IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WILLIAM R. WILLIAMS, ROBERT S. WILLIAMS, & BRYAN P. WILLIAMS,	: NO. 18-1063
Plaintiffs,	:
v.	: CIVIL ACTION
GORDON C. BITLER, LEO M. WILLIAMS, JR., LYCOMING SUPPLY, INC., KAMATOMA EAST, LTD., & LYCOMING CONSTRUCTION SERVICES, LLC,	:
Defendants.	: *Thirteen Preliminary Objections*

MEMORANDUM OPINION

On September 5, 2018, Plaintiffs William R. Williams, Robert S. Williams and Bryan P. Williams (collectively "Plaintiffs"), children of decedents Leo M. Williams, Sr. and Josephine A. Williams,[1] filed a Complaint against Defendants Gordon C. Bitler ("Defendant Bitler"), Leo M. Williams, Jr. ("Defendant Williams"), Lycoming Supply, Inc. ("LS Inc."), Kamatoma East, Ltd. ("KE Ltd."), and Lycoming Construction Services, LLC ("LCS LLC").[2] Plaintiffs aver violations of fiduciary duties and conspiracy based on the failure to properly distribute certain corporate shares in accordance with Leo M. Williams, Sr.'s May 2, 1990 will ("Will").

[1] Plaintiffs' Complaint, ¶12. Defendant Leo M. Williams, Jr. is also a child of the decedents. *Id.*
[2] Defendant Williams is the president and owner of KE Ltd., as well as the owner of LSC LLC.

I. FACTUAL HISTORY[3]

A. Tenets of Leo M. Williams, Sr.'s Will

Pursuant to the terms of the Will, Defendant Leo Williams, Jr., Plaintiff Robert Williams, and Plaintiff Bryan Williams were bequeathed 19%, 18%, and 12%, respectively, of Leo M. Williams, Sr.'s shares in LS Inc.[4] Because Josephine A. Williams survived her husband Leo M. Williams, Sr., provisions of the Will were triggered and required that his executors divide his residuary estate into two parts—Share No. 1 and Share No. 2 ("Trust Share No. 2")—to be held in separate trusts.[5] Trust Share No. 2 is the focus of this litigation.

On December 20, 1990, Leo M. Williams, Sr. passed away, and Trust Share No. 2 was formed.[6] Pursuant to the terms of the Will, Josephine A. Williams and Williamsport National Bank were appointed executors of the estate, as well as trustees.[7] On May 15, 1991, Williamsport National Bank renounced its right to administer the estate.[8] On July 1, 1991, Josephine A. Williams was granted letters testamentary and appointed executrix of the estate of Leo M. Williams, Sr.[9] On June 3, 1992, Defendant Bitler, doing business as Bitler & Associates, was appointed by order of court to serve

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[3] The following recitation of facts is based on the averments in Plaintiffs' Complaint. *See Phil. Factors, Inc. v. Working Data Grp., Inc.*, 849 A.2d 1261, 1264 (Pa. Super. Ct. 2004).
[4] Plaintiffs' Complaint, ¶17. Plaintiff William Williams possesses a remainder interest under the Will. *Id.*, Ex. A, at 2.
[5] *Id.*, ¶19. Plaintiffs aver that this separation likely did not occur since it is not clear that Share No. 1 was created according to the terms of the Will. Accordingly, as Share No. 2 depended on share deductions allocated from Share No. 1, Share No. 2 appears to exist as an invalid trust. *Id.*, ¶¶20-23. However, for the sake of Plaintiffs' complaint, they reserved argument as to whether Trust Share No. 2 is a valid trust. *Id.*, ¶23.
[6] *Id.*, ¶27.
[7] *Id.*, ¶26.
[8] *Id.*, ¶28.
[9] *Id.*, ¶29.

as co-trustee with Josephine A. Williams.[10] Josephine A. Williams passed away on September 5, 2015.[11]

B. Ownership Interests in LS Inc.

LS Inc. has only authorized and issued 1,000 shares of stock, including three decommissioned treasury stocks.[12] Therefore, as of June 30, 2015, there were 997 outstanding shares.[13] Leo M. Williams, Sr.'s estate held 996 shares and Josephine A. Williams held one (1) share.[14] As noted above, Leo M. Williams bequeathed 488 of those shares to Defendant Williams, Plaintiff Robert Williams, and Plaintiff Bryan Williams, leaving 508 shares in his residuary estate.[15] Josephine A. Williams bequeathed her one (1) share to Defendant Williams in her will.[16] Plaintiff Robert Williams and Plaintiff Bryan Williams sold their 18% and 12% respective share ownership in LS Inc. (totaling 299 shares) back to LS Inc., which then sold those shares to Defendant Williams.[17] Because the Will requires Trust Share No. 2 to be divided into five equal shares among Plaintiff William Williams, Plaintiff Robert Williams, Plaintiff Bryan Williams, Defendant Williams, and Bonnie Noviello, the interest in the 508 shares held in Trust Share No. 2 as residuary are:

