IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

FRANK G. PELLEGRINO, individually and derivatively on behalf of Defendant Primus Technologies, Corp,.	:	
Plaintiff	:	NO. 15-2056
VS.	:	
PRIMUS TECHNOLOGIES, CORP,. a Pennsylvania corporation ; JEREMIAH W. SULLIVAN, CHRISTOPHER B. SULLIVAN, BARBARA A. SULLIVAN, LORI J. SULLIVAN, and JOHN AND JANE DOES 1-99 (fictitious individuals),	:	CIVIL ACTION - LAW
Defendants	:	JUDGMENT ON THE PLEADINGS

OPINION

Before the Court is a motion for partial judgment on the pleadings, filed by Defendants, Primus Technology Corporation, and shareholders who are members of the Sullivan family. Defendants seek dismissal of Counts II, IV and VI of Plaintiff Frank Pellegrino's ten count complaint. Plaintiff seeks various forms of legal and equitable relief claiming that Defendants, as majority shareholders, are oppressing him (a 17 percent shareholder) and forcing him out of the company without paying fair market value for his shares and reducing his power and influence within the company.

As to Count II, Defendants seek judgment claiming Pennsylvania Law does not provide for a court ordered buy-out of an allegedly oppressed minority shareholder. Concerning Count IV, Defendants contend that intra corporate conspiracy is not a cognizable cause of action in Pennsylvania. Finally, in Count VI, Defendant contends that Plaintiff did not lose property belonging to him as opposed to the company's loss.

STANDARD FOR JUDGMENT ON THE PLEADINGS

Rule 1034 of the Rules of Civil Procedure provides for judgment on the pleadings when the pleadings are close. Pa. R.C.P. 1034. Judgment on the pleadings only can be granted when the facts are not in dispute and the law is clear making a trial a fruitless exercise. Rice v. Rice,

468 Pa. 1, 359 A.2d 782, 784 (Pa. 1976); Gallo v. J.C. Penney Casualty Insurance Co., 328 Pa.Super. 267, 476 A.2d 1322 (1984)(citations omitted). For purposes of the motion, the Court "must accept as true all well-pleaded statements of fact of the party against whom the motion is granted and consider against him only those facts that he specifically admits." Jones v. Travelers Ins. Co., 356 Pa. Super. 213, 217, 514 A.2d 576, 578 (1986)(citations omitted). "The parties cannot be deemed to admit either conclusions of law or unjustified inferences." Id. (citations omitted). The Court "should confine itself to the pleadings themselves and any documents or exhibits properly attached to them." Jones, supra, at 217, 578 A.2d at 578; Gallo v. J.C. Penney Casualty Ins. Co., 328 Pa. Super. 267, 270, 476 A.2d 1322, 1324 (1984).

DISCUSSION

The Court will discuss each of the Counts that Defendants seek to dismiss in ascending order. In support of its request to dismiss Count II, Defendants argue that because the Pennsylvania Business Corporation Law ("BCL") provides for certain remedies, but not specifically a forced buy-out, the Court is precluded from crafting a forced buy-out as a remedy. This Court disagrees. 15 Pa.C.S. § 104 of the BCL provides the Court with equitable powers. The 1988 amendment to Section 104 of the BCL demonstrates that the Section enables the Court to grant equitable relief, even when granting statutory relief under the BCL, as long as the BCL does not specifically limit equitable relief. Baron v. Pritzker, 52 Pa.D.&C. 4th 14, 20 & n.7 (C.P. Phila. Co. 2001). The comments to Section 1767(a)(2) further buttress this conclusion. The comments to Section 1767(a)(2), in pertinent part, provide the following:

> This new provision is intended to establish a statutory foundation for the development on a case-by-case basis of safeguards for incorporated partners in dealing with each other, rather than forcing the courts to distort the general rules of corporate law in order to grant relief in closely held situations. **In the case of a closely held corporation, oppressive conduct often takes the form of freezing-out a minority shareholder by removing him from his various offices or by substantially diminishing his power or compensation; in the absence of paragraph (a)(2), the courts might feel constrained to look exclusively to direct injury to the shareholder's stock interest or to**

> **recharacterize the actual wrong as such a stock interest injury.** (emphasis added by the Court) Baron, supra, 52 Pa. D.&C. 4th at 20.

Section 1767(a)(2), as illustrated by the comments, provides substantially broad equitable power for the court to protect a "frozen out" minority shareholder such as Plaintiff. The Court adopts this approach to Plaintiff Pellegrino's claim in this case.

In permitting Plaintiff to seek compensation and relief, the Court is supported by the holding of the United States District Court for the Western District of Pennsylvania in Orchard v. Covelli, 590 F.Supp. 1548 (1984). In Orchard, the Court ordered Plaintiff to be paid fair market value for Plaintiff's interest in the corporation. The Court stated that:

> we must find a fair method of compensating Orchard for his interest...the Court will order the Defendants to provide Orchard the fair value of his interest in the corporation. Such relief is adequate to address his claim of breach of the fiduciary duty and is necessary to bring the business dealings of the parties to an end." Orchard, supra, 590 F.Supp. at 1560.

As to Count IV, conspiracy, the claim fails because a single entity cannot fully conspire with itself. Lackner v. Glosser, 892 A.2d 21, 35 Pa.Super. 2006. As aptly noted by the Commonwealth Court in an unpublished opinion, board members cannot be said to conspire with each other or with the corporation. Lilly v. Boots Saddle Riding Club, No. 57 C.D. 2009 (Pa. Cmwlth. July 17, 2009).[1] In order to be a conspiracy, more must occur than the majority shareholders voting against a minority shareholder. *See* Baire v. Purcell, 500 F.Supp. 2d 468 (M.D. Pa. 2007).

Finally, as to Count VI, for conversion, the Court believes that the pleading is sufficient in alleging that Plaintiff's stock is being taken at reduced value as a result of the majority shareholders' action. The amount of value allegedly lost constitutes property that was allegedly converted or misappropriated for Defendants' use.

O R D E R

AND NOW, this **12th** day of **February, 2016**, the motion for partial judgment on the pleadings is DENIED as to Counts II and VI. As to Count IV, judgment on the pleadings is GRANTED and the claim for conspiracy is DISMISSED.

BY THE COURT,

Hon. Richard A. Gray, Judge

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[1]Plaintiff names John and Jane Does 1-99 as Defendants. See, ¶8 of the complaint. These fictitious name defendants are not specifically plead to be individuals without affiliation or control within the corporation.