**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**CIVIL TRIAL DIVISION**

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| WILLIAM R. LISS, | : | JUNE TERM, 2001 |
| Plaintiff | : | No. 2063 |
| v. | : | COMMERCE PROGRAM |
| SHELDON J. LISS, LISS BROTHERS, INC., LISS GLOBAL, INC., JEFFREY WALDMAN, | : | |
| Defendants | : | Control No. 102951 |

**OPINION**

Presently before this court are the Preliminary Objections of Defendants, Sheldon J. Liss, Liss Brothers, Inc., Liss Global, Inc. and Jeffrey Waldman, to the Amended Complaint of Plaintiff, William R. Liss. The Preliminary Objections set forth a demurrer to the majority of Counts in the Amended Complaint, as well as asserting that Plaintiff lacks standing to bring certain claims.

For the reasons set forth, the Preliminary Objections are **Sustained** in part and **Overruled** in part.

**BACKGROUND**

The operative facts, as pled in the Amended Complaint, are as follows. Plaintiff, William R. Liss ("William"), and Defendant, Sheldon J. Liss ("Sheldon") are each fifty percent (50%) shareholders of Defendant, Liss Brothers, Inc. ("Liss Brothers"). Am.Compl., ¶¶ 1-2. William is also a director and officer of Liss Brothers, serving as Vice President, Secretary and Treasurer. Id. at ¶ 1. Sheldon is a director and officer of Liss Brothers, serving as President. Id. at ¶ 2. William and Sheldon are also fifty percent (50%) owners of Sheldon J. Liss and William R. Liss, Co-Partners ("the Partnership"), which

engages in the business of buying and selling real estate. Id. at ¶ 5.

Defendant, Liss Brothers, a Pennsylvania corporation with its principal place of business located at 14501 Townsend Road, Philadelphia, PA, has been engaged in the trade and business of purchasing, importing and selling general merchandise (i.e., giftware, housewares, seasonal merchandise, hardware, novelties, etc.) since its incorporation in 1976. Id. at ¶¶ 3, 12. Defendant, Liss Global, Inc. ("Liss Global"), a Pennsylvania corporation with its principal place of business located at 7746 Dungan Road, Philadelphia, PA, was incorporated on February 21, 2001 by Sheldon, who is the sole shareholder, director, Chief Executive Officer ("CEO"), President, Secretary and Treasurer. Id. at ¶ 6. As alleged, Liss Global is identical and indistinguishable from Liss Brothers and engages in exactly same business as Liss Brothers, sells the same merchandise to the same customers, purchases from the same vendors, employs the same employees and uses a fictitious name, RAC Designs, for a division of its business, which is identical to a division of Liss Brothers operating under the fictitious name, Robert Alan Candle Company. Id. at ¶ 7. Defendant, Jeffrey Waldman ("Waldman"), is employed by both Liss Brothers and Liss Global as Chief Financial Officer ("CFO") of each corporation. Id. at ¶ 8.

On March 3, 1999, Liss Brothers entered into a Loan and Security Agreement with Summit Bank ("Summit"), which included a working capital line of credit in the amount of $6,500,000, a letter of credit facility note in the amount of $3,000,000 and a term loan in the amount of $470,100 (collectively "the Notes"). Id. at ¶¶ 21-22. In exchange, Liss Brothers granted Summit a security interest in its personal property, the Partnership granted Summit a mortgage against the property located at 14501 Townsend Road, and William, Sheldon and their wives personally guaranteed the loans. Id. at ¶ 23. Between May 1999 and May 2000, numerous amendments were made to the Loan and Security Agreement and

Forbearance Agreements. Id. at ¶ 24. On March 1, 2001, Summit Bank declared the Notes in default even though Liss Brothers was purportedly current on its payments due under the Notes. Id. at ¶¶ 25-26. Rather, the defaults were "paper defaults", i.e., Liss Brothers' ratio requirements were not in compliance with the terms of the Notes. Id. at ¶ 26. Further, in November, 2000, the Partnership sold the real estate located at 14501 Townsend Road and the proceeds of this sale in the amount of $2,866,456.00 were allegedly invested by William and Sheldon into Liss Brothers as a capital contribution to correct the "paper defaults". Id. at ¶ 27.

Between 1995 and 1998, William and Sheldon purportedly had numerous discussions concerning Sheldon purchasing William's interest in Liss Brothers and to allow the two brothers to sever their business relations. Id. at ¶ 28. Since 1998, Sheldon and William have actively negotiated the terms of an agreement, pursuant to which Sheldon would purchase William's interest in Liss Brothers. Id. at ¶ 29. On May 31, 2000, William and Sheldon signed a "Letter of Intent", which was hand-written by Sheldon, and set forth terms for the proposed buy-out of William's interest by Sheldon. Id. at ¶ 30. See also, Am.Compl., Exhibit B. Specifically, the Letter of Intent included the purchase price and payment terms as follows:

> Purchase Price: $3,200,000.00 to be paid by Sheldon to William under the following terms: $1,000,000 to be paid at settlement and $2,200,000 to be paid equally over eleven (11) years plus five percent (5%) interest for the first ten (10) years, zero interest in the eleventh (11th) year.

Am.Compl., Exhibit B at 1. Also, the Letter of Intent provided that Sheldon would personally secure the buy-out and that William would be granted a security interest in Liss Brothers, subordinate to the lending institutions. Id. Further, the Letter of Intent explicitly stated that "this agreement is subject to the

preparation of an agreed final agreement of sale." Id. at 2.

It is alleged that Sheldon and Waldman conspired to induce, coerce, usurp, defraud and transfer William's interest in Liss Brothers to Liss Global. Am.Compl., ¶ 32. Sheldon's actions purportedly included usurping William's authority and power at Liss Brothers, hiring and firing of employees without William's consent, agreement or knowledge, unilaterally changing corporate policy, unilaterally granting himself a raise in salary in violation of the by-laws of Liss Brothers and without William's consent, along with taking away William's office and computer and freezing him out of the daily operations of Liss Brothers. Id. at ¶ 33. Sheldon also allegedly induced William to complete settlement of the sale of 14501 Townsend Road and to invest his share of the proceeds in the amount of $1,433,228.00 into Liss Brothers as a capital contribution, under the following assurances:

> (1) Sheldon would finalize the purchase of William's interest in Liss Brothers according to the Letter of Intent;
>
> (2) Sheldon would repay William the capital contribution of $1,433,228.00 plus interest;
>
> (3) Liss Brothers would continue to pay William's salary and benefits as set forth in a Sales Proceeds Disposition Agreement, attached at Exhibit C to the Amended Complaint
>
> and
>
> (4) Liss Brothers would continue to pay monthly installments on a personal loan which William obtained in 1994 in the amount of $500,000 ("the PNC Loan"), which funds were invested in Liss Brothers as a capital contribution.