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[10] *Id.*, ¶30.
[11] *Id.*, ¶32.
[12] *Id.*, ¶33.
[13] *Id.*, ¶34.
[14] *Id.*, ¶¶35-36.
[15] *Id.*, ¶¶38-39
[16] *Id.*, ¶37.
[17] *Id.*, ¶40, Ex. B (January 21, 2009 Option Agreement between Defendant Williams, as shareholder and Josephine A. Williams and Defendant Bitler as directors of LS Inc., as well as a January 21, 2009 Exercise Notice signed by Defendant Williams, and an April 21, 2009 Promissory Note).

Plaintiff William Williams	20%
Plaintiff Robert Williams	20%
Plaintiff Bryan Williams	20%
Defendant Williams	40%[18]

C. Corporate Agreements

After Leo M. Williams, Sr.'s death, LS Inc. engaged in multiple agreements related to its evaluation and shares.[19] On February 2, 1993, LS Inc. and Trust Share No. 2 entered into an agreement ("1993 Agreement") that required the value of Trust Share No. 2 to be reevaluated each fiscal year, noting that if a reevaluation was not performed then the value would be the higher of either the last previously stipulated value, or the book value as of the date of Josephine A. Williams's death ("failure to stipulate clause").[20] This agreement was executed by Josephine A. Williams as president of LS Inc. and Josephine A. Williams and Defendant Bitler on behalf of Trust Share No. 2.[21] Plaintiff avers that neither party received consideration for entering into the agreement, and the other beneficiaries were not consulted or advised of this agreement.[22] On June 8, 1995, a corporate resolution was promulgated wherein LS Inc.'s board of directors rescinded the 1993 Agreement between LS Inc. and Trust Share No. 2.[23]

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[18] Plaintiffs' Complaint, ¶43. On July 3, 2006, Bonnie P. Noviello, daughter of Leo M. Williams, Sr., also sold any interest she had in the share remaining in the residuary estate to Defendant Leo Williams, Jr. *Id.*, ¶41, Ex. C ("Agreement to Assign Interest in Trust").

[19] *Id.*, ¶44.

[20] *Id.*, ¶¶45-48, Ex. D (noting a current value of $500,000). The 1993 Agreement also stated that LS Inc. had purchased a life insurance policy worth $750,000.00, which insured the life of Josephine A. Williams and would be used to purchase the shares in Trust Share No. 2 upon her death. *Id.*, ¶49.

[21] *Id.*, ¶51. Plaintiff Robert Williams's name also appears under the witness paragraph as corporate secretary for LS Inc. Plaintiffs' Complaint, Ex. D.

[22] *Id.*, ¶¶52-53.

[23] *Id.*, ¶54, Ex. E. This corporate resolution was signed by Patricia Williams, as secretary; Josephine A. Williams; Defendant Bitler; and—what appears to be—Defendant Williams. Plaintiffs' Complaint, Ex. E.

On November 28, 1995, Defendant Williams and Trust Share No. 2 entered into an agreement ("1995 Agreement") that bound Trust Share No. 2 to sell its shares to Defendant Williams upon Josephine A. Williams's death.[24] Although the 1995 Agreement also possessed a failure to stipulate clause, its second criteria for evaluation was not based on the book value, but the value of Trust Share No. 2's assets at the time of Josephine A. Williams's death.[25] Josephine A. Williams and Defendant Bitler, as trustees for Trust Share No. 2, and Defendant Williams executed this agreement.[26] Plaintiff avers that neither party received consideration for entering into the agreement, and the other beneficiaries were not consulted or advised of this agreement.[27]

On January 22, 1999, a corporate resolution ("1999 Resolution") was declared by LS Inc.'s board of directors which amended the corporate bylaws as follows:

> The price of an outstanding share of Lycoming Supply Inc. stock shall be valued using the book value method of the most recent audited financial statement for the purpose of buying, selling or satisfaction of any legal document. However, the Board of Directors shall have the right to reject any and all purchases and/or sales and shall have the final determination by unanimous vote of share pricing.[28]

The resolution was signed by Josephine A. Williams, Defendant Bitler, and Defendant Williams.[29] Plaintiffs assert that the 1999 Resolution does not reflect

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[24] *Id.*, ¶¶58-60, Ex. F. The 1995 Agreement stated that the current value of Trust Share No. 2 was $750,000. *Id.*, ¶¶61-62.

