individual shareholders of these members. Likewise, RISI and the individual defendants, who are shareholders of Royal PA and RISI, cannot be held liable for breach of fiduciary duty.

purpose and desire but known to him to be a necessary consequence of his action. The fact that this interference with the other's contract was not desired and was purely incidental in character is, however, a factor to be considered in determining whether the interference is improper." Rest. (Second) of Torts § 766, cmt. j. See also, Glazer v. Chandler, 414 Pa. 304, 308, 200 A.2d 416, 418 (1964)("where . . . the allegations and evidence only disclose that defendant breached his contract with plaintiffs and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies only in contract for defendant's breaches, and the consequential damages recoverable, if any, may only be adjudicated in that action.").

In addition, a claim for tortious interference based on a prospective contractual relation is not deficient where it fails to specifically define the specific prospective contract(s). Kelly-Springfiled Tire Co. v. D'Ambro, 408 Pa.Super. 301, 309, 596 A.2d 867, 871 (1991)(holding that complaint was not deficient for failing to identify a specific prospective contractual relation, because "prospective contractual relations are, by definition, not as susceptible of definite, exacting identification as is the case with an existing contract with a specific person.").

In Count VIII, plaintiff sets forth, in pertinent part, the following allegations:

> 80. Plaintiffs have been successful providers of linen services to various hospitals in their market area.
>
> 81. The grossly deficient performance of defendants in supervising the operations of GEM, which have in turn caused the damages to plaintiffs contended in this complaint, have substantially impeded plaintiffs' ability to market and expand business activities.
>
> 82. The activities of defendants have tortiously interfered with plaintiffs' corporate opportunities to develop and expand their operations.

Second Am.Compl. at ¶¶ 80-82. Plaintiffs also alleged that "[t]he GEM joint venture undertaking was

never negotiated, commenced or performed by the Royal Group defendants in good faith. To the contrary, based upon the subsequent actions of the Royal Group, the defendants entered into the GEM joint venture principally in order to promote the size of their commercial laundry business operations in contemplation of selling all of the Royal Group's business operations." Id. at ¶ 37. Further, defendants' alleged misconduct rests in its focus on selling its entire business operations (including GEM) and failing to locate and secure experienced GEM management personnel or to efficiently run the daily operations of GEM in a cost-effective manner. Id. at ¶¶ 29-30. In addition, plaintiffs alleged that the Harbor Group arranged for an alternative laundry service provider in August 1999, after the Royal Group advised it that they would abandon their obligations to oversee and supervise the performance of laundry services. Id. at ¶ 34. During this transition in the performance of laundry services, the performance problems did not dramatically improve. Id. at ¶ 35.

Even taking these allegations as true and assuming all reasonable inferences, this court finds that plaintiffs have not alleged that defendants took purposeful action specifically intended to harm plaintiffs' business relations with prospective third parties. This court also cannot reasonably infer from the allegations that defendants knew or should have known that their behavior was substantially certain to result in plaintiffs' business relations with others being negatively affected.

For these reasons, the demurrer to Count VIII is sustained and Count VIII is stricken.

E. Failure To Attach Writings

Defendants also move to strike Counts II, III and IV, to the extent that their based on an alleged agreement between Virtua and Century and between Century and GEM, for failure to attach any writings.

Preliminary objections may also be brought for failure of a pleading to conform to law or a rule of court. Pa.R.C.P. 1028(a)(2). Currently, subsection (i) of Rule 1019 requires a pleader to attach a copy of the writing or material part thereof where a claim or defense is based upon that writing.[11] Pa.R.C.P. 1019(i). Further, a pleader may state that the writing is not accessible, along with the reason and the substance of the writing, in order to comply with the rule. Id. Also, the current subsection (h) of Rule 1019 requires the pleader to state whether an agreement is written or oral. Nonetheless, Rule 126 provides that the procedural rules are to be liberally construed and allows the court to disregard any procedural defect which does not affect the substantial rights of the parties. Pa.R.C.P. 126.

Here, the allegations do not state whether any agreement between Virtua and any of the parties was written or oral. Plaintiffs also do not attach this agreement. Plaintiffs may not assert their claims for breach of contract or breach of fiduciary duty or any other claims without attaching this agreement or providing an explanation for why it was not attached or whether it was oral.

In this instance, the court will overrule the Preliminary Objection for failure to attach a writing with the specific direction that plaintiffs either provide the written Virtua Agreement, or provide in writing an explanation for the reasons it is not provided.

II. PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT - AUGUST ACTION

All defendants, except GEM, have also filed Preliminary Objections to the Amended Complaint in the August action filed by Harbor on the grounds that Harbor may not bring a claim against the guarantor defendants because the guaranty in question is a special guaranty in favor of Waxman, and cannot be

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[11]Formerly, subdivision (i) was listed as subdivision (h) which was amended in 2000. See Explanatory Comment-2000 to Pa.R.C.P. 1019.

enforced by Harbor as an assignee. These defendants also object based on Pa.R.C.P. 1019(h) and (i) for failure to attach a copy of the assignment or to state whether the assignment was contained in a writing.

In the Amended Complaint, Harbor is suing on the Promissory Note ("Note"), executed on November 24, 1998, in the principal amount of two hundred thousand dollars ($200,000.00) in favor of Earl Waxman. Am.Compl. at ¶ 9. See, Am.Compl., Exhibit A. Plaintiff alleges that the Note provides that an event of default exists if Fleet National Bank ("Fleet") declares a default against GEM under the July 29, 1998 Loan and Security Agreement, which Fleet did so declare in or about May 1999. Id. at ¶ 9. Further, plaintiff alleges that the Note was assigned without recourse by Waxman to Harbor, who is the current holder thereof. Id. at ¶ 13.

First, this court previously addressed part of this issue in footnote 6 of its Opinion, granting the Petition to Strike the Confessed Judgment. Harbor Hospital Services, Inc. v. Gem Laundry Services, L.L.C., et al., August 2000, No. 207, slip op. at 7 n.6 (C.P. Phila. Nov. 28, 2000)(Herron, J.)(finding that "this court cannot conclude that Harbor, as an assignee, did not have authority to enforce the confession of judgment against the guarantors" since the Note specifically provided that the payee or any other holder thereof may cause such judgment to be confessed). Further, this court does not find that the "guaranty" at the end of the Note is a "special guaranty" as argued by the defendants. Rather, it is a surety agreement.

A guaranty is a "collateral agreement for performance of another's undertaking" or "[a]n agreement in which the guarantor agrees to satisfy the debt of another . . . only if and when the debtor fails to pay (secondarily liable)." Black's Law Dictionary (6th ed. 1990), at 705. A "special guaranty" is a "guaranty which is available only to the particular person to whom it is offered or addressed; as distinguished from a *general* guaranty, which will operate in favor of any person who may accept it." Id. at 706. In contrast,

a surety is "[o]ne who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person . . . [or] undertakes to pay money or to do any other act in event that his principal fails therein." Id. at 1441. A surety is a "person who is primarily liable for payment of debt or performance of obligation of another." Id. "A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. Id. On the other hand, a guaranty agreement is a separate undertaking, in which the principal does not join, and is usually entered into before or after that of the principal and is often founded on separate consideration. Id.

Here, the "guaranty" in question is written directly under the terms of the Note and GEM's signature on the Note and was executed at the same time as the Note. Am.Compl., Exhibit A at 2-3. It states the following:

> The undersigned, Royal Institutional Services, Inc., Royal of PA, Inc., and Mark Johnson, Shawn Ryan and Mark Leibovitz, collectively constituting the sole shareholders of Royal of Pa, Inc. and of Royal Institutional Services, Inc., do each hereby acknowledge the foregoing Promissory Note executed by GEM Laundry Services, L.L.C., and do each hereby, jointly and severally, guaranty, as surety, in favor of Earl Waxman the payment and performance of all the Maker's obligations under such Promissory Note.

Id. (emphasis added). Its express terms reveal that it is a surety, not a special guaranty. There does not appear to be a prohibition against Harbor, as assignee, from suing the individual guarantors - RISI, Royal PA or the individual defendants - for monies owed on the Note. Moreover, Harbor's sole shareholder is Waxman, who should be able to assign the Note to his own corporation.

For these reasons, the demurrer to the Amended Complaint is overruled.

Additionally, Harbor, as assignee, did not have to attach a copy of the assignment in order to proceed in this action. See Manor Bldg. Corp. v. Manor Complex Assocs., Ltd., 435 Pa.Super. 246, 256, 645 A.2d 843, 848 (1994). See also, Brown v. Esposito, 157 Pa.Super. 147, 149, 42 A.2d 93, 94 (1945)(assignees "were not required to set out [the] assignment verbatim or attach a copy of the assignment as an exhibit to their pleadings.").

Therefore, the Preliminary Objections, based on Pa.R.C.P. 1019(h) and (i), in this action are also overruled.

CONCLUSION

For the reasons set forth, this court is entering a contemporaneous Order, sustaining the Preliminary Objections to Counts II and VIII of the Second Amended Complaint in the July action, as well as the Preliminary Objections based on failure to attach the Virtua Agreement. The Preliminary Objections to Count III are sustained, in part, and overruled, in part. Additionally, this court is overruling the remaining Objections in the July action and all of the Objections to the Amended Complaint in the August action. Defendants shall have twenty-two (22) days within entry of this Opinion and contemporaneous Order to file an Answer to both complaints.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.