Id. at ¶ 34. In addition, Sheldon allegedly caused Summit to declare Liss Brothers' loans in default, forced the illegal liquidation of Liss Brothers by presenting a plan for liquidation to Summit though said plan was not approved by the board of directors, and created Liss Global which acts as a "de facto" Liss Brothers

that excludes William. Id. at ¶ 35. Further, Sheldon terminated certain "Corporate Benefits" of William, including William's corporate credit card, cellular phone and automobile payments. Id. at ¶ 49.

On February 13, 2001, William, Sheldon and their attorneys held a meeting, which was not an official shareholder or board meeting but was intended to finalize the terms of the buy-out by Sheldon of William's interest. Id. at ¶¶ 53-54. At this meeting, Sheldon allegedly advised William that he would not proceed with the terms of the Letter of Intent. Id. at ¶ 55. Instead, Sheldon offered different terms under the threat that if William did not agree, Sheldon would not cooperate with the request to extend the Liss Brothers' loans with Summit and that Liss Brothers would thereby be forced into involuntary liquidation. Id. at ¶¶ 55-56. Then, on February 21, 2001, Sheldon incorporated Liss Global without William's knowledge. Id. at ¶ 57. Further, on February 27, 2001, Sheldon and Waldman met with Summit's representatives to present Sheldon's "Liquidation Plan" for Liss Brothers. Id. at ¶ 59. Said plan was presented without William's consent or authorization and without approval of a majority of Liss Brothers' shareholders or board of directors. Id. at ¶ 58. Thereafter, Summit declared Liss Brothers' loans in default. Id. at ¶ 60. Liss Brothers is currently being liquidated under a liquidation plan created by Robert T. Wheeler ("Wheeler") to pay off Liss Brothers' loans with Summit. Id. at ¶ 61.

Within this context, William filed a Complaint, setting forth Counts against Sheldon for Breach of Fiduciary Duties (Count I), Breach of Contract (Count II), Breach of the Duty to Negotiate in Good Faith (Count III), Promissory Estoppel (Count IV), Conversion (Count V), Fraud (Count VI), Intentional Misrepresentation (Count VII), Appointment of a Custodian/Receiver of Liss Global (Count VIII), Appointment of a Constructive Trustee upon Liss Global (Count IX),and a Count for Civil Conspiracy against Waldman (Count X). William also filed an Emergency Petition for Appointment of a

Custodian/Receiver.[1] Defendants have filed Preliminary Objections, asserting *inter alia* that:

(1) Plaintiff lacks standing to pursue Counts I, V, VIII, IX and X where the injuries, if any were suffered by Liss Brothers and not by William, and his interest is only indirect as a shareholder of Liss Brothers;

(2) Plaintiff fails to state a cause of action for which relief can be granted under Counts II, III, IV, and VIII;[2] and

(3) Plaintiff's jury demand must be stricken for failure to conform to law or rule of court because William has asserted both equitable and legal claims which arise from the same facts and circumstances which results in William waiving his right to a jury trial on all of his claims.

Preliminary Objections, ¶¶ 10-47.

This court will address the objections *seriatim*.

**DISCUSSION**

I. STANDING

Defendants argue that William, as a shareholder, cannot maintain a direct action for damages or other relief allegedly sustained by Liss Brothers in relation to Count I (Breach of Fiduciary Duty), Count V (Conversion) and Count X (Civil Conspiracy) which purportedly resulted in a decrease in the value of Liss Brothers and William's interest therein. In addition, Defendants argue that the same defects are fatal

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[1]A hearing on this Petition, after being postponed and re-scheduled several times, was then held on January 30-31, 2002, continued on February 21, 2002 and continued again to be heard on May 2, 2002.

[2]Defendants withdrew their Preliminary Objections to Counts VI and VII. Defs. Mem. of Law, at 2 n.1.

to Count VIII (Appointment of a Custodian/Receiver) and Count IX (Imposition of a Constructive Trust) to be imposed upon Liss Global for the benefit of both Liss Brothers and William. Plaintiff, in turn, argues that his claims are not derivative and may be treated as direct claims, under two of this court's previous decisions in Levin v. Schiffman, July 2000, No. 4442 (C.P. Phila. Feb. 1, 2001)(Sheppard, J.) and Baron v. Pritzker, 52 Pa. D. & C.4th 14 (C.P. Phila. Mar. 6, 2001)(Sheppard, J.). In anticipation of this argument, Defendants contend that the decisions in Levin and Baron are contrary to Pennsylvania law in light of 15 Pa.C.S.A. § 1717, which places a limitation on standing, and a body of cases that disallows stockholders to sue individually for injury to the corporation.

It is true that, under 15 Pa.C.S.A. § 1717, an action to recover for injury suffered by the corporation may only be pursued by the corporation or, in certain exceptional circumstances, by a shareholder in the name of the corporation. Section 1717 reads:

> The duty of the board of directors, committees of the board and individual directors under section 1712 (relating to standard of care and justifiable reliance) is solely to the business corporation and may be enforced directly by the corporation, or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group. . . .

15 Pa.C.S.A. § 1717. The Draftsmen's Comment to § 1717 states, in pertinent part, that:

> This section reaffirms the statutory concept . . . that the directors' duty is owed solely to the corporation. It therefore limits standing with respect to an asserted breach of duty by directors to the corporation itself or to shareholders suing as such in a secondary or derivative action. Consequently, an individual not suing in his or her capacity as a shareholder-for example a person suing in his or her capacity as an employee, as a representative of a community, or as a potential acquiror [*sic*], even if the person owns shares in the corporation-would not have standing to assert any breach of duty. And a shareholder may not bring an action directly, but only in a derivative capacity and would therefore be required to show the normal requisites with respect to such action.

> This section clarifies that none of the powers described in 15 Pa.C.S. § 1715(a) or (b) or 1716(a) imposes or creates any duties or liabilities for or causes of action against, or basis for standing to sue, directors. . . . The provisions are explicitly permissive, not mandatory, with regard to the consideration of the interests of these corporate groups and constituencies in connection with the satisfaction of the directors' duty to act in the best interests of the corporation.

W. Edward Sell & William H. Clark, Jr., Pennsylvania Business Corporations, § 1717 (vol. 3 1997)(emphasis added).

Further, Rule 1506 of the Pennsylvania Rules of Civil Procedure ["Pa.R.Civ.P."] requires a plaintiff-stockholder to allege that efforts have been made to secure enforcement by the corporation or the reason for not making such efforts, in a derivative action to enforce a secondary right on behalf of the corporation. Pa.R.Civ.P. 1506(a). See also, Drain v. Covenant Life Ins. Co., 551 Pa. 570, 580-82, 712 A.2d 273, 278-79 (1998), aff'g, 454 Pa.Super. 143, 685 A.2d 119 (1996)(excusing the demand requirement for a shareholder to have standing to bring a derivative suit based on the former rule that such demand would be futile); Garber v. Lego, 11 F.3d 1197, 1202-02 (3d Cir. 1993)(applying Pennsylvania law)(noting that the shareholder's right to act for the corporation is exceptional and only arises on a clear showing of special circumstances).