[25] *Id.*, ¶¶62-63. The 1995 Agreement required that Defendant Williams possess a life insurance policy worth $750,000, which would be used to purchase the shares of Trust Share No. 2 upon Josephine A. Williams's death. *Id.*, ¶64. According to the agreement, Defendant Williams obtained this insurance; however, the policy number is identical to the policy number identified in the 1993 Agreement. *Id.*, ¶¶65-66.

[26] *Id.*, ¶67.

[27] *Id.*, ¶¶68-69.

[28] Plaintiffs' Complaint, Ex. G.

[29] *Id.*

any consideration or reason why the valuation method was altered.[30] Plaintiffs again aver that Defendant Bitler did not consult with the other beneficiaries regarding this decision.[31]

On January 22, 2009, Defendant Williams and Trust Share No. 2 entered into an agreement ("2009 Agreement") that "amend[s] and restate[s]" the entire 1995 Agreement.[32] The 2009 Agreement grants Defendant Williams the option to purchase up to 304.8 of LS Inc.'s shares with purchase price per share determined by the book value at the end of the most recent fiscal year, but not less than $835.45 per share.[33] Josephine A. Williams and Defendant Bitler, as trustees for Trust Share No. 2, and Defendant Williams executed this agreement.[34] Plaintiffs again assert that the 2009 Agreement does not reflect any consideration or evidence that Defendant Bitler consulted with, or advised, the other beneficiaries regarding the agreement.[35]

On July 7, 2016, a fourth agreement ("2016 Agreement") was entered into between Defendant Williams and Trust Share No. 2.[36] The 2016 Agreement set the price per LS Inc. share at $1,562.18—totaling $476,152.46 for 304.8 shares.[37] Defendant Williams and Defendant Bitler, as sole surviving trustee of Trust Share No. 2, executed this agreement.[38] Plaintiffs assert that the 2016 Agreement does not reflect

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[30] *Id.*, ¶71.
[31] *Id.*, ¶73.
[32] *Id.*, ¶¶74-76, Ex. H.
[33] *Id.*, ¶78. The number of shares is based on the 101.6 shares that Defendant Williams was entitled to receive under the Will in addition to the 101.6 share interest that Defendant Williams purchased from Bonnie P. Noviello subtracted from the 508 shares held by Trust Share No. 2. *Id.*, ¶77. Defendant Williams's option allows payment by promissory note over sixty (60) monthly installments. *Id.*, ¶79.
[34] *Id.*, ¶80.
[35] *Id.*, ¶¶81-82.
[36] *Id.*, ¶¶83-84, Ex. I.
[37] *Id.*, ¶85. This total was payable over sixty (60) monthly installments with an interest rate of 3.25% per annum. *Id.*
[38] *Id.*, ¶86.

any consideration or evidence that Defendant Bitler consulted with, or advised, the other beneficiaries regarding the agreement.[39]

D. Plaintiffs' Claims

Plaintiffs argue that Defendant Bitler has failed to inform Plaintiffs, who possess a total of 60% beneficial interest in Trust Share No. 2, of the aforementioned transactions.[40] Since December 2016, Plaintiffs have unsuccessfully requested that Defendant Bitler distribute the LS Inc. shares directly to the beneficiaries, so they could negotiate the valuation of LS Inc. shares.[41] Alternatively, Plaintiffs have also requested Defendant Bitler provide justification as to why book value valuation is appropriate and consistent with the Will.[42] Defendant Bitler has failed to provide justification or supportive documentation.[43] A companion Orphans' Court matter is pending in this county regarding these methods and Defendant Bitler's failure to provide an accounting as trustee of Trust Share No. 2.[44]

Under Count I, Plaintiffs assert a breach of fiduciary duty/duty of loyalty against Defendant Bitler, as trustee of Trust Share No. 2, pursuant to the Pennsylvania Uniform Trust Act, 20 Pa.C.S. § 7701, *et seq*.[45] Plaintiffs claim that Defendant Bitler failed to administer the trust in "good faith, in accordance with its provisions and purposes and the interests of the beneficiaries."[46] Plaintiffs specifically aver that Defendant Bitler "intentionally withheld information and documentation from Plaintiffs so that he could fix

