

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ROBERT JEAN, et al.,	)	CASE NO. 1:04 CV 1904
)	
Plaintiffs,	)	JUDGE CHRISTOPHER A. BOYKO
)	
v.	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION TO DISMISS FIRST
THE STANLEY WORKS, et al.,	)	AMENDED CLASS ACTION
	)	COMPLAINT FOR DAMAGES AND
<u>Defendants.</u>	)	FOR DECLARATORY AND
	)	INJUNCTIVE RELIEF AND JOINED
	)	INDIVIDUAL PLAINTIFFS'
	)	COMPLAINT FOR DECLARATORY
	)	RELIEF AND DAMAGES WITH JURY
	)	DEMAND

Plaintiffs, Vince Bainter, Harlan Grantham, Kenneth Hankins, Robert Jean, Rob Love, Jerry Mead, Stan Schwartz, Fidel Tallet, Rick Williams and Joseph Zollo (hereinafter, "Plaintiffs"), submit this memorandum in opposition to the Motion to Dismiss the First Amended Complaint filed by Defendant The Stanley Works ("Stanley") on January 10, 2005.

Stanley attacks each cause of action raised by these Plaintiffs either for failure to state a claim, or for lack of particularity. On the contrary, Plaintiffs' claims are supported by law, and Stanley ignores the numerous specific allegations set forth in paragraphs 13 through 109 of the First Amended Complaint ("Am. Compl."), focusing only on the allegations under each cause of action, despite express incorporation by reference. Accordingly, Stanley's motion should be

denied, or at the very least, Plaintiffs should be granted leave to amend, to cure any defects recognized by this Court, or to plead with greater particularity.¹

THE STANDARD FOR DETERMINING THIS MOTION

To the extent Stanley seeks dismissal under Fed. R. Civ. Proc. Rule 12, the U.S. Court of Appeals for the Sixth Circuit has made clear the appropriate standard for this Court on this motion:

“The court must construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief. *Mayer v. Mylod*, 988 F. 2d 645, 637-38 (6th Cir. 1993). A court may not grant a Rule 12(b)(6) motion based on disbelief of a complaint’s factual allegations. *Lawler v. Marshall*, 898 F. 2d 1196, 1199 (6th Cir. 1990).”

Bovee v. Coopers & Lybrand, 272 F. 3d 356 (6th Cir. 2001).

With regard to Stanley’s arguments that Plaintiffs failed to plead unjust enrichment, legal fraud, and actual fraud with sufficient particularity, Stanley also overstates the relevant standard:

“In ruling upon a motion to dismiss under Rule 9(b) for failure to plead fraud ‘with particularity,’ a court must factor in the policy of simplicity in pleading which the drafters of the Federal Rules codified in Rule 8. Rule 8 requires a ‘short and plain statement of the claim,’ and calls for ‘simple, concise, and direct’ allegations.”

Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 679 (6th Cir. 1988). A party may allege malice, intent, knowledge and condition of mind generally, as with any ordinary allegation under Rule 8. *Wright v. BankAmerica Corp.*, 219 F.3d 79 (2nd Cir. 2000); *see also In re GlenFed, Inc., Sec. Litig.*, 42 F. 3d 1541 (9th Cir. 1994) (*en banc*) and *Chill v. General Electric Co.*, 101 F. 3d 263, 267 (2nd Cir. 1996). Plaintiffs have met these standards.

¹ Stanley challenges these individual Plaintiffs’ claims in counts II and III for defamation and false imprisonment. Stanley’s Memorandum in Support of Motion to Dismiss the First Amended Complaint, filed January 10, 2005 (“Stanley’s Memo”) at 11-13. Because these ten Plaintiffs do not have any such claims, they consent to dismissal of those two counts as to themselves only. The other plaintiffs in this case, not subject to this motion, are not consenting to dismissal of those counts or any counts.

STANLEY OWED PLAINTIFFS A FIDUCIARY DUTY

Stanley fundamentally misconstrues Plaintiffs' allegations regarding the basis for imposition of a fiduciary duty on Stanley. Plaintiffs are not asserting a duty based on the manufacturer-distributor relationship, but rather based on a constructive trust. Stanley asserts that Plaintiffs' complaint alleges that the Distributor Agreements created a fiduciary duty. Stanley's Memo at 2-3. Rather, as the cited allegation avers: "Consequent to the distributorship agreements between Plaintiffs and Mac, Plaintiffs and Class members were required to send all monies collected from their customers to Mac." Am. Compl., ¶ 135. Webster's Dictionary defines "consequent" as "following as an effect or result."

In other words, the Distributor Agreement did not create a fiduciary duty. Rather, "following" the execution of Distributor Agreements, it was the act of Plaintiffs sending "monies and property (tool trucks, tool inventories and equipment)" (Am. Compl., ¶ 137) to Stanley as required by Stanley in subsequently adopted policies that gave rise to a fiduciary duty.² In particular, when Mac accepted "legal title" to monies and property that it held for the beneficial enjoyment of Plaintiffs, Mac assumed fiduciary duties. *Id.*

Ohio law recognizes a "constructive trust," which imposes a fiduciary duty on the trustee of said trust, namely Stanley. "A constructive trust arises irrespective of the intention of the parties." *Gabel v. Richley*, 101 Ohio App. 3d 356, 363, 655 N.E. 2d 773, 778 (1995); *see also Brown v. Holloway*, No. CA-6689, 1981 WL 2853, *8 (2nd Dist. App. July 15, 1981)(Ex. A) ("In constructive trusts or involuntary trusts the parties have exercised no intention to have a trust nor

² Despite the fact that Plaintiffs are not arguing that a fiduciary duty arose out of the Distributor Agreement and distributor-manufacturer relationship, later versions of the Distributor Agreement contain the following provision: "8.2 **No Fiduciary Relationship.** It is understood and agreed by the parties hereto that this Agreement does not and is not intended to create a fiduciary relationship between us." Exhibit A to Stanley's Motion to Compel Arbitration and Dismiss, filed on January 10, 2005, at 11 (emphasis in original). Why would Stanley later add such a provision to its form Distributor Agreements if it were not necessary?

does the court infer or presume that any such intent existed, ...”), *quoting* 53 O. Jur. 2d Trusts, § 88.

The trustee of a constructive trust is a fiduciary. O.R.C. § 1339.03 (B) provides, in relevant part, that a: “(B) ‘Fiduciary’ includes a trustee under any trust, expressed, implied, resulting, or *constructive*, ...” (Emphasis added.) As the Ohio Court of Appeals confirmed:

“The concept of a ‘constructive trust’ has been explained as follows:

‘A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may arise because it was acquired through *fraud*, duress, undue influence or mistake, or through a breach of fiduciary duty, or *through wrongful disposition of another’s property*. The basis of the constructive trust is the unjust enrichment that would result if the person having the property were permitted to retain it. Ordinarily a constructive trust arises without regard to the intention of the person who transferred the property.’ ... *Bilovocki v. Marimberga* (1979), 62 Ohio App. 2d 169, 171-72, 16 O.O.3d 369, 371, 405 N.E. 2d 337, 340, *quoting* 5 Scott on Trusts 8-9, Section 404.2; *Glick v. Dolin* (1992), 80 Ohio App. 3d 592, 609 N.E. 2d 1338.”

Gabel, supra, 101 Ohio App. 3d at 363 (emphasis added). Likewise:

“A constructive trust is a fictional remedial institution imposed in direct opposition to the intention of the constructive trustee, who is made to account and perform certain fiduciary duties as if he were an express trustee of the property in question. 53. O. Jur. 2d, Trusts, Section 88; 47 Ohio Jur. 2d, Restitution, Section 32.

* * *

A constructive trust is not a technical trust but is rather a fiction of equity, devised to the end that the equitable remedies available against a conventional fiduciary may be available under the same name and processes against one who through fraud or mistake or by any means *ex maleficio* acquires the property of another. 53 O. Jur. 2d, Trusts, Section 88.”

Brown, supra, at *8 (internal punctuation omitted).

Stanley’s deficient software and inaccurate accounting methods, implemented by Stanley after execution of the Distributor Agreements, led to the wrongful disposition of Plaintiffs’

monies and property. *See, e.g.*, Am. Compl., ¶¶ 68, 84. Additionally, at the termination of the Distributors' relationships with Stanley, Stanley takes receipt of the Plaintiffs' remaining inventory, but deeply discounts the value, or assigns no value, to the property received from Plaintiffs. *Id.*, ¶¶ 30, 138, 161. These actions created a constructive trust in favor of Plaintiffs as beneficiaries, with Stanley as the trustee.

That Stanley is the involuntary trustee of a constructive trust in favor of the Plaintiffs is the fiduciary relationship at issue in Count III. Therefore, all of the cases cited in Stanley's Memo (at 3-4) are irrelevant. All of those cases discuss whether a duty arises out of the manufacturer-distributor relationship. That is not the basis for Plaintiffs' assertion of a duty here.

Read in the light most favorable to the Plaintiff, the Amended Complaint clearly alleges an appropriate fiduciary duty. However, in the event that the Court prefers the term "equitable duty" to "fiduciary duty," or requires that a constructive trust be pleaded with more specificity, leave to amend must be granted.

PLAINTIFFS STATE A CLAIM FOR CONVERSION

First, Stanley asserts that Plaintiffs have not alleged breach of a duty apart from Stanley's duties under the Distributor Agreements. Stanley's Memo at 5. The conversion count incorporates by reference the previously made allegations that Stanley assumed fiduciary duties by obtaining "monies and property" from Plaintiffs. Am. Compl., ¶¶ 137-38. These duties did not arise from an agreement between the parties, as discussed in the preceding section.

Second, Plaintiffs did identify the property converted as "tool trucks, tool inventory, and equipment." All three of the cases cited by Stanley requiring any more specific identification relate to conversion of money only, as opposed to tangible property. Stanley's Memo at 5. Each

of the ten Plaintiffs had different specific items in their tool inventory and equipment, but it is ludicrous to suggest that more specificity is required at the pleading stage with regard to “tool trucks, tool inventory, and equipment,” given that these items are obviously identifiable and tangible.

Third, as to the specific money, Stanley acknowledges that Plaintiffs have pleaded that “Mac would apply the funds to the distributors’ accounts.” Stanley’s Memo at 4. The cases cited by Stanley state that conversion occurs where the money is “earmarked” or “funds that have otherwise been sequestered.” *NPF IV, Inc. v. Transitional Health Servs.*, 922 F. Supp. 77, 81 (S.D. Ohio 1996). The court in *NPF IV* cited several cases from other jurisdictions noting that where plaintiff fails to show that the funds were segregated in a separate account, no conversion lies. *Id.* Here, Plaintiffs allege that the funds were supposed to have been segregated into separate accounts for each distributor by Stanley, and thus conversion lies here.

Finally, Stanley attacks the conversion claim on grounds that Plaintiffs failed to plead a demand for return of their property. Stanley’s Memo at 6. If the Complaint itself was not a sufficient “demand” (and Stanley has cited no cases requiring more), Plaintiffs have made numerous demands for return of money and property from Stanley, and can so allege if leave to amend were allowed. Thus, at the very least, Plaintiffs should be given leave to amend to make those demands. In any event, this is a formalistic requirement, and it is obvious that Stanley has no plans to honor any such requests.

PLAINTIFFS HAVE ALLEGED FRAUD AND UNJUST ENRICHMENT

WITH SUFFICIENT PARTICULARITY

Stanley is not seeking to dismiss Plaintiffs’ unjust enrichment and fraud claims on grounds that they fail to state a claim. Instead, Stanley first argues that Plaintiffs unjust

enrichment allegation “is predicated on fraud,” and thus fails to meet the requirements of Fed. R. Civ. Proc. Rule 9(b). Stanley’s Memo at 6-7. Stanley then argues with regard to Plaintiffs’ counts for legal or constructive fraud (the Seventh Claim for Relief) and for actual fraud and fraud-in-the-inducement (the First Non-Class Claim for Relief), that Plaintiffs have not pleaded any facts with particularity. Stanley’s Memo at 8-9. In so doing, Stanley ignores the numerous specific allegations of “‘who, what, when, where and how’ of the alleged fraud,” (*id.*) made through the earlier allegations that are incorporated by reference.

“When” is set forth as to each distributor, namely, when they became distributors (by signing a Distributor Agreement). Am. Compl., ¶¶ 5-6. “Where” is the orientation in Columbus, Ohio. *Id.*, ¶ 166. “What,” “How” and “Who” are set forth throughout the Complaint. The Distributor Financial Evaluation Form (“DFEF”), filled out for each Plaintiff prior to becoming a distributor, was one aspect of the fraud, and fraud-in-the-inducement. *Id.*, ¶¶ 23-28. Stanley failed to disclose the shortcomings in its business model, and the lack of viability of the distributorships. *Id.*, ¶¶ 86-97. Plaintiffs also allege that Stanley failed to disclose the “Doomsday Scenario” and its conclusion that Plaintiffs’ businesses were no longer viable. *Id.*, ¶¶ 31-35.

With regard to Plaintiffs who converted from MDSR’s, fraud took place upon the transfer of assets when the MDSR converted to a distributor, and where Stanley misrepresented the inventory purchased by distributors, and then failed to deliver the inventory, or credit any of their trade accounts. *Id.*, ¶¶ 55-60. Thus there are numerous, detailed allegations with sufficient specificity to support claims for fraud and unjust enrichment.

Finally, the unjust enrichment claim is not solely “predicated on fraud,” as Stanley asserts. Plaintiffs also allege that they were entitled to commissions on products sold by

Stanley's Mac Tools division to customers on their lists. *Id.*, ¶¶ 150-152. Therefore, Plaintiffs are also seeking disgorgement of ill-gotten revenue. Furthermore, to the extent the Court finds that there was no fiduciary duty, those same allegations support a claim for unjust enrichment. Moreover, if Plaintiffs succeed in persuading this Court that the Distributor Agreements are unconscionable, they can proceed to recover damages from Stanley under the theory of unjust enrichment. As to those aspects of Plaintiffs' claims, Stanley has not raised any arguments in support of dismissal.

PLAINTIFFS STATE A CLAIM FOR BREACH OF CONTRACT

Stanley argues that Plaintiffs failed to state a claim for breach of contract because "the Complaint does not identify any contractual provision allegedly breached by Mac." Stanley's Memo at 7-8. This is simply not true.

First, the Complaint identifies several express contract breaches. For example, with regard to Mac's sales directly to Plaintiffs' customers, for which Plaintiffs received no commission, the complaint alleges that: "In the case of traditional distributors who signed agreements preventing Mac from making sales to customers on their routes, this conduct violated the express terms of their agreements." Am. Compl., ¶ 76. Plaintiffs' Distributor Agreements provided only limited rights to Stanley/Mac to sell to customers in Plaintiffs' territories:

"Notwithstanding the first paragraph of this Agreement Mac reserves the right to sell Products to Industrial users, Governmental Installations, Original Equipment Manufacturers, Exporter, Foreign Accounts and other customers or potential customers in similar categories within or without the Territory which in Mac's sole judgment require technical data or special assistance as a prerequisite to servicing and selling the account."

Vincent Bainter's Distributor Agreement (Stanley's Memo Exhibit A) at ¶ 18.³ Mac did not reserve the right to sell to the rest of Mr. Bainter's ordinary customers and deprive Mr. Bainter of the commissions.

Nowhere does Stanley address the remainder of Plaintiffs' Sixth Claim for Relief for breach of contract. In paragraphs 156 through 171, Plaintiffs allege that the Distributor Agreements were unconscionable. If so, they are not enforceable under Ohio law. *See, generally*, Plaintiffs' Memorandum in Opposition to Motion to Compel Arbitration, filed herewith. The Court can refuse to enforce the unconscionable terms. If so, Plaintiffs would be entitled to relief under theories of unjust enrichment or *quantum meruit*. ORC § 1302.15(A) provides that:

“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

Finally, with regard to the breach of contract claims, Plaintiffs allege that Mac violated the implied covenant of good faith and fair dealing. Am. Compl., ¶¶ 172-173. For example, Mac offered Mac-labeled goods to end users who were Plaintiffs' customers for less than the cost to Plaintiffs for the same items, and unfairly competed with its own distributor force. *Id.*, ¶ 74. Even if nothing in the Distributor Agreements prohibited Stanley from so doing, such conduct clearly violates the implied covenant of good faith and fair dealing.

Accordingly, Plaintiffs' claim for relief for breach of contract should not be dismissed. At the very least, Plaintiffs should be given leave to amend to provide greater specificity.

³ Substantially identical language appears in each of Plaintiffs' Distributor Agreements submitted by Stanley.

PLAINTIFFS STATE A CLAIM FOR TORTIOUS INTERFERENCE

Plaintiffs set forth a claim based on tortious interference with contractual relations when Mac sent “credit-dunning” letters to customers of Plaintiffs on Time Payment (“TP”) accounts for which Stanley had been paid in full. Stanley asserts that these communications were privileged, and that therefore Stanley had qualified immunity, so that Plaintiffs must establish that the letters were sent with malice. Stanley’s Memo at 9-10.

First, and fundamentally, Stanley misconstrues or mischaracterizes Plaintiffs’ allegations. Paragraph 100 makes clear that “The distributors already bought the tools, associated with these accounts from Mac.” Thus it is incorrect for Stanley to assert that “Under plaintiffs’ allegations, Mac would receive these funds and therefore clearly had an interest in these debts and therefore had a privilege to send the collection letters.” Stanley’s Memo at 10. The accounts belonged to the distributor, in most instances, and Stanley had no right to collect on them.

At the point in time when the letters went out, Mac/Stanley did own certain TP accounts that had been generated by employee-MDSR’s on Mac’s behalf. Thus, Plaintiffs allegations concede that some of those accounts may have been delinquent. But, by definition, those accounts were not Plaintiffs’ accounts. If need be, leave to amend should be granted to change that sentence to read that “Mac had received payment in full on every account of Plaintiffs’ customers that Mac turned over to collection.” There should be no need to amend the allegation, because Stanley’s reading of it is strained, to say the least. In any event, dismissal is not required as Stanley was not “privileged” to dun customers of distributors who had paid in full and owed nothing.

Second, Stanley claims qualified privilege, and suggests that Plaintiffs therefore must prove malice. Generally, qualified privilege applies to communications with government

agencies, and the immunity benefits the public interest. “In Ohio, ‘[p]ublic policy dictates that those who provide information to government officials who may be expected to take action with regard to qualifications of [insurance agents] be given a qualified privilege.’” *Doyle v. Fairfield Machine Co., Inc.*, 120 Ohio App. 3d 192, 218, 697 N.E. 2d 667, 683-84 (1997) (citations omitted). *See also, generally, A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St. 3d 1, 7-10, 651 N.E. 2d 1283, 1995-Ohio-66 (1995).

The only case Stanley relies upon to assert qualified privilege is *Andrews v. Carmody*, 145 Ohio App. 3d 27, 33 (2001). Stanley’s Memo at 10. That court found that interference “was justified because Conway was representing Carmody as her attorney.” *Id.*, at 34. That ruling is also based on Ohio public policy:

“Some immunity from being sued by third persons must be afforded an attorney so that he may properly represent his client. To allow indiscriminate third-party actions against attorneys of necessity would create a conflict of interest at all times, so that the attorney might well be reluctant to offer proper representation to his client in fear of some third-party action against the attorney himself.”

Simon v. Zipperstein, 32 Ohio St. 3d 74, 76, 512 N.E. 2d 636, 638 (1987) (citations omitted).

There are no cases finding qualified privilege in circumstances like this where the communication is entirely between private parties, and no public policies are implicated.

Third, and finally, Plaintiffs have, in any event, pleaded facts sufficient to establish malice. Malice includes “acting with reckless disregard as to the ... truth or falsity of the statements made.” *A & B-Abell, supra*, 73 Ohio St. 3d at 12, 651 N.E. 2d at 1292. Plaintiffs repeatedly allege that Stanley was aware of the inaccuracy of the information upon which it turned accounts over to collection, but nevertheless proceeded with reckless disregard as to the truth or falsity of the statements in the collection letters that it authorized be sent.

Thus, Stanley was not privileged to send the letters to Plaintiffs' customers collecting on accounts for which Stanley had been paid in full. As a matter of law, Stanley did not possess qualified privilege requiring Plaintiffs to show malice, and if so, Plaintiffs have pleaded facts sufficient to establish malice.

PLAINTIFFS MUST BE ALLOWED TO SEEK AN INJUNCTION

Plaintiffs seek to enjoin Stanley's collection efforts. Am. Compl., ¶ 120. Stanley argues that Plaintiffs are not entitled to separately plead for an injunction. Stanley's Memo at 11. The Federal Rules of Civil Procedure provide for injunctive relief. Stanley is attempting to enforce obligations under agreements that are unconscionable and unenforceable. Regardless of whether the relief should be denoted as a "cause of action," under Ohio substantive law, as Stanley argues, Plaintiffs must be allowed to pursue an injunction pending trial on the Merits. *See, e.g. CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 48 F. 3d 618, 620 (1st Cir. 1995):

"The purpose of a preliminary injunction is to preserve the status quo", pending full adjudication later.

CONCLUSION

Stanley cites no authority to support its argument that Plaintiffs should be denied leave to amend. This Court did not rule on Stanley's first motion to dismiss these ten Plaintiffs. Plaintiffs assert that their allegations were, and are, adequate under Rule 8 and Rule 9 pleading standards. Leave to amend is to be freely given where, as here, Plaintiffs contend that they could, if need be, allege even more facts than are already contained in the lengthy Amended Complaint. Fed. R. Civ. Proc. Rule 15(a). Accordingly, Stanley's motion to dismiss should respectfully be denied. To the extent any portion of Defendants' Motion is granted, it should be granted with leave to amend to cure any defect this Court determines to exist.

**RESPECTFULLY SUBMITTED:
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CERTIFICATE OF SERVICE

The foregoing Memorandum in Opposition to Defendants' Motion to Dismiss the First amended Complaint as to Certain Plaintiffs was filed electronically this 28th day of February, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

s/Andre' F. Toce