The Draftsmen's language for Section 1717 and Section 1717, itself, indicate that the limitation of standing applies to suits against directors for breaches of various duties which are owed by them to the corporation. This section does not speak to the situation of a fifty percent (50%) shareholder oppressing or freezing-out the other fifty percent (50%) shareholder in a close corporation[3] as is the case presently

[3]A "closely-held corporation" is a business corporation that has no more than thirty (30) shareholders. 15 Pa.C.S.A. § 1103. Closely held corporations are typically defined as corporations for which there is no public market for shares and, sometimes, no market at all. An alternative and

before the court. Further, here, it is not clear that William is merely suing Sheldon in his capacity as director, though some of his claims may arguably be derivative in nature, i.e., the breach of fiduciary duty claim in Count I or Count IX, setting forth the claim for the imposition of a constructive trust on Liss Global for the benefit of William and Liss Brothers. Rather, William's claims derive from his rights as shareholder of Liss Brothers and seem to be asserted against Sheldon in his capacity as both president and co-owner of Liss Brothers.

The general test for determining whether an action asserts a direct or derivative claim is:

> If the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action. On the other hand, if the wrong is primarily against the corporation, the redress for it must be sought by the corporation, except where a derivative action by a stockholder is allowable, and a stockholder cannot sue as an individual. The action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent dissipation of its assets.

Hendrickson v. Vandling, 41 Pa. D.& C.3d 568, 571 (C.P. Cumberland Cty June 2, 1983)(quoting 13 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5911, at 309 (1980)). See also, Tyler v. O'Neill, 994 F.Supp. 603, 609-10 (E.D.Pa. 1998), ), aff'd, 189 F.3d 465 (3d Cir. 1999), cert, denied, 528 U.S. 1137 (2000)(applying Pennsylvania law)(quoting same rule for assessing the type of action).

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largely co-extensive definition is corporations with few (typically defined as less than 25) shareholders. See, e.g., American Law Inst., Principles of Corporate Governance: Analysis and Recommendations § 1.06 (1994).

Here, this case involves two fifty percent (50%) shareholders and the alleged oppression by one shareholder, Sheldon, against the other shareholder, his brother William. The gravamen of William's claims, in their entirety, assert both direct injuries to William, affecting his rights as a shareholder, and derivative injuries asserted on behalf of Liss Brothers. William's alleged damages relate not merely to the decrease in the value of Liss Brothers or William's interest therein; rather, the damages include William's being deprived of his rights of ownership and other corporate benefits primarily through Sheldon's allegedly oppressive and fraudulent conduct and the alleged conspiracy with Waldman to deprive William of his interest in Liss Brothers.

For instance, Count I asserts a breach of fiduciary duties by Sheldon who allegedly seized control of Liss Brothers, excluded William from its operations and engaged in oppressive conduct akin to oppression by a majority shareholder against a minority shareholder. Normally, the breach of fiduciary duty is charged against directors in a shareholder derivative suit when it involves waste of corporate assets or abuse of control in fundamental decisions affecting the corporate structure. See, e.g., Drain, 551 Pa. at 574, 712 A.2d at 274-75 (examining derivative claim against directors for breach of fiduciary duty involving corporate waste and abuse of control in connection with a merger). However, Pennsylvania law also allows a minority shareholder, especially in a close corporation, to maintain a direct suit against a majority shareholder for oppressive conduct. See, e.g., Ferber v. American Lamp Corp., 503 Pa. 489, 496, 469 A.2d 1046, 1050 (1983)("majority [shareholders] occupy a quasi-fiduciary relation toward the minority which prevents them from using their power in such a way as to exclude the minority from their proper share of the benefits accruing from the enterprise."); In re Jones & Laughlin Steel Corp., 488 Pa. 524, 530-31, 412 A.2d 1099, 1103 (1980)("a freezing out of minority holders with the purpose of continuing

the business for the benefit of the majority holders" is a violation of a fiduciary duty owed to minority shareholders by the majority shareholders)(quoting Weisbecker v. Hosiery Patents Inc., 356 Pa. 244, 250, 51 A.2d 811, 814 (1947)); Baron, 52 Pa. D. & C.4th at 28-29 (allowing fifty percent shareholder's claim for fiduciary duty to proceed were it was alleged that said shareholder had a two-thirds vote on the board of directors and was allegedly oppressing the other fifty percent shareholder); Del Borello v. Del Borello, April 2001, No. 1327, slip op. at 6-15 (C.P. Phila. Aug. 28, 2001)(Herron, J.)(examining grounds for finding actions to be oppressive in a close corporation and allowing direct claims of minority shareholder against majority shareholders to proceed). This Court noted in Baron that:

> [It] is aware of no published decision by a Pennsylvania state court addressing whether a non-majority shareholder in control of the board of a closely held corporation owes a fiduciary duty to other shareholders. But see, Delaney v. Georgia-Pacific Corp., 564 P.2d 277, 281 (Or. 1977)(holding that "equal owners of a close corporation" are each "entitled to the other's performance of fiduciary duties of loyalty, good faith, and full disclosure") and Gilbert v. El Paso Co., 490 A.2d 1050, 1055 (Del.Ch.1984)(holding that a non-majority shareholder who controls or dominates the corporation owes fiduciary duties to the corporation). See also, ALI Principles §1.10(a)(2) and (b) (definition of controlling shareholder).

52 Pa. D. & C.4th at 28-29. Likewise, here, William's breach of fiduciary duty claim against Sheldon should be allowed to proceed as a direct claim where Sheldon allegedly used his control of Liss Brothers to "oppress" William and exclude him from Liss Brothers' operations.

Under this same reasoning, Count V may be construed as setting forth a direct claim for conversion, on behalf of William who, as an individual shareholder, was allegedly deprived of his interest in Liss Brothers and resulting in Sheldon's owning one hundred percent (100%) of the stock of Liss Global without paying any consideration to William. Similarly, Count X, setting forth a civil conspiracy claim against Waldman, is based on Waldman's alleged aiding and abetting Sheldon in his scheme to convert Liss

Brothers into Liss Global.

Additionally, Count VIII, seeking the appointment of a receiver of Liss Global for the benefit of both William and Liss Brothers, is being brought pursuant to 15 Pa.C.S.A. § 1767(a)(2) and/or Pa.R.Civ.P. 1533[4]and derives from the same alleged oppressive conduct by Sheldon.

Likewise, Count IX seeks the imposition of a constructive trust upon Liss Global for the benefit of William and Liss Brothers based upon the same alleged illegal and oppressive conduct by Sheldon. Pennsylvania courts have allowed such equitable claims by shareholders in circumstances similar to this case. See, Santoro v. Morse, 781 A.2d 1220, 1231 (Pa.Super.Ct. 2001)(upholding imposition of constructive trust upon corporation which was formed and wholly-owned by the defendant, a fifty percent

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[4]Section 1767 provides, in pertinent part, that:

> (a) . . . upon application of any shareholder, the court may appoint one or more persons to be custodians of and for any business corporation when it is made to appear that: . . . (2) in the case of a closely-held corporation, the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders or owners of 5% or more of the outstanding shares of any class of the corporation in their capacities as shareholders, directors, officers or employees. . . .

15 Pa.C.S.A. § 1767(a)(2)(emphasis added). This section indicates that a shareholder in a close corporation may bring his claims directly when seeking the appointment of a custodian where those in control have acted oppressively. This section does not necessarily apply because William does not legally have shares in Liss Global, which is wholly-owned by Sheldon.

Rather, Rule 1533 of the Pennsylvania Rules of Civil Procedure, which provides for the appointment of a temporary receiver "if required by the exigencies of the case," is more applicable because William's claim is more properly brought in equity since he does not legally have shares in Liss Global, Liss Brothers is currently in liquidation, Sheldon has allegedly acted oppressively toward William and he, along with Waldman, have converted Liss Brothers into Liss Global without having paid William any consideration. This court will explain in greater detail the nuances of this rule when it addresses the demurrer to Count VIII, *infra*.

(50%) shareholder of the original corporation, who allegedly misappropriated the business of the original corporation to the newly-formed corporation).

Even if some of these claims can be characterized as derivative ones, the circumstances of this case are akin to those in Levin and in Baron, which allowed the otherwise derivative claims to be treated as direct claims. Even more pressing in this case is the threat of irreparable injury to both Liss Brothers and William if his claims may not go forward since Liss Brothers is currently in liquidation, even though William disputes the propriety of the liquidation. Further, the alleged threat of irreparable injury could continue if Sheldon were to continue operating Liss Global as a "de facto" Liss Brothers without including William or paying William any consideration for his interest.

Contrary to Defendants' position, the holdings of Levin and Baron are on point and were correctly decided. First, both cases involve disputes between fifty-fifty shareholders of closely-held corporations and alleged breaches of fiduciary duties and other claims. In Levin, the dispute between Levin and Schiffman concerned Schiffman's authority and position with the corporation and her alleged refusal to sell coupon books to the school district to be used for fund raising, which was the main purpose of the corporation. Slip op. at 2-4. Levin filed a lawsuit on behalf of the corporation against Schiffman, alleging breach of fiduciary duty, breach of contract, declaratory judgment, commercial disparagement and defamation. Id. at 4. Defendants filed preliminary objections, asserting that Levin did not have standing to sue on behalf of the corporation because no demand had been made on the board of directors. Id. at 10.

Similarly, in Baron, a dispute arose between Baron and Pritzker over Pritzker's alleged refusal to buy out Baron's fifty percent (50%) interest in the corporation, pursuant to a disability buyout provision

in the stockholders agreement. 52 Pa. D.& C.4th at 16-18. In 1996, Baron began suffering from a series of medical problems, including a heart attack, three grand mal seizures and a brain tumor, all of which affected his ability to work. Id. at 17. Since the onset of Baron's medical problems, Pritzker allegedly froze Baron out of the management of the corporation, cut Baron's compensation, refused Baron access to company information, increased his own compensation to unreasonable levels, spent corporate monies for personal expenses and mismanaged the company. Id. Finally, Pritzker allegedly forced Baron to retire and terminated his compensation and benefits. Id. at 18. Baron filed suit against Pritzker, asserting counts for (1) the appointment of a custodian, (2) corporate waste and mismanagement, (3) breach of fiduciary duty, (4) breach of the duty of good faith and fair dealing, (5) breach of contract, (6) indemnification and (7) punitive damages. Id. Defendants filed preliminary objection, asserting *inter alia* that Baron lacked standing to assert a corporate waste claim because he failed to make demand on the board of directors. Id. at 24.

In both Levin and Baron, this Court examined the Pennsylvania Supreme Court's decision in Cuker v. Mikalauskas, 547 Pa. 600, 612-13, 692 A.2d 1042, 1048-1049 (1997), which held that the determination of whether the corporation had adequately considered whether suit should be brought on the shareholders' request, or whether the shareholders' derivative suit should be terminated, would be made in accordance with the considerations set forth in the American Law Institute Principles of Corporate Governance ("ALI Principles"). Further, the Cuker court reaffirmed the general rule, requiring the plaintiff-shareholder to make demand on the board to institute action before filing derivative claims. Id. at 615, 609 A.2d at 1050, citing ALI Principles § 7.03(a). However, the Cuker court did allow that the demand requirement would be excused if the shareholder showed that irreparable injury to the corporation would

otherwise result; and even then, the plaintiff must make demand promptly after filing suit. Id., citing ALI Principles § 7.03(b). See also, Drain, 551 Pa. at 581, 712 A.2d at 278 (noting that Cuker changed the law on demand requirements in derivative actions, requiring the allegation of irreparable harm to the corporation rather than the futility exception).

Further, the Cuker court noted, in a footnote, that:

> Our adoption of [sections § 7.02-7.10 and § 7.13] is not a rejection of other sections not cited. . . . The entire [ALI Principles] is a comprehensive, cohesive work more than a decade in preparation. Additional sections, particularly procedural ones due to their interlocking character, may be adopted in the future. Issues in future cases or, perhaps, further proceedings in this case might implicate additional sections of the ALI Principles. Courts of the Commonwealth are free to consider other parts of the work and utilize them if they are helpful and appear to be consistent with Pennsylvania law.

Cuker, id. at 614 n.5, 692 A.2d at 1049 n.5. Based on this statement and the fact that Cuker did not involve a closely-held corporation, this Court in both Levin and Baron looked to § 7.01(d) and found that it provided a second exception to the demand requirement in the case of a close corporation. This section reads as follows:

> (d) In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

ALI Principles of Corporate Governance, § 7.01(d). In both Levin and Baron, this Court found that the factors set forth in this section applied and allowed the otherwise "derivative" claims to be treated as direct claims. Levin, slip op. at 14; Baron, 52 Pa. D. & C.4th at 27.

Contrary to Defendants' position, these two previous decisions were not contrary to law, notwithstanding 15 Pa.C.S.A. § 1717, because the decision in Cuker directed this Court to look to ALI Principles of Corporate Governance when deciding issues of shareholder's standing and both cases involved close corporations and allegations of oppression or usurpation of corporate opportunities. Further, as previously noted, Section 1717 speaks to the duties of directors but is silent as to the duties of fifty percent shareholders in closely-held corporations.

Moreover, many of the cases relied upon by Defendants are not dispositive because, in those cases, the plaintiff-shareholder was seeking to recover damages against a third party for injuries which were clearly suffered by the corporation alone. See White v. First National Bank of Pittsburgh, 252 Pa. 205, 212-13, 97 A. 403, 405-05 (1916)(substantial stockholder of corporation cannot sue bank for breach of contract where the injuries, if any, belonged to the corporation); Pitchford v. PEPI, Inc., 531 F.2d 92, 96-97 (3d Cir 1975), cert. denied, 426 U.S. 935 (1976)(plaintiff could not recover personal injuries as shareholder or officer for alleged antitrust violations suffered by corporation); Borkowski v. Fraternal Order of Police, 155 F.R.D. 105, 112-113 (E.D.Pa. 1994)(holding that remaining fifty percent shareholder as president and assignor of contracts did not have standing to sue because the claims arise out of a contract that was legally assigned, fail to make a causal connection and absent a direct individual injury, a corporate shareholder lacks standing to sue for injury to the corporation). See also, Tyler, 994 F.Supp. at 609-11(finding minority shareholder has standing to pursue claims in their derivative capacity and the demand requirement would be excused where plaintiff particularly alleges participation, self-dealing, bias, bad faith

or corrupt motive on the part of the majority of defendant directors).[5]

Therefore, this court may apply § 7.01(d) of the ALI Principles. In so doing, this court finds that treating the allegedly derivative claims as direct claims will not unfairly expose Liss Brothers to a multiplicity of suits since Liss Brothers is currently in liquidation and preventing William from being allowed to proceed would leave him without any remedy. ALI Principles § 7.01(d)(i). Further, there is no reason to conclude that allowing a direct action would materially prejudice the interest of creditors since the purpose of the liquidation was intended to pay off Liss Brothers' loans with Summit. Id., § 7.01(d)(ii); see also, Am.Compl., ¶ 61. If there are in fact other unsecured creditors of Liss Brothers, they could be prejudiced if the claims are not allowed to go forward if, it is proven that Sheldon and Liss Global are in fact usurping corporate opportunities and acting to the detriment of Liss Brothers. Additionally, allowing a direct action will not interfere with a fair distribution of the recovery among all interested persons since such recovery can be decided at trial and the named parties seem to be the only interested persons. Id., § 7.01(d)(iii). Under these circumstances, the court will exercise its discretion to treat any of William's claims which may be deemed derivative in nature as direct claims for which demand is not required.

Even if § 7.01(d) did not apply, the allegations in this case sufficiently show that irreparable injury may otherwise result to Liss Brothers which is the exception carved out by Cuker to the demand requirement. 547 Pa. at 615, 609 A.2d at 1050 (citing ALI Principles § 7.03(b)). Further, demand on shareholders should not be required. Id. (citing ALI Principles § 7.03(c)).

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[5]Ironically, Tyler supports William's case because it allows the shareholder to have standing to pursue a derivative claim without making a demand on the board of directors based on exceptional circumstances that are present in this case.

For these reasons, the court overrules the Preliminary Objections to Counts I, V, VIII, IX and X, based on lack of standing. This conclusion is limited to the issue of William's standing the bring these claims without having made demand on the board of directors of Liss Brothers which consists of himself and Sheldon. It is not to say that William may recover personally for damages which more properly flow to Liss Brothers. However, that determination goes to the merit of the claims and is not before the Court at this time.

II. DEMURRER

Under Pa. R. Civ. P. 1028(a)(4), preliminary objections may be asserted based on legal insufficiency of a pleading (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). 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, this court need not accept as true any averments in the complaint which conflict with exhibits that are properly attached to the complaint. See Baravordeh v. Borough Council of Prospect Park, 699 A.2d 789, 791 (Pa.Super.Ct. 1997)(affirming dismissal of complaint on preliminary objections)(citing Jenkins v. County of Schuylkill, 441 Pa.Super. 642, 648, 658

A.2d 380, 383 (1995)).

A. Both Counts II (Breach of Contract) and III (Breach of the Duty to Negotiate in Good Faith) of the Amended Complaint Fail to State a Cause of Action Where the Attached Exhibit Negates the Existence of a Binding Agreement.

Defendants assert that Counts II and III should be dismissed because the facts alleged in the Amended Complaint and documents attached as exhibits do not set forth the existence of a binding and enforceable contract between William and Sheldon for Sheldon to purchase William's shares or for the parties to negotiate in good faith. This court agrees.

Certain fundamental principles are notable in deciding this matter. To properly plead a cause of action for breach of contract, the plaintiff must allege the following: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 884 (Pa.Super.Ct. 2000)(quoting CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (1999)). Further, "[w]hile not every term of a contract must be stated in complete detail, every element must be specifically pleaded." CoreStates, 723 A.2d at 1058.

"It is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds." Jenkins, 441 Pa.Super. at 648, 658 A.2d at 383 (citation omitted). See also, *In re* Estate of Hall, 731 A.2d 617, 621 (Pa.Super.Ct. 1999)(stating that "[a]n agreement is a valid and binding contract if: the parties have manifested an intent to be bound by the agreement's terms; the terms are sufficiently definite; and there was consideration").

It is also correct that "where parties have settled upon the essential terms, the intent to later formalize the agreement by writing does not prevent the formation of a contract." Philmar Mid-Atlantic, Inc. v. York St. Assocs. II, 389 Pa.Super. 297, 301, 566 A.2d 1253, 1255 (1989)(citing Field v. Golden

Triangle Broadcasting, Inc., 451 Pa. 410, 418, 305 A.2d 689, 693 (1973)). Accord Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Bd., 559 Pa. 56, 62, 739 A.2d 133, 136 (Pa. 1999)("[i]f the parties agree upon essential terms and intend them to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date."). See also, Johnston the Florist, Inc. v. TEDCO Constr. Corp., 441 Pa.Super. 281, 291, 657 A.2d 511, 516 (1995)(the court considered "what was intended by what was said and done by the parties" in determining whether an oral contract had been formed; Accu-Weather, Inc. v. Thomas Broad. Co., 425 Pa.Super. 335, 340, 625 A.2d 75, 78 (1993)(a party's actions and conduct may be considered when determining whether a contract has been formed); Martin v. Capital Cities Media, Inc., 354 Pa.Super. 199, 218, 511 A.2d 830, 840 (1986)("[t]he parties' own interpretation of a contract, as shown by their acts and declarations, will ordinarily be adopted by the court").

Nonetheless, "[a]bsent a manifestation of an intent to be bound . . . negotiations concerning the terms of a possible future contract do not result in an enforceable agreement." Jenkins, 441 Pa.Super. at 648, 658 A.2d at 383 (citing Philmar, 389 Pa.Super. at 301, 566 A.2d at 1255). See also, Sociedad Comercializadora y De Servicos Unifrutti Traders Limitada v. Quizada, 434 Pa.Super. 48, 56, 641 A.2d 1193, 1197 (1993) ("preliminary negotiations do not constitute a contract."). Moreover, section 21 of the Restatement (Second) of Contracts specifically recognizes the following:

> Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.

Rest. (2d) of Contracts, § 21 (1979). A term providing that the parties are not to be legally bound is "respected by the law like any other term . . . [and] may mean that no bargain has been reached, or that

a particular manifestation of intention is not a promise; [or] it may reserve a power to revoke or terminate a promise under certain circumstances but not others." Id., cmt. b.

Pennsylvania courts, confronted with "letters of intent", have held that the letters were not enforceable contracts and did not manifest a mutual intent to be bound because the letters contained language explicitly stating that the document was not binding or conditioning consummation of the transaction on some later event or third party approval. See GMH Assocs., Inc. v. The Prudential Realty Group, 752 A.2d 889, 894 (Pa.Super.Ct. 2000)(agreement stated that "IN NO EVENT WILL THIS LETTER BE CONSTRUED AS AN ENFORCEABLE CONTRACT TO SELL OR PURCHASE THE PROPERTY AND EACH PARTY ACCEPTS THE RISK THAT NO SUCH CONTRACT WILL BE EXECUTED"); Jenkins, 441 Pa.Super. at 645, 658 A.2d at 382 (agreement stated that the "proposal is not accepted until the Board of County Commissioners takes official action on the lease"); Philmar, 389 Pa.Super. at 300, 566 A.2d at 1254 (agreement stated that it was non-binding on the parties and is subject to the approval of a mutually satisfactory lease");Caplen v. Burcik, February 2000, No. 1964, slip op. at 10-12 (C.P. Phila., August 4, 2000)(Sheppard, Jr., J.)(sustaining preliminary objections on counts for breach of contract and breach of an agreement to negotiate in good faith where letter stated it was "merely an offer to enter into negotiations, not an offer to enter into a contract").

Moreover, no Pennsylvania court has yet determined whether a cause of action for breach of a duty to negotiate in good faith is cognizable in Pennsylvania. Caplen, slip op. at 12. See also, GMH Assocs., 752 A.2d at 904 (holding that the duty to negotiate in good faith was not breached by the seller's failure to keep the property "off the market" or reveal that it was negotiating with another buyer, despite seller's verbal assurances to the contrary, where the letter of intent expressly provided that either party could

terminate negotiations without incurring liability); Jenkins, 441 Pa.Super. at 652-53, 658 A.2d at 385 (holding that cause of action for breach of duty to negotiate in good faith did not apply where language in letter did not reveal intent to be bound by any terms of the original specifications); Philmar, 389 Pa.Super. at 302, 566 A.2d at 1255 (same).

In Caplen, however, this Court did describe the Third Circuit's test for finding an independent contract to negotiate in good faith, which requires that: (1) both parties manifested an intention to be bound by the agreement; (2) the terms of the agreement were sufficiently definite to be enforced; and (3) consideration had been given. Slip op. at 13 (citing Channel Home Centers, 795 F.2d at 299-300). This Court also adhered to the Pennsylvania Superior Court's mandate that "the scope of any obligation to negotiate in good faith can only be determined from the framework the parties have established for themselves in their letter of intent." Id. at 13 (quoting Jenkins, 441 Pa.Super. at 652, 658 A.2d at 385). In addition, this Court found that "the purported agreement to negotiate in good faith did not evidence a mutual intent to be bound to specific terms" where the express language left open the determination of a "mutuality of interest" and the due diligence provisions provided the defendant-buyers with an escape clause. Id. at 15.

Moreover, the cases relied on by William are distinguishable from the present case. In Channel Home Centers, the letter of intent provided, *inter alia*, that "[t]o induce the Tenant [Channel] to proceed with the leasing of the Store, you [Grossman] will withdraw the Store from the rental market, and only negotiate the above described leasing transaction to completion." 795 F.2d at 299. The court held that the agreement contained an "unequivocal promise" to take the store off the market and negotiate the leasing transaction to completion. Id. The court also observed that the surrounding circumstances, following

execution of the letter by both parties, indicated that both parties intended to be bound where they both took steps toward satisfying the lease contingencies. Id. at 299-300.

Additionally, in Flight Systems, Inc. v. EDS Corp., 112 F.3d 124, 130-31 (3d Cir. 1997), the court held that the plaintiff stated a claim for breach of the duty to negotiate in good faith where it alleged that the letter of intent showed that the parties agreed to negotiate a lease for a specific property on specific terms and within a specific time. The court also concluded that removal of the property from the market during the defined negotiations period constituted consideration for the agreement. Id. at 130. The defendant in that case pointed out a caveat in the letter which stated that "[t]his is strictly an outline and is contingent upon EDS internal approval and a mutually executed lease document." Id. at 131. The court stated that "[t]his evidence merely raises an issue of material fact; it does not preclude the claim since Flight Systems relies not only on this letter but on EDS' course of conduct to argue that EDS agreed to negotiate in good faith." Id.

Here, in Count II of the Amended Complaint, William alleges that on May 31, 2000, he and Sheldon entered into an oral contract pursuant to which Sheldon agreed to purchase William's interest in Liss Brothers. Am.Compl., ¶ 78. Further, William alleges that he and Sheldon signed a "Letter of Intent" which set forth all of the essential terms of the purchase agreement and shows the parties' intent to be bound. Id. at ¶ 79. Sheldon further allegedly manifested an intent to be bound when he advised William of his intent to proceed with the buyout, agreed to repay William the capital contribution, agreed that Liss Brothers would continue to repay William's PNC loan and agreed to hold William harmless from any corporate debt. Id. at ¶ 81. In addition, Count II alleges that William justifiably and detrimentally relied on Sheldon's repeated manifestations of his intent to be bound to the terms of the Letter of Intent and the

oral agreement. Id. at ¶ 83. And it alleged that Sheldon breached the oral agreement and Letter of Intent when he failed to complete the buyout, failed to repay William the money William invested from the sale of the real estate and failed to pay William's PNC loan. Id. at ¶ 85. As a result of the purported breach, William has suffered economic losses. Id. at ¶ 86.

Additionally, in Count III of the Amended Complaint, William alleges that Sheldon had a duty to negotiate the final agreement in good faith, in regards to the buyout, based on the Letter of Intent. Am.Compl., ¶¶ 88-91. William further alleged that Sheldon failed to negotiate in good faith by conspiring, plotting and scheming to eliminate William from Liss Brothers without paying him consideration for his interest. Id. at ¶ 92. And William alleges that Sheldon's conduct was done knowingly and with malicious intent to cause William to suffer emotional, mental and economic harm. Id. at ¶¶ 93-95.

Notwithstanding these allegations, the hand-written Letter of Intent explicitly stated that "this agreement is subject to the preparation of an agreed final agreement of sale." Am.Compl., Exhibit B at 2. Under the principles outlined above, such language manifests an intent not to be bound and therefore negates the existence of a binding agreement either to purchase William's interest or to negotiate in good faith. This court is not bound to accept allegations which conflict with exhibits attached to the complaint. Baravordeh, 699 A.2d at 791. Moreover, the Amended Complaint also alleges that Sheldon offered William $3,000,000 for his interest in Liss Brothers at the meeting held on February 13, 2001. Am.Compl., ¶ 55. While such an offer would contradict the terms of the Letter of Intent, it could be construed as Sheldon continuing to negotiate with William.

For these reasons, this court finds that William has failed to plead an enforceable agreement which would support either Counts II or III. Therefore, the Preliminary Objections to those Counts are sustained

and they are dismissed.

B. Count IV (Promissory Estoppel) Sufficiently States a Cause of Action as to the Alleged Promise to Repay William's Capital Contributions and as to the Alleged Promise to Pay William's Salary-Corporate Benefits But Not as to the Alleged Promise to Buyout William's Interest.

Defendants argue that William fails to state a cause of action for promissory estoppel because he does not allege that his reliance on Sheldon's repeated assurances was reasonable and makes no allegations regarding his duty of inquiry, or absence thereof. This court disagrees in part.

To support a claim based on promissory estoppel, the complaint must allege that "1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; 2) the promisee actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise." Crouse v. Cyclops Indus., 560 Pa. 394, 403, 745 A.2d 606, 610 (2000). Further, promissory estoppel is invoked as an equitable doctrine to a contract dispute when the contract is otherwise unenforceable. Id.[6]

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[6]Defendants rely on the Pennsylvania Superior Court's requirements set forth in Thomas v. E.B. Jermyn Lodge No. 2, 693 A.2d 974, 977 (Pa.Super.Ct. 1997) for promissory estoppel:

> 1) Misleading words, conduct or silence by the party against whom the estoppel is asserted;
> 2) Unambiguous proof of reasonable reliance on the misrepresentation by the party seeking to assert the estoppel; and
> 3) No duty of inquiry on the party seeking to assert estoppel.

Id. at 977. Since Crouse was issued after the Thomas decision and since Crouse comes from the Pennsylvania Supreme Court, this Court will rely on its requirements for promissory estoppel. Further, the Thomas court was considering the merits of a verdict when examining the claim for promissory estoppel. As this case is at an earlier procedural stage than Thomas, this Court does not find its definition for the cause of action to be useful.

Here, Count IV alleges, in pertinent part, that:

> 97. Defendant Sheldon repeatedly assured, promised, guaranteed William that he would: (a) complete the Buyout as set forth in the Letter of Intent; (b) repay William's Capital Contribution; (c) assured that William would continue to be paid his salary and Corporate Benefits pursuant to the Proceeds Agreement; and, (d) assured that defendant Liss Brothers would continue to repay William's PNC Loan.
>
> 98. William detrimentally relied on defendant Sheldon's repeated assurances[,] promises and guarantees and was lulled into a sense of security as a result of which: (a) William agreed to complete settlement on the Sale of 14501 Townsend Road, Philadelphia, Pennsylvania; and (b) did not take action to stop defendant Sheldon's oppressive conduct and take over of defendant Liss Brothers. Therefore, defendant Sheldon is promissorily estopped from refraining to comply with the terms of his agreements to:
>
> a. Buyout William's interest in defendant Liss Brothers;
>
> b. Repay William's Capital Contributions; and
>
> c. Pay William's salary-corporate benefits.

Am.Compl., ¶¶ 97-98.

This Court finds that these allegations, together with the rest of the Amended Complaint and all reasonable inferences, are sufficient to set forth a claim for promissory estoppel as to the alleged promises to repay William's capital contribution, to continue to pay William's salary and corporate benefits and as to the promise to repay William's PNC loan. Additionally, this Court can reasonably infer that William's alleged reliance on Sheldon's alleged promises was reasonable and that injustice would otherwise result if the promises were not enforced. However, since the Letter of Intent contained conditional language as explained above, this Court cannot infer that William's reliance on an alleged promise to complete the Buyout pursuant to the Letter of Intent's terms was reasonable. A claim for promissory estoppel is not

supportable as to that alleged promise. Therefore, the Preliminary Objections to the Count for Promissory Estoppel are Overruled in Part and Sustained in Part.[7]

C. Count VIII Sufficiently States Grounds For the Appointment of A Custodian or Receiver of Liss Global Pursuant to Pa.R.Civ.P. 1533.

Defendants argue that William has not alleged any mismanagement of Liss Global or threat of loss or dissipation of its assets, but rather, the alleged injury is to Liss Brothers only. Thus, defendants assert that William has not alleged sufficient grounds for the appointment of a receiver of Liss Global. This court disagrees.

"A temporary receiver may be appointed without notice if required by the exigencies of the case." Pa.R.Civ.P. 1533. As noted by the Pennsylvania Supreme Court in a partnership dissolution case, "[t]he existence of waste or dissipation of assets, or fraud or mismanagement of partnership assets, give cause for the appointment of a receiver, but we have never indicated that these are the only circumstances that would warrant the appointment of a receiver in partnership liquidation cases." Hankin v. Hankin, 507 Pa. 603, 608-09, 493 A.2d 675, 677 (1985).[8] While the Hankin court addressed a partnership dissolution, its reasoning is persuasive and the circumstances in that case are analogous to the present one. See also, Credit Alliance Corp. v. Philadelphia Mini-Man Car Wash Corp., 450 Pa. 367, 372, 301 A.2d 816, 818-19 (1973)("a receiver will not be appointed unless it appears that the appointment is necessary to save the

[7]Of course, plaintiff will have to come forth with evidence to support his claim, but it is sufficiently pled to withstand the demurrer.

[8]This Hankin case is a later related case of the first one cited in this Opinion. In the later case, the Pennsylvania Supreme Court upheld the appointment of a receiver to liquidate the remaining partnership assets where the partner, who was originally charged with the responsibility of selling the assets, was found to have compromised his duty in favor of his own interests. 507 Pa. at 609-10, 493 A.2d at 678.

property from injury or threatened loss or dissipation").

Moreover, Section 1767(a)(2) allows for the appointment of a custodian in a closely-held corporation where those in control of the corporation have acted oppressively or fraudulently. 15 Pa.C.S.A. § 1767(a)(2). See also, Santoro, 781 A.2d at 1227-28 (upholding preliminary injunction to preserve the status quo and finding that trial court properly found that alleged fifty percent owner of original corporation may have an ownership interest in the newly created corporation where other fifty percent owner allegedly misappropriated the assets of the original corporation); Leech v. Leech, 762 A.2d 718, 720 (Pa.Super.Ct. 2000)(affirming trial court's appointment of custodian where fifty percent shareholder unjustly exercised his authority as director to diminish other 50 percent shareholder's authority and income); ARC Manufacturing Co. v. Konrad, 321 Pa.Super. 72, 82, 467 A.2d 1133, 1138 (1983 )(relying on predecessor to Section 1767 to order appointment of a custodian where two controlling shareholders breached their fiduciary duties to the third shareholder). Though Section 1767 may not necessarily apply as explained in footnote 4, *supra*, the grounds for appointing a custodian and cases relying on this section are persuasive in analyzing the legal sufficiency of William's claim.

In Count VIII, William alleges that Sheldon has transferred and continues to transfer tangible and intangible assets of Liss Brothers to Liss Global and caused Liss Global to take over Liss Brothers' business operations. Am.Compl., ¶ 126. William also alleges that Sheldon's action have and will continue to cause immediate and irreparable harm to Liss Brothers. Id. at ¶ 127. Further, it is alleged that Sheldon is in possession and control of William's fifty percent interest in Liss Brothers. Id. at ¶ 128. In addition, Sheldon allegedly cannot be trusted to oversee and protect William's interest in Liss Global. Id. at ¶ 129. Finally, this claim alleges that a custodian/receiver is necessary to prevent Sheldon from continuing to

convert Liss Brothers' assets to Liss Global and/or to prevent the destruction and/or concealment of Liss Global's assets. Id. at ¶ 130.

Taking these allegations as true, and all reasonable inferences derived therefrom, this Court finds Count VIII to be legally sufficient. Thus, the demurrer to Count VIII is overruled.

III. JURY DEMAND

Lastly, Defendants assert that the jury demand should be stricken because the Amended Complaint asserts claims for both equitable and legal relief. In turn, Plaintiff asserts that this Preliminary Objection is premature since it is not yet clear which claims will proceed to trial.

The Pennsylvania Constitution provides that "[t]rial by jury shall be as heretofore, and the right thereof remain inviolate." Pa. Const. art. 1, § 6 (1776)(amended 1998). The right to a jury trial attaches where the action existed at common law when the constitution was enacted or where granted by statute. See 42 Pa.C.S.A. § 5104(a); Blum v. Merrell Dow Pharmaceuticals, Inc., 534 Pa. 97, 109, 626 A.2d 537, 543 (1993); Mishoe v. Erie Ins. Co., 762 A.2d 369, 374 (Pa.Super.Ct. 2000).

However, the Pennsylvania Constitution does not afford the right to a jury trial in an equity action. Rosenberg v. Rosenberg, 276 Pa.Super. 203, 206, 419 A.2d 167, 168 (1980)(citing Schwab v. Miller, 302 Pa. 507, 509, 153 A. 731, 733 (1931)). In Rosenberg, an ex-wife brought an action in equity against her ex-husband for failing to comply with their written agreement. 276 Pa.Super. at 205, 419 A.2d at 168. Mr. Rosenberg then filed a counterclaim, alleging that his ex-wife also violated the agreement. Id. The court held that Mrs. Rosenberg had waived her right to a jury trial on the counterclaim because the original action was brought in equity and once the matter enters the realm of equity, equity jurisdiction subsumes the entire case. Id. at 206, 419 A.2d at 168. As reasoned by the court, "[t]he principle that equity has

jurisdiction to do complete justice is a long established one." Id. (citing Wortex Mills v. Textile Workers U. of A., 380 Pa. 3, 11, 109 A.2d 815, 819 (1954)). As reasoned by the court:

> due process problems are inherent in a situation where a chancellor under equitable principles hears the complaint and a jury hears the counterclaim under legal principles where the issues raised in both the case in chief and the counterclaim are the same. Furthermore, having two different tribunals rule on the same dispute, could very well result in problems of collateral estoppel, thereby working an injustice to one of the parties. It would also result in a burdensome, cumbersome procedure which would not be in the best interests of judicial expediency and would cause great confusion to lawyers, judges and the parties to the litigation. . . .

Id. at 207, 419 A.2d at 168. See also, Petrecca v. Allstate Ins. Co., 53 Pa. D. & C.4th 1, 6 (C.P. Phila. July 9, 2001)(Cohen, J.)(holding that defendant is not entitled to a jury trial on bad faith insurance claim where no timely motion for severance was filed and the law requires that bad faith claims be heard non-jury).

Moreover, requesting both legal and equitable relief in the same complaint, constitutes a misjoinder of causes of action. City of Philadelphia v. Pennrose Management Co., 142 Pa.Commw. 627, 635, 598 A.2d 105, 109 (1991). The Pennsylvania Rules of Civil Procedure provide that an action at law cannot be joined with an action in equity. Id. at 636, 598 A.2d at 110 (citing D'Allesandro v. Wassel, 526 Pa. 534, 537-38, 587 A.2d 724, 726 (1991)(finding that Pa.R.Civ.P. 1020(d)(1) requiring joinder of related causes of action refers to actions brought in assumpsit and trespass but not equity). Rather, a party would be able to separately bring an action in equity and an action at law. D'Allesandro, 526 Pa. at 538, 587 A.2d at 726.

Here, though Defendants did not explicitly assert "misjoinder of a cause of action" in their Preliminary Objections, as allowed by Pa. R. Civ. P. 1028(a)(5), it did move to strike the jury demand

since the Amended Complaint asserted both equitable and legal claims. Under Rosenberg and Petrecca, this request will be granted. William asserts both equitable and legal claims which arise out of the same nuclei of facts. He has also filed an Emergency Petition for a Temporary Custodian/Receiver and/or the Imposition of a Constructive Trust. The hearing on this petition is on-going and has yet to be resolved. Since this matter has entered into the realm of equity, it is for equity to resolve all of the claims. Therefore, Defendants' motion to strike the jury demand is granted.

**CONCLUSION**

For the reasons set forth above, this Court is sustaining the Preliminary Objections in part and overruling the Preliminary Objections in part. A contemporaneous Order will issue, consistent with this Opinion.

**BY THE COURT,**

**JOHN W. HERRON, J.**

**Dated: March 22, 2002**

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**CIVIL TRIAL DIVISION**

| | | |
|---|---|---|
| WILLIAM R. LISS, | : | JUNE TERM, 2001 |
| Plaintiff | : | No. 2063 |
| v. | : | COMMERCE PROGRAM |
| SHELDON J. LISS, LISS BROTHERS, INC., LISS GLOBAL, INC., JEFFREY WALDMAN, | : | |
| Defendants | : | Control No. 102951 |

**ORDER**

AND NOW, this 22nd day of March, 2002, upon consideration of Defendants' Preliminary Objections to the Amended Complaint, Plaintiff's response in opposition thereto, 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 I, V, VIII, IX and X of the Amended Complaint, asserting lack of standing, are **Overruled**;
2. Defendants' Preliminary Objections to Counts II and III, in the form of a demurrer, are **Sustained** and those Counts are **Dismissed**;

3. Defendants' Preliminary Objections to Count IV, in the form of a demurrer, are **Overruled** in part and **Sustained** in part;

4. Defendants' Preliminary Objections, in the form of a motion to strike the jury demand, is **Sustained**.

and

5. The remaining Preliminary Objections are **Overruled**;

**BY THE COURT,**

_____

**JOHN W. HERRON, J.**