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[39] *Id.*, ¶¶87-88.
[40] *Id.*, ¶90. Plaintiffs also argue that the agreements are void for lack of valid consideration. *Id.*, ¶89.
[41] *Id.*, ¶¶93-94.
[42] *Id.*, ¶96.
[43] *Id.*, ¶95.
[44] The companion case (OC-41-91-0340) has been stayed pursuant to the Honorable Dudley N. Anderson's October 2, 2018 Order.
[45] *Id.*, ¶¶105-37.
[46] *Id.*, ¶¶109-10.

the share prices of [LS Inc.] to benefit one beneficiary, [Defendant Williams]."[47] Plaintiffs are seeking Defendant Bitler's removal as trustee and damages. Under Count II, Plaintiffs assert a breach of fiduciary duty/duty of loyalty against Defendant Bitler and Defendant Williams, as members of LS Inc.'s board of directors, pursuant to 15 Pa. C.S. § 512.[48] Plaintiffs aver that Defendant Bitler's and Defendant Williams's actions diminished the value of LS Inc.[49] Plaintiffs request that the Court "appoint a receiver for LS Inc. who shall have sufficient authority over its affairs," as well as enter an award of damages.

Under Count III, Plaintiffs assert a claim of aiding and abetting breach of fiduciary duty against all Defendants.[50] Plaintiffs allege that Defendant Williams individually, as president, and owner of KE Ltd. and owner of LCS LLC, aided and abetted Defendant Bitler "by encouraging [Defendant] Bitler to take actions [sic] diminishing the value of shares of [LS Inc.]."[51] Plaintiffs also claim that KE Ltd. and LCS LLC "aided and abetted [Defendant] Williams in the breach of his fiduciary duty owed to [LS Inc.] as a member of its Board of Directors."[52] Plaintiffs seek an entry of damages against Defendants.

Under Count IV, Plaintiffs assert a claim of abuse of minority shareholders' rights against Defendant Williams for his use of his "business connections and capital, without fair consideration, of [LS Inc.] to build up his other business entities."[53] Plaintiffs particularly state that Defendant Williams's other business entities have "prospered in

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[47] *Id.*, ¶124.
[48] *Id.*, ¶¶138-43.
[49] *Id.*, ¶141.
[50] *Id.*, ¶¶144-55.
[51] *Id.*, ¶¶145-46.
[52] *Id.*, ¶147.
[53] *Id.*, ¶157

areas where the work would have typically been undertaken by [LS Inc.]."[54] Further, Plaintiffs claim Defendant Williams "used his standing as the largest shareholder outside of Trust Share [No. 2] to continually revisit and renegotiate buy/sell agreements without consideration being paid for the revised buy/sell agreements."[55] Plaintiffs seek the appointment of a receiver for LS Inc. and an entry of damages. Finally, under Count V, Plaintiffs claim that Defendants committed civil conspiracy by "act[ing] in concert to violate Pennsylvania's Uniform Trust Act, commit breaches of fiduciary duties, and oppress minority shareholder rights."[56] Plaintiffs seek an award of damages.

II. THE PARTIES' CONTENTIONS

A. Defendant Bitler's Preliminary Objections

On September 25, 2018, Defendant Bitler filed four Preliminary Objections to Plaintiffs' Complaint.[57] First, Defendant Bitler argues that Plaintiffs cannot allege a breach of a fiduciary duty or breach of loyalty against board members under Count II when Plaintiffs lack standing under 15 Pa.C.S. § 1717 because they do not possess any LS Inc. shares.[58] Therefore, Defendant Bitler deems Plaintiffs' derivative claim a non-starter and requests it be stricken.[59] Second, pursuant to Pa.R.C.P. 1028(a)(3),

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[54] *Id.*, ¶158.
[55] *Id.*, ¶161.
[56] *Id.*, ¶166.
[57] Defendant Bitler conceded at argument that his fourth preliminary objection, which requests a dismissal based on the companion case proceeding in the Orphans' Court, is moot based on Judge Anderson's October 2, 2018 Order. Accordingly, Defendant Bitler's fourth objection and Defendant Williams's and Corporate Defendants' sixth objection are *overruled* as moot.
[58] Defendant Bitler's Preliminary Objections, ¶¶5-12 (Sept. 25, 2018) (hereinafter "Defendant Bitler Objections"). Defendant Bitler relies on *Winer Family Trust v. Queen* for the proposition that only shareholders can bring a derivative action against a corporation. *Id.*, ¶10 (citing *Winer Family Trust v. Queen*, 503 F.3d 319 (3d. Cir. 2007)). Although *Winner Family Trust* does note the distinction between direct and derivative suits, it does not stand for the proposition that a beneficial interest in a corporation prevents standing to bring a derivative suit. 503 F.3d at 338.
[59] Defendant Bitler also claims that "even if Plaintiffs were shareholders" Count II would still be dismissed based upon *Kauffman v. Dreyfus Fund Inc.* Defendant Bitler Objections, ¶11 (quoting *Kauffman v. Dreyfus Fund Inc.*, 434 F.2d 727, 732 (3d. Cir. 1970)). However, Defendant Bitler's quoted section in

