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
	)	
vs.	)	**REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT FOR DAMAGES AND FOR DECLARATORY AND INJUNCTIVE RELIEF AND JOINED INDIVIDUAL PLAINTIFFS' COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES WITH JURY DEMAND**
THE STANLEY WORKS, et al.	)	
Defendants.	)	

INTRODUCTION

In its opening brief, The Stanley Works ("Stanley") exposed the pleading deficiencies of the claims attempted to be stated by the ten named plaintiffs ("plaintiffs") who lacked arbitration agreements with Stanley's Mac Tools Division ("Mac"). In response, plaintiffs attempt, but fail, to explain away their failure to state a claim. Plaintiffs were on full notice of those pleading deficiencies since they filed their amended complaint well after Stanley's original motion to dismiss, but they elected to stand on their original and defective allegations. Therefore, the Complaint should be dismissed with prejudice as to these ten plaintiffs.

LAW AND ARGUMENT

A. PLAINTIFFS' REQUEST FOR A CONSTRUCTIVE TRUST CANNOT SUPPORT THEIR BREACH OF FIDUCIARY DUTY CLAIM (COUNT III) BECAUSE A CONSTRUCTIVE TRUST IS A REMEDY WHICH CANNOT BE IMPOSED ABSENT AN UNDERLYING FIDUCIARY OR CONFIDENTIAL RELATIONSHIP.

In their claim for breach of fiduciary duty (Count III), plaintiffs confuse a remedy with an element of a cause of action. Despite language to the contrary in their Amended Complaint, plaintiffs now argue that their claim for breach of fiduciary duty is based not on their distributor-manufacturer relationship with Stanley, but on a "constructive trust" created when plaintiffs sent money and property to Stanley. Plaintiffs fail to recognize that a constructive trust is a court-imposed **remedy** for the breach of a fiduciary or other confidential relationship; it does not provide a basis for creating the underlying fiduciary duty. See Chisholm v. Western Reserves Oil Co., 655 F.2d 94 (6th Cir. 1981) ("It is well established that a constructive trust is an appropriate **remedy** to redress breach of a fiduciary or confidential relationship."). Plaintiffs must first allege a cognizable basis for some fiduciary duty or other confidential relationship before a court will examine whether a constructive trust should be imposed.

As stated in Stanley's motion to dismiss, and as admitted in plaintiffs' Memorandum in Opposition,[1] plaintiffs have not pled a fiduciary duty based on their distributor-manufacturer relationship with Stanley. Because plaintiffs have alleged no other relationship creating such a fiduciary duty, plaintiffs have failed to state a breach of fiduciary duty claim as a matter of law.

B. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR CONVERSION (COUNT IV).

---

[1] See Memo. in Opp., p. 3 ("Plaintiffs are not asserting a duty based on the manufacturer-distributor relationship, but rather based on a constructive trust.")

Plaintiffs also rely on their faulty "constructive trust" argument in an attempt to show that their purported conversion claim is not merely an impermissible recasting of their breach of contract claim. As previously discussed, a constructive trust is a remedy, not the basis for a fiduciary or other duty. Plaintiffs have alleged no duty owed separately from the obligations created by their distributor agreements, and no independent tort claim of conversion can lie. See DeNune v. Consol. Capital of N. Am., Inc., 288 F. Supp. 2d 844, 854 (N.D. Ohio 2003).

Furthermore, plaintiffs fail to adequately plead a claim of conversion anyway. With respect to the funds purportedly converted, plaintiffs do not argue in their Memorandum in Opposition that the funds were ever segregated in a separate account so as to make them identifiable. Instead, with no supporting authority, plaintiffs assert that because the funds were **supposed to have been** segregated into separate accounts, a claim of conversion exists. This argument is wrong. Unless identifiable funds **are** already segregated, there is no obligation to deliver "specific" money as opposed to a certain sum of money. See NPV IV, Inc. v. Transitional Health Servs., 922 F. Supp. 77, 81 (S.D. Ohio 1996). Plaintiffs' afterthought (and unpled) argument that the funds should have or could have been segregated cannot save this dismissal.

Plaintiffs also failed to specifically identify any property converted. A general allegation that Mac converted tool trucks, tool inventories, and equipment cannot not satisfy basic pleading requirements when dealing with the separate claims of ten plaintiffs. Stanley has no way of knowing which property of which plaintiff was purportedly converted.

Plaintiffs also failed to allege a demand for the specific property from Stanley. The requirement that plaintiffs asserting a conversion claim must allege a demand and subsequent refusal to return the property at issue is more than a formalistic requirement; it ensures that

plaintiffs notify potential defendants of the identity of the property allegedly converted. Accordingly, it is an essential element of a claim for conversion that must be pled. 1st Fed. S&L Assn v. U.S. Sterling Capital Corp., 2005 U.S. Dist. LEXIS 3480 *7 (N.D. Ohio, March 7, 2005) (Ex. A) ("Plaintiff's complaint adequately pleads the elements of conversion; namely, control or dominion over plaintiff's funds and subsequent refusal to accede to a demand for their return."). Contrary to plaintiffs' assertion, the mere filing of a Complaint is insufficient to satisfy this demand requirement. See Ohio Tel. Equipment & Sales, Inc. v. Hadler Realty Co., 24 Ohio App. 3d 91 (Ohio Ct. App. 1985) (rejecting plaintiff's contention that its complaint charging defendant with taking possession of the phone equipment and refusing to return it fulfilled the demand requirement). Plaintiffs failed to plead this essential element of their claim. It must be dismissed.

At most, the facts pled in the Complaint would support a finding that a debtor-creditor relationship arose between the parties. For example, plaintiffs refer to Mac's alleged failure to credit the plaintiffs' account for broken tools. (Am. Compl. ¶ 102). In replacing broken tools for customers, plaintiffs expected Stanley to credit their accounts for the cost of the replacement tool. (Id.) This expectation is the hallmark of a debtor-creditor relationship, and such a relationship precludes a claim of conversion. NPV IV, Inc., 922 F. Supp. at 82 (S.D. Ohio 1996) ("An action will not lie for the conversion of a mere debt, and where there is only a relation of debtor and creditor, not an obligation to return identical money, an action for conversion of the funds representing the indebtedness will not lie against the debtor.").

Accordingly, Count IV of plaintiffs' Amended Complaint fails to state a claim.

C. PLAINTIFFS' CLAIMS FOR UNJUST ENRICHMENT (COUNT V) SHOULD BE DISMISSED.

Plaintiffs incorrectly argue that because their unjust enrichment claim is not solely predicated on fraud, it is not subject to the heightened pleading requirements of Federal Rule of

Civil Procedure 9(b). In support, plaintiffs allege that Stanley was unjustly enriched by retaining commissions on products Stanley sold to customers on the plaintiffs' distribution routes. As discussed in greater depth in regard to Count VI, *infra*, the relative rights of the distributors and Stanley to sell products is governed by the distributor agreements. Because plaintiffs' unjust enrichment claim is based on conduct governed by the distributor agreements, the quasi-contractual remedy of unjust enrichment is not available. See Mansfield Plumbing Prods., LLC v. Mariner Partners, Inc., et al, 300 F. Supp. 2d 540, 553 (N.D. Ohio 2004) ("Ohio law does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject.").

Even if unjust enrichment was an available claim, Plaintiffs failed to state it as a matter of law. The unjust enrichment claim, which is predicated on fraud, must meet the heightened pleading standard of Fed. R. Civ. P. 9(b). See Memo. in Support of Motion to Dismiss, p.6. As next discussed, plaintiffs wholly fail to meet the pleading standard in regard to their allegations that Mac committed a fraud. The claim fails as a matter of law.

D. PLAINTIFFS' CLAIMS FOR FRAUD (COUNT VII AND INDIVIDUAL COUNT I) SHOULD BE DISMISSED.

In describing the "who, what, when, where and how" required to plead with specificity a claim of fraud, plaintiffs designate two events. Plaintiffs argue that fraud took place during the conversion of plaintiffs from Mac Direct Sales Representatives ("MSDRs") to independent distributors. Plaintiffs failed to allege anywhere in the Complaint that these plaintiffs were ever MSDRs.[2] Accordingly, this event cannot satisfy the heightened pleading standard required for claims of fraud.

---

[2] Indeed, plaintiffs cannot make such an allegation, because none of the ten plaintiffs named in Stanley's motion to dismiss were ever MSDRs.

Plaintiffs also attempt to satisfy the "who, what, when, where and how" pleading requirement by describing the procedure in Columbus, Ohio, by which plaintiffs became distributors of Mac tools. They allege that during that process Stanley failed to disclose purported shortcomings in its business model and the lack of viability of the distributorships. These general allegations are insufficient to meet the heightened pleading standard of Fed. R. Civ. P. 9(b). In complying with Rule 9(b), a plaintiff, at a minimum, must "allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." Coffey v. Foamex L.P., 2 F.3d 157, 161-62 (6th Cir. 1993) (internal quotation marks and citations omitted). Plaintiffs failed to meet these minimum requirements.

They failed to individually plead the circumstances surrounding their initial relationship with Stanley, which of Stanley's employees each Plaintiff spoke to, and the content of the alleged misrepresentation on which each Plaintiff relied. See United States ex rel. Bledsoe v. Cmty. Health Sys., 342 F.3d 634, 643 (6th Cir. 2003); see also United States ex rel. Branhan v. Mercy Health Sys. of Southwest Ohio, No. 98-3127, 1999 U.S. App. LEXIS 18509 (6th Cir. Aug. 5, 1999) (Ex. B.) (affirming dismissal of a complaint alleging improper billing in violation of the FCA because it "failed to allege a single specific incident in which improper billing occurred and the plaintiff never set forth the dates, times, or the names of individuals who engaged in the alleged improper billing"). Instead, Plaintiffs lumped their allegations together rendering it impossible for Stanley to "prepare an informed pleading responsive to the specific allegations of fraud." Bledsoe, 342 F.3d at 643. Plaintiffs failed to properly plead a claim of fraud.

E. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR BREACH OF CONTRACT (COUNT VI).

Count VI fails to state a proper claim for breach of contract because the Complaint does not identify any contractual provision allegedly breached by Mac, and thus does not meet even the most basic pleading requirements of Fed. R. Civ. P. 8(a). See Memo. in Support of Motion to Dismiss, p. 8. The portion of the Complaint that plaintiffs point to in their Memorandum in Opposition as identifying an express contractual breach does not set forth a breach. While plaintiffs contend that Mac's sales to customers on plaintiffs' routes violated the express terms of the Agreements, the contractual provision identified in the Memorandum as supposedly being breached[3] in no way limits **Mac's** right to sell products to customers on the distributor's routes. In fact, the Agreement plaintiffs cite to expressly states that Mac appoints the distributor as a "**Non-Exclusive** Distributor for the Territory." (See Vincent Bainter's Distributor Agreement (Stanley's Memorandum in Support of Motion to Dismiss, Exhibit A at ¶ 1.) Therefore, plaintiffs have identified no contractual provision prohibiting Mac from selling products to customers on the distributor's routes, and so the breach of contract claim cannot stand. See Schoonover v. Van Leunen's, Inc., No. C-780035, 1979 Ohio App. LEXIS 9863 *3 (1st Dist. App. March 21, 1979) (Ex. C) ("The instant complaint alleged that . . . defendant breached its

---

[3] Plaintiffs identify the following provision as breached by Stanley:

> Notwithstanding the first paragraph of this Agreement Mac reserves the right to sell Products to Industrial users, Governmental Installations, Original Equipment Manufacturers, Exporters, 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.

Memo. in Opp., p. 8.

duties 'as called for in said contract' . . . . [T]he instant complaint fails to identify the promised [sic] claimed to have been broken and thus it fails to state a claim under Civ. R. 8(A).").

Plaintiffs' fleeting reference to the implied covenant of good faith and fair dealing does not satisfy Fed. R. Civ. P. 8(A). Stanley cannot answer this accusation in an informed manner because it has no way of knowing how it purportedly breached this covenant. In its Memorandum in Opposition, plaintiffs elaborate on the breach of this covenant by pointing to one of 122 paragraphs in the background section of this Complaint. In this paragraph, plaintiffs complain that Mac unfairly competed with its own traditional distributors in its sales to plaintiffs' customers. This is simply not true because, as discussed above, Mac retained the right to sell to plaintiffs' customers when it authorized the distributor as a "Non-Exclusive Distributor for the Territory." Plaintiffs cannot use the implied covenant of good faith and fair dealing to override the express terms of the contract. Stephenson v. Allstate Ins. Co., 328 F.3d 822, 826 (6th Cir. 2003) ("[T]his circuit has declined to ascribe a covenant of good faith and fair dealing in the interpretation of a contract 'to override express contract terms.'"). Plaintiffs' failure to identify which contractual obligations were allegedly breached renders this claim appropriate for dismissal.

F. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS (COUNT VIII).

Contrary to plaintiffs' assertion, Stanley was privileged to send collection letters to customers it believed were delinquent. A qualified privilege to interfere in a business relationship does not apply only to communications with government agencies. See Re/Max International, Inc. v. Smythe, Cramer Co., 265 F. Supp. 2d 882 (N.D. Ohio 2003) (recognizing application of qualified privilege in dispute between residential real estate brokers); Salatin v. Trans Healthcare of Ohio, Inc., 170 F. Supp. 2d 775 (N.D. Ohio 2001) (recognizing privilege of

corporate officers to interfere with corporate agreement if acting in furtherance of their legitimate business interests as shareholders.) Rather, it applies to any person "legitimately asserting a legally protected interest that the person believes will be impaired by the performance of the contract." Emergency Preemption, Inc. v. Emergency Preemption Systems, Inc., No. 71350, 1997 Ohio App. LEXIS 3691 *15 (8th Dist. App. Aug. 14, 1997) (Ex. D). It is Stanley's **belief** that it was privileged to send the collection letters that invokes the privilege. Id. at *15; see also RESTATEMENT (SECOND) OF TORTS § 773 (Illustration 1) ("A enters into a contract to buy Blackacre from B. C honestly believes that he has a right-of-way over Blackacre. With knowledge of the contract, he in good faith informs A of his interest and threatens to enforce it by legal proceedings if, as and when the owner of Blackacre should deny his claim. A thereupon refuses to perform his contract with B. C is privileged under the rule stated in this Section.") Even if Stanley was mistaken in its belief that the accounts were delinquent, it was privileged to send collection letters. Furthermore, Plaintiffs concede that they failed to plead that Stanley acted with malice, which would be necessary to state a claim for breach of the qualified privilege.[4]

Finally, Stanley faces yet again the impossible challenge of responding to plaintiffs' "group" pleading. Plaintiffs argue that "[t]he accounts belonged to the distributor, **in most instances**, and Stanley had no right to collect on them." See Memo. in Opp., p. 10. Plaintiffs fail to identify which distributor's accounts Stanley would have had a right to collect on, and

---

[4] Plaintiffs then seem to claim that they have met the malice pleading requirement by suggesting that they repeatedly alleged that Stanley was aware of the inaccuracy of the information upon which it turned accounts over to collection. See Memo. in Opp., p. 11. Plaintiffs point to no paragraph of the Complaint, however, containing these allegations, and Stanley can find no such allegations. In fact, plaintiffs suggest otherwise, claiming that Mac's accounting problems resulted from a "lack of knowledgeable management, software failures, and inadequate administrative and technical support." (Am. Compl. ¶ 70).

which they purportedly would not. For these reasons, plaintiffs fail to state a claim of tortious interference with business relations.

G. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR INJUNCTIVE RELIEF (COUNT IX).

Plaintiffs do not attempt to rebut Stanley's point that a "claim" for an injunction is a request for relief only, and not an independently cognizable claim. Instead, plaintiffs argue only that the Federal Rules of Civil Procedure allow them to pursue injunctive relief. Stanley does not dispute this proposition. What Stanley disputes is plaintiffs' right to pursue injunctive relief without a properly pled underlying claim. Because an injunction is a remedy and not a cause of action, if the Court dismisses the causes of action, plaintiffs have no claim on which to base a request for injunctive relief. See Chamberlain v. The American Tobacco Co., 1999 U.S. Dist. LEXIS 22636 *61 (N.D. Ohio 1999) (Ex. E) ("[E]quitable relief is not a cognizable legal theory of recovery but is merely a request for a specific type of relief.").

CONCLUSION

For each of these reasons, defendant The Stanley Works respectfully requests that this Court dismiss the First Amended Class Action Complaint of the ten-ADR plaintiffs with prejudice. Although the numerous pleading deficiencies in the original Complaint were pointed out in Stanley's original motion to dismiss, these ten plaintiffs have not cured any of them in their First Amended Class Action Complaint,[5] and therefore this dismissal should be with prejudice.

[5] While plaintiffs, in their Memorandum in Opposition, again and again mention the possibility of amending their First Amended Complaint (no less than six times), such an amendment clearly would be futile and should not be allowed. Moreover, plaintiffs have already had that opportunity since they filed their First Amended Complaint (without any such changes) over a month after they had been served with defendant's original motion to dismiss, placing them on full notice of their pleading deficiencies.

Respectfully submitted,

s/ Thomas S. Kilbane ____

Thomas S. Kilbane (0005938)
tkilbane@ssd.com
Joseph C. Weinstein (0023504)
jweinstein@ssd.com
Steven A. Friedman (0060001)
sfriedman@ssd.com
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500 (telephone)
(216) 479-8780 (facsimile)

Attorneys for Defendant,
The Stanley Works

CERTIFICATE OF SERVICE

The foregoing Reply in Support of Motion to Dismiss First Amended Class Action Complaint for Damages and for Declaratory and Injunctive Relief and Joined Individual Plaintiffs' Complaint for Declaratory Relief and Damages with Jury Demand was filed electronically this 31st day of March, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

*s/ Thomas S. Kilbane*________________
One of the Attorneys for Defendant
The Stanley Works