

**IN THE COURT OF COMMON PLEAS
WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

JANINE LITMAN and TIMOTHY
MASTROIANNI, individually and
jointly,

Plaintiffs,

v.

CANNERY CASINO RESORTS, LLC, a
Nevada limited liability company,
WASHINGTON TROTTING ASSOCIATION,
INC., a Delaware corporation, WTA
ACQUISITION CORP., a Delaware corporation,
CANNERY CASINO RESORTS, LLC,
CANNERY CASINO RESORTS and
WASHINGTON TROTTING ASSOCIATION,
INC., t/d/b/a THE MEADOWS RACETRACK
& CASINO, an unincorporated association,
CANNERY CASINO RESORTS, an
unincorporated association consisting of one
or more yet unidentified natural and/or legal
persons, individually and jointly,

Defendants.

CASE NO. 2012-8149

**PRELIMINARY OBJECTIONS
TO THIRD AMENDED
COMPLAINT**

Filed on behalf of all Defendants,
Cannery Casino Resorts, LLC,
Washington Trotting Association,
Inc., WTA Acquisition Corp.,
Cannery Casino Resorts, LLC,
Cannery Casino Resorts and
Washington Trotting Association,
Inc. t/d/b/a The Meadows
Racetrack & Casino, and
Cannery Casino Resorts

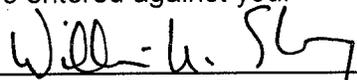
Counsel of Record for these
parties:

William L. Stang, Esquire
PA Id. No. 33221
Benjamin I. Feldman, Esquire
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NOTICE TO PLEAD:

To the within named Plaintiffs you are
hereby notified to plead to the within Preliminary
Objections within Twenty (20) days from the date
of service hereof or a default judgment may
be entered against you.



William L. Stang, Esquire

**IN THE COURT OF COMMON PLEAS
WASHINGTON COUNTY, PENNSYLVANIA
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CASE NO. 2012-8149

Plaintiffs,

v.

CANNERY CASINO RESORTS, LLC, a
Nevada limited liability company,
WASHINGTON TROTTHING ASSOCIATION,
INC., a Delaware corporation, WTA
ACQUISITION CORP., a Delaware corporation,
CANNERY CASINO RESORTS, LLC, CANNERY
CASINO RESORTS and WASHINGTON TROTTHING
ASSOCIATION, INC. t/d/b/a THE MEADOWS
RACETRACK & CASINO, an unincorporated
association, CANNERY CASINO RESORTS, an
unincorporated association consisting of one
or more yet unidentified natural and/or legal
persons, individually and jointly,

Defendants.

PRELIMINARY OBJECTIONS TO THIRD AMENDED COMPLAINT

Defendants, Cannery Casino Resorts, LLC, a Nevada limited liability company,
Washington Trotting Association, Inc., a Delaware corporation, WTA Acquisition Corp.,
a Delaware corporation, Cannery Casino Resorts, LLC, Cannery Casino Resorts and
Washington Trotting Association, Inc. t/d/b/a The Meadows Racetrack & Casino, an

unincorporated association, and Cannery Casino Resorts,¹ an unincorporated association consisting of one or more yet unidentified natural and/or legal persons, individually and jointly, by and through their counsel, William L. Stang, Esquire, Benjamin I. Feldman, Esquire and Fox Rothschild LLP, file Preliminary Objections to Plaintiffs' Third Amended Complaint as follows:

1. Plaintiffs have filed a Third Amended Complaint alleging fourteen (14) separate causes of action against Defendants. The causes of action are for (a) Count I – Breach of Oral Contract, (b) Count II – Breach of Written Contract, (c) Count III – Breach of Contract Implied in Fact, (d) Count IV – Unjust Enrichment, (e) Count V – Breach of Fiduciary Duty, (f) Count VI – Tortious Interference with Contract and Prospective Business Relations and Advantage, (g) Count VII – Unfair and Deceptive Trade Practice, (h) Count VIII – Fraud, (i) Count IX – Conversion, (j) Count X – Negligence, (k) Count XI – Violation of Gaming, 4 Pa.C.S.A., (l) Count XII – Civil Conspiracy, (m) Count XIII – Accounting, and (n) Count XIV – Special Damages.

2. Pa.R.C.P. 1019(a) provides in part that the material facts on which a cause of action is based must be stated in a concise and summary form. This rule is satisfied if the allegations in a pleading “(1) contain averments of all facts the Plaintiffs will eventually have to prove in order to recover; and (2) they are sufficiently specific so as to enable the party served to prepare a defense thereto.” Commonwealth of

¹ It is denied that the Defendant identified as “Cannery Casino Resorts” exists as an entity separate and distinct from the Defendant identified as “Cannery Casino Resorts, LLC.” Further explanation concerning Plaintiffs' mistaken identification of Defendants will be made subsequent to disposition of these Preliminary Objections.

Pennsylvania Department of Transportation v. Shipley Humble Oil Co., 370 A.2d 438, 439 (Pa.Cmwlt. 1977).

3. The Third Amended Complaint is poorly conceived. In particular, it is virtually impossible to determine what material facts are being alleged in support of the fourteen (14) causes of action. As a result, the Third Amended Complaint is subject to an abundance of preliminary objections as are detailed below.

I. **DEMURRER TO COUNT I (BREACH OF ORAL CONTRACT)**

4. In Count I of the Third Amended Complaint Plaintiffs attempt to state a cause of action against all Defendants for breach of an oral contract.

5. In order to state a cause of action for breach of contract a party must allege "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Core States Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super. 1999). Moreover, in order to maintain an action for breach of contract, every element of the contract at issue must be stated. Snaith v. Snaith, 422 A.2d 1379 (Pa.Super. 1980).

6. The requisite allegations for a claim of breach of contract are not made in the Third Amended Complaint. In particular, Plaintiffs have failed to allege sufficient facts to show (a) the existence of a contract between Plaintiffs and any of the Defendants, (b) any breach by any of the Defendants or (c) damages suffered by Plaintiffs resulting from any Defendants' alleged breach of contract. Similarly, Plaintiffs do not attribute any specific oral statements to any of the Defendants that would constitute an offer, nor do Plaintiffs attribute any oral statements to themselves that would constitute an acceptance.

7. Furthermore, Plaintiffs fail to identify which of the Defendants entered into the alleged contract with Plaintiffs.

8. By virtue of the foregoing the allegations of Count I of the Third Amended Complaint are insufficient to state a cause of action for breach of an oral contract against any of the Defendants.

WHEREFORE, Defendants request that Count I of the Third Amended Complaint be dismissed.

II. COUNT II (BREACH OF WRITTEN CONTRACT)

9. In Count II of the Third Amended Complaint Plaintiffs attempt to state a cause of action against all Defendants for breach of a written contract.

10. Pa.R.C.P. 1019(i) provides, in part, that when a claim is based upon a written agreement, a copy of the relevant agreement must be attached to the Complaint.

11. In order to state a cause of action for breach of contract a party must allege "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Core States Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super. 1999). Moreover, in order to maintain an action for breach of contract, every element of the contract at issue must be stated. Snaith v. Snaith, 422 A.2d 1379 (Pa.Super. 1980).

12. Plaintiffs have failed to attach to their Third Amended Complaint a copy of the written agreement allegedly made by Plaintiffs and Defendants. Defendants believe and therefore aver that no such written agreement exists.

13. Moreover, the requisite allegations for a claim of breach of contract, as required by Pa.R.C.P. 1019 and Pennsylvania law, have not been made. In particular,

Plaintiffs have failed to allege sufficient facts to show (a) the existence of a written contract between Plaintiffs and any of the Defendants, (b) any breach by any of the Defendants or (c) damages suffered by Plaintiffs resulting from any Defendants' alleged breach of contract.

14. Similarly, Plaintiffs fail to identify which of the Defendants entered into the alleged contract with Plaintiffs.

WHEREFORE, Defendants request that Count II of the Third Amended Complaint be dismissed.

III. DEMURRER TO COUNT III (BREACH OF CONTRACT IMPLIED IN FACT)

15. In Count III of the Third Amended Complaint Plaintiffs attempt to state a cause of action against all Defendants for breach of an implied contract.

16. As a matter of law, an implied contract "is an actual contract arising when there is an agreement, but the parties' intentions are inferred from their conduct in light of the circumstances." Ameripro Search, Inc. v. Fleming Steel Co., 787 A.2d 988, 991 (Pa.Super. 2001).

17. Count III of the Third Amended Complaint fails to include sufficient facts from which it could be determined whether there was a breach of the alleged implied contract, and if so, which of the Defendants was responsible for the alleged breach.

18. By virtue of the foregoing Plaintiffs have failed to allege sufficient facts to show the existence of a contract implied in fact between Plaintiffs and any of the Defendants.

WHEREFORE, Defendants request that Count III of the Third Amended Complaint be dismissed.

IV. DEMURRER TO COUNT IV (UNJUST ENRICHMENT)

19. In Count IV of the Third Amended Complaint Plaintiffs attempt to state a cause of action against all Defendants for unjust enrichment.

20. The doctrine of unjust enrichment is applied when a court determines that there exists a contract implied in law (i.e., a quasi contract) which imposes a duty, not as the result of an agreement, but in spite of the absence of an agreement. Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alts., Inc., 832 A.2d 501 (Pa.Super. 2003).

21. The elements of a cause of action for unjust enrichment are “benefits conferred on Defendant by Plaintiff, appreciation of such benefits by Defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for Defendants to retain the benefit without payment of value.” Styer v. Hugo, 619 A.2d 347 (Pa.Super. 1993).

22. The most significant element of the doctrine of unjust enrichment is whether the enrichment of the defendant is unjust; the doctrine does not apply simply because a defendant may have benefitted from the acts of a plaintiff. Styer v. Hugo, *supra*.

23. In the present case, Plaintiffs fail to state, with requisite specificity, the benefits allegedly conferred on each of the Defendants. Moreover, Plaintiffs fail to state how or why Defendants’ receipt of the alleged benefits is unjust as a matter of law.

24. By virtue of the foregoing, the allegations of the Third Amended Complaint are insufficient to state a cause of action for unjust enrichment against any of the Defendants.

WHEREFORE, Defendants move that Count IV of the Third Amended Complaint be dismissed.

V. DEMURRER TO COUNT V (BREACH OF FIDUCIARY DUTY)

25. In Count V of the Third Amended Complaint Plaintiffs attempt to state a cause of action against all Defendants for breach of fiduciary duty.

26. "Under Pennsylvania law a fiduciary duty will arise in two contexts: (1) in a principal/agent relationship, where the agent is expected to act with the utmost duty of loyalty to the interests of the principal; and (2) where the facts evidence a confidential, or special relationship, such that 'one has the power to take advantage of or exercise undue influence over the other.'" Pratter v. Penn Treaty American Corporation, 11 A.3d 550, 561 (Pa.Comm.w. 2010) (quoting eToll, Inc. v. Elias/Savion Ad., Inc., 811 A.2d 10, 22-23 (Pa.Super. 2002)).

27. Plaintiffs have not alleged the existence of a principal/agent relationship with Defendants. Nor have Plaintiffs alleged any facts to support the existence of a special or confidential relationship between any of the Plaintiffs and any of the Defendants.

28. As such, Plaintiffs' claim for breach of fiduciary duty is legally insufficient as to all Defendants. See, Burton v. Bojazi, 2005 WL 1522040, at * 3 (Pa.Comm.Pl. June 17, 2005) (granting the defendants' demurrer to plaintiff's breach of fiduciary duty claim where the complaint did not allege "weakness, dependence, inferiority, or a disparity in the parties' position giving rise to an abuse of power.") (citation omitted).

29. By virtue of the foregoing it is submitted that there is no basis for the claim that any of the Defendants owed fiduciary duties to any of the Plaintiffs.

WHEREFORE, Defendants respectfully request that the claims asserted in Count V of the Third Amended Complaint be dismissed.

VI. DEMURRER TO COUNT VI (TORTIOUS INTERFERENCE)

30. In Count VI of the Third Amended Complaint Plaintiff Mastroianni attempts to assert a cause of action against The Meadows Racetrack & Casino for “Tortious Interference with Contract and Prospective Business Relations and Advantage.”

31. In order to state a cause of action for tortious interference with existing or prospective contractual relations a party must allege: “(1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant’s conduct.” Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997).

32. The requisite allegations for a claim of tortious interference with contractual relations are not made in the Third Amended Complaint. In particular, Plaintiff Mastroianni has failed to allege sufficient facts to show (a) the existence of a contractual or prospective contractual relation between him and a true third party, (b) purposeful action by the Meadows Racetrack & Casino specifically intended to harm the alleged contractual relation, or (c) actual legal damage suffered by Plaintiff Mastroianni.

33. By virtue of the foregoing the allegations of Count VI of the Third Amended Complaint are insufficient to state a cause of action for tortious interference with contractual relations against Defendant Meadows Racetrack & Casino.

WHEREFORE, Defendants request that Count VI of the Third Amended Complaint be dismissed.

VII. DEMURRER TO COUNT VII (UNFAIR AND DECEPTIVE TRADE PRACTICE)

34. In Count VII of the Third Amended Complaint Plaintiffs allege that Defendants have violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 ("Pa. UTPCPL"); the Limited Liability Company Law, 15 Pa.C.S.A. § 8981; and 19 Pa. Code § 17.203(b).

A. THE PA UTPCPL CLAIM

35. Plaintiffs are not permitted any recovery under the Pa. UTPCPL because as a matter of law, a party is not making a "purchase" or a "lease" at a casino as those terms are interpreted under the statute. See, Gottlieb v. Tropicana Hotel and Casino, 109 F.Supp.2d 324, 331 (E.D.Pa. 2000) ("Ms. Gottlieb did not purchase or lease anything, in the ordinary sense of those words.").

36. In the alternative, in order to establish that a defendant engaged in fraudulent or deceptive conduct in violation of the Pa. UTPCPL, a plaintiff must prove all of the elements of common law fraud. Skurnowicz v. Lucci, 798 A.2d 788, 791 (Pa.Super. 2002).

37. To sufficiently state a claim for fraud, a plaintiff must allege: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

38. Further, Pa.R.C.P. 1019(b) requires that averments of fraud must be stated with particularity.

39. Plaintiffs have not alleged any of the above elements of fraud, and have certainly not done so with particularity.

40. By virtue of the foregoing it is submitted that as a matter of law the allegations of Count VII are insufficient to state a cause of action under the Pa. UTPCPL.

B. LACK OF CAPACITY TO SUE FOR VIOLATION OF 15 Pa.C.S.A. § 8981

41. In Count VII of the Third Amended Complaint Plaintiffs also attempt to state a cause of action against Defendants for an alleged failure to qualify to do business within the Commonwealth of Pennsylvania in violation of 15 Pa.C.S.A. § 8981 *et. seq.*

42. Section 8981, titled "Foreign limited liability companies," states, in part, that "(a) foreign limited liability company shall be subject to Subchapter K of Chapter 85 (relating to foreign limited partnerships) as if it were a foreign limited partnership" except in three limited aspects which are not applicable here.

43. Section 8588, titled "Action by Attorney General," which is a part of Subchapter K of Chapter 85, states that "(t)he Attorney General may bring an action to restrain a foreign limited partnership from doing business in this Commonwealth in violation of this subchapter."

44. Under Pennsylvania law an alleged violation of 15 Pa.C.S.A. § 8981 does not give rise to a private cause of action.² To the contrary, the sole remedy for an alleged violation of 15 Pa.C.S.A. § 8981 is for the Attorney General to bring an action to restrain the partnership or company from doing business in Pennsylvania.

45. By virtue of the foregoing, Defendants submit that Plaintiffs' allegation that Defendants violated 15 Pa.C.S.A. § 8981 *et. seq.* must be dismissed.

C. DEMURRER TO CLAIM FOR VIOLATION OF 19 PA CODE § 17.203(b)

46. In Count VII of the Third Amended Complaint, Plaintiffs further allege that Defendants have failed to comply with the requirements of 19 Pa. Code § 17.203(b). This section of the Pennsylvania Code relates to the Pennsylvania Fictitious Names Act, 54 Pa.C.S. § 303(b).

47. In support of the Fictitious Names Act claim, Plaintiffs quote 19 Pa. Code § 17.203(b) and allege that "Defendants failed to comply with Pennsylvania law, thereby cloaking and misleading the identity of operator of The Meadows from the Pennsylvania Gaming Commission." (Third Amended Complaint, ¶ 82).

48. Contrary to Plaintiffs' allegations, Defendants have fully complied with the Pennsylvania Fictitious Names Act and 19 Pa. Code § 17.203(b). In fact, Exhibit 5 attached to Plaintiffs' Third Amended Complaint plainly shows that "The Meadows Racetrack & Casino" is a registered fictitious name and that the owners are Defendants WTA Acquisition Corp. and Washington Trotting Association, Inc.

² The United States Supreme court has articulated three narrow circumstances where a private cause of action might be read into a statute which does not expressly provide for one: (1) where the plaintiff is one of a class for whose special benefit the statute was enacted; (2) there is proof of legislative intent to create a private cause of action; and (3) a private cause of action would be consistent with the underlying purpose of the legislative scheme. Witthoeft v. Kiskaddon, 733 A.2d 623 262 (Pa. 1999) (citing Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975)). None of those circumstances are found in the present matter.

49. In the alternative, it is submitted that under Pennsylvania law an alleged violation of the Pennsylvania Fictitious Names Act and/or 19 Pa. Code § 17.203(b) does not give rise to a private cause of action in favor of any party.

50. By virtue of the foregoing, it is submitted that Count VII of the Third Amended Complaint must be dismissed in its entirety.

WHEREFORE, Defendants request that Count VII of the Third Amended Complaint be dismissed.

VIII. DEMURRER TO COUNT VIII (FRAUD)

51. In Count VIII of the Third Amended Complaint Plaintiffs attempt to state a cause of action against all Defendants for fraud.

52. The Pennsylvania Rules of Civil Procedure impose, in any claim for fraud, a heightened standard of pleading, requiring that allegations of fraud be pled with "particularity." Pa.R.C.P. 1019(b).

53. To state a claim for fraud under Pennsylvania law, a plaintiff must allege: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

54. The allegations of fraud as set forth in the Third Amended Complaint are insufficiently specific to satisfy the particularity requirement of Rule 1019(b) and/or the pleading requirements of Pennsylvania law. For example, Plaintiffs have failed to

identify the alleged misrepresentation and/or which Defendant made an alleged misrepresentation.

55. Similarly, Plaintiffs have failed to identify the injury or harm that was caused by their reliance on the alleged misrepresentation.

WHEREFORE, Defendants respectfully request that Count VIII of the Third Amended Complaint be dismissed.

IX. DEMURRER TO COUNT IX (CONVERSION)

56. In Count IX of the Third Amended Complaint Plaintiffs attempt to state a cause of action for conversion against all Defendants.

57. Conversion is "a tort by which a defendant deprives a plaintiff of his or her right to a chattel and interferes with a plaintiff's use or possession of a chattel without the plaintiff's consent and without lawful justification." Chrysler Credit Corp. v. Smith, 643 A.2d 1098, 1101 (Pa.Super. 1994). Similarly, conversion is "an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession." Norriton East Realty Corp. v. Central-Penn Nat'l Bank, 254 A.2d 637, 638 (Pa. 1969).

58. Plaintiffs have failed to allege that any of the Defendants have taken control or possession of any chattel or goods belonging to the Plaintiffs. Similarly, Plaintiffs have failed to identify any chattel or goods that were allegedly wrongfully taken by Defendants.

59. By virtue of the foregoing, the allegations of Count IX of the Third Amended Complaint are insufficient to state a cause of action for conversion against any of the Defendants.

WHEREFORE, Defendants respectfully request that Count IX of the Third Amended Complaint be dismissed.

X. DEMURRER TO COUNT X (NEGLIGENCE)

60. In Count X of the Third Amended Complaint, Plaintiffs attempt to state a cause of action for negligence.

61. Under Pennsylvania law, to state a cause of action for negligence, “a plaintiff must allege facts which establish the breach of a legally recognized duty or obligation of the Defendant that is causally connected to actual damages suffered by the plaintiff.” Scampone v. Highland Park Care Center, LLC, 57 A.3d 582, 596 (Pa. 2012).

62. In paragraphs 97 and 98 of the Third Amended Complaint Plaintiffs state as follows:

“97. Defendants breached their duty of care and Plaintiffs have been injured thereby.”

“98. Defendants [*sic*] acts and/or failures to act when required proximately caused the injury to the Plaintiffs.”

63. Plaintiffs have failed to allege with requisite specificity any facts which demonstrate negligence on the part of any Defendant. Similarly Plaintiffs have failed to state the amount of any damage allegedly suffered.

64. By virtue of the foregoing Defendants submit that Plaintiffs have failed to properly allege a claim for negligence.

WHEREFORE, Defendants request that Count X of the Third Amended Complaint be dismissed.

XI. DEMURRER TO COUNT XI (VIOLATION OF GAMING LAWS)

65. In Count XI of the Third Amended Complaint, Plaintiffs state that “(b) the acts averred and incorporated into this Count, Defendant has violated the Pennsylvania Gaming Laws and related regulations, 4 Pa.C.S.A., et. seq., including but not limited to 58 Pa.Code et. seq.”

66. As a matter of law, the allegations of a Complaint must disclose the material facts necessary for an adverse party to prepare its defense. Smith v. Wagner, 588 A.2d 1308 (Pa.Super. 1991).

67. The allegation that Defendants have violated Pennsylvania Gaming Laws by “the acts averred and incorporated into this Count” is a conclusion of law.

68. Plaintiffs have not alleged which parts of the “Pennsylvania Gaming Laws” the Defendants allegedly violated, or which Defendant committed the alleged wrongful act.

69. Plaintiffs have not disclosed the material facts necessary to allow the Defendants to understand the claims being brought against them, which statute they are alleged to have violated, and which defendant is alleged to have made the violation.

WHEREFORE, Defendants request that Count XI of the Third Amended Complaint be dismissed.

XII. INSUFFICIENT SPECIFICITY OF COUNT XII (CIVIL CONSPIRACY)

70. In Count XII of the Third Amended Complaint, Plaintiffs attempt to state a cause of action for civil conspiracy.

71. To state a cause of action for civil conspiracy, a Complaint must allege “(1) a combination of two or more persons acting with a common purpose to do an

unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage.”

McKeeman v. Cove States Bank, N.A., 751 A.2d 655, 660 (Pa.Super. 2000).

72. Under Pennsylvania law, “in order for a claim of civil conspiracy to proceed, a plaintiff must ‘allege the existence of all elements necessary to such a cause of action.’” Grose v. Proctor and Gamble Paper Products, 866 A.2d 437, 440 (Pa.Super. 2005) (citing Rutherford v. Presbyterian University Hospital, 612 A.2d 500, 508 (Pa.Super. 1992)).

73. The Third Amended Complaint lacks the specificity required in order to state a cause of action for civil conspiracy. In particular, Plaintiffs have failed to allege that any particular Defendant acted with the requisite intent to support an action for civil conspiracy. See, Reading Radio, Inc. v. Fink, 833 A.2d 199 (Pa.Super. 2003). Similarly, Plaintiffs have failed to allege an overt act done in pursuance of a common purpose and/or actual legal damage.

74. By virtue of the foregoing, the allegations of the Third Amended Complaint are insufficient to state a cause of action for conspiracy against the Defendants.

WHEREFORE, Defendants request that Count XII of the Third Amended Complaint be dismissed.

XIII. INSUFFICIENT SPECIFICITY TO COUNT XIII (ACCOUNTING)

75. In Count XIII of the Third Amended Complaint, Plaintiffs attempt to state a cause of action for an accounting.

76. For the reasons set forth in these Preliminary Objections, Defendants do not believe that Plaintiffs are entitled to any relief whatsoever. As a result, it is submitted that Plaintiffs are not entitled to an accounting.

77. Similarly, Plaintiffs' Complaint provides no factual information in support of Plaintiffs' demand for an accounting.

78. In addition, Plaintiffs do not identify which Defendants they demand an accounting from.

79. Until the court has determined which claims, if any, the Defendants will have to address, and the Plaintiffs have provided to Defendants the type of factual information that is required by Pennsylvania law, the Plaintiffs are not entitled to any type of accounting.

WHEREFORE, Defendants request that Count XIII of the Third Amended Complaint be dismissed.

XIV. DEMURRER TO COUNT XIV (REQUEST FOR SPECIAL DAMAGES)

80. In Count XIV of the Third Amended Complaint, Plaintiffs attempt to state a cause of action for special damages.

81. Under Pennsylvania law, "special damages" are damages which are not the usual or ordinary consequences of an alleged wrongful act.

82. A request for "special damages" is not recognized as an independent cause of action under Pennsylvania law. To the contrary, special damages are an item of relief that may be requested as part of the demand for relief in a recognized cause of action. For this reason alone, Count XIV must be stricken.

83. In the alternative, Pa.R.C.P. 1019(f) requires that averments of items of special damage "shall be specifically stated." Similarly, Pa.R.C.P. 1020(a) provides, in part, that "(e)ach cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief."

84. Plaintiffs have failed to state with particularity any special circumstances or specific facts that would give rise to or permit an award of special damages. Similarly, Plaintiffs have failed to state with the requisite particularity the items of special damages allegedly sustained.

85. By virtue of the foregoing it is submitted that Count XIV of the Third Amended Complaint must be dismissed.

WHEREFORE, Defendants respectfully request that Count XIV of Plaintiffs' Third Amended Complaint be dismissed with prejudice.

XV. DEMURRER TO REQUESTS FOR PUNITIVE DAMAGES

86. In Counts I through XIV of the Third Amended Complaint Plaintiffs attempt to assert claims for punitive damages.

87. As a matter of law punitive damages are not permitted in an action for breach of contract or based on breach of contract.

88. Punitive damages are permitted in common law tort claims only when the acts complained of are intentional, willful, wonton and/or committed with reckless indifference to the rights of others.

89. Plaintiffs have failed to allege with the requisite particularity any conduct such as would permit an award of punitive damages under any circumstance.

90. By virtue of the foregoing it is submitted that Plaintiffs' requests for punitive damages must be dismissed.

XVI. DEMURRER TO COMMON LAW TORT CLAIMS

91. Plaintiffs' Third Amended Complaint includes causes of action based on breach of contract and causes of action based upon tort claims.

92. Each of the tort claims stated in Plaintiffs' Third Amended Complaint is interwoven with the contractual obligations alleged by Plaintiffs.

93. For the reasons referenced in Preliminary Objections I through IV above Defendants assert that Plaintiffs' breach of contract claims must be dismissed. However, in the alternative that the Plaintiffs' breach of contract claims are not dismissed, Defendants assert that the tort claims included in the Third Amended Complaint are interwoven with the contractual obligations referenced by Plaintiffs.

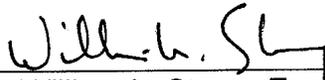
94. Under Pennsylvania law, the "gist of the action doctrine" bars tort claims arising solely from a contract between the parties where the duties allegedly breached were created and grounded in the contract or where the tort claim essentially duplicates a breach of contract claim. Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10 (Pa.Super. 2002).

95. The gist of Plaintiffs' tort claims are that Defendants engaged in tortious activities in the course of the parties' contractual relationships. Therefore, Plaintiffs' tort claims are barred by the gist of the action doctrine.

WHEREFORE, Defendants request that the tort claims included at Counts V, VI, VIII, IX, and X be dismissed.

Respectfully submitted,

FOX ROTHSCHILD LLP

By: 
William L. Stang, Esquire
Benjamin I. Feldman, Esquire

Counsel for Defendants

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RACETRACK & CASINO, an unincorporated
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or more yet unidentified natural and/or legal
persons, individually and jointly,

Defendants.

ORDER OF COURT

AND NOW this _____ day of _____, 2013, upon
consideration of Defendants' Preliminary Objections to Third Amended Complaint, and
argument thereon, it is Ordered that the Third Amended Complaint is dismissed.

BY THE COURT:

J.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Preliminary Objections to Third Amended Complaint was served upon counsel as addressed below via e-mail and regular mail on the 21 day of June, 2013:

Gregg R. Zegarelli, Esquire
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