Defendant Bitler argues that Plaintiffs' Count II cannot generally rely—"[f]or the reasons set forth herein"—on one-hundred and four (104) paragraphs to support their claim that Defendant Bitler and Defendant Williams violated their fiduciary duties to LS Inc.[60] Defendant Bitler requests that Count II be stricken or, alternatively, Plaintiffs be given leave to amend their complaint.[61] Third, Defendant Bitler argues that Plaintiffs' count of civil conspiracy against Defendant Bitler and Defendant Williams for their actions when on LS Inc.'s board of directors is meritless since a corporation (and by extension its agents) cannot conspire with itself.[62] Defendant Bitler requests that Count V be stricken.

On October 15, 2018, Plaintiffs filed their Answer to Defendant Bitler's Preliminary Objections. In response to the first objection, Plaintiffs note that a derivative action can be asserted by either a shareholder or an "owner of a beneficial interest in the shares," pursuant to 15 Pa.C.S. § 1782.[63] Regarding the second objection, Plaintiffs disagree that the *Pennsylvania Rules of Civil Procedure* require them to reiterate similar facts under the Count II heading, as many of the same paragraphs would have to be restated.[64] Related to the third objection, Plaintiffs argue that Count V is not limited to Defendant Bitler and Defendant Williams.[65] Further, Plaintiffs point out that Defendant

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Kauffman addresses how a shareholder is prohibited from claiming a direct injury based solely on diminution in share value. *Id.*; *see also Kauffman*, 434 F.2d at 732. The Court does not read Plaintiffs' second count as asserting a direct cause of action, but a derivative one based on Defendant Bitler and Defendant Williams violating 15 Pa.C.S. § 512 as directors of said corporation. Plaintiffs' Complaint, ¶139.

[60] Defendant Bitler Objections, ¶¶13-18.
[61] *Id.*, ¶119.
[62] *Id.*, ¶¶20-24.
[63] Plaintiffs' Answer to Preliminary Objections, ¶9 (Oct. 15, 2018).
[64] *Id.*, ¶¶17-19.
[65] *Id.*, ¶21.

Bitler and Defendant Williams are not alleged to have acted solely as agents of LS Inc.[66] In addition, Plaintiffs also claim that Defendant Bitler conspired in a non-director capacity, namely as an insurance agent.[67]

At the argument on February 8, 2019, Defendant Bitler submitted a *Brief in Support* of his Preliminary Objections ("Brief").[68] Defendant Bitler's Brief supplements his original objections with the following points. Regarding Plaintiffs' position that the law does not require them to be shareholders in order to bring a derivative action because they own "beneficial interests" in the shares under 15 Pa.C.S. § 1782, Defendant Bitler argues § 1782 has been "suspended" by the adoption of Pa.R.C.P. No. 1506.[69] Regarding Plaintiffs' civil conspiracy claim against Defendant Bitler in his capacity as an insurance agent, Defendant Bitler argues that such a claim is duplicative of Count III and; therefore, should be dismissed.[70]

B. Defendant Williams's, KE Ltd.'s & LCS LLC's Preliminary Objections

On October 19, 2018, Defendants Williams, KE Ltd. and LCS LLC (collectively "Defendant Williams and Corporate Defendants") filed six Preliminary Objections to Plaintiffs' Complaint.[71] They assert similar objections to Defendant Bitler in relation to Count II and Plaintiffs' lack of standing under 15 Pa.C.S. § 512; however, Defendant Williams and Corporate Defendants also argue that even if Plaintiffs possess standing,

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[66] *Id.*, ¶24.
[67] *Id.*, ¶23 (citing Plaintiffs' Complaint, ¶123).
[68] Brief in Support of Preliminary Objections of Gordon C. Bitler to Plaintiffs' Complaint (hereinafter "Defendant Bitler's Brief").
[69] *Id.* at 4.
[70] *Id.* at 7.
[71] Preliminary Objections of Defendants Leo M. Williams, Jr., Kamatoma East, Ltd. and Lycoming Construction Services, LLC to Plaintiffs' Complaint (Oct. 12, 2018) (hereinafter "Defendant Williams's Objections"). As noted previously, preliminary objection six will not be addressed as it too involves the Orphans' Court companion case.

they failed to bring the action on behalf of LS Inc.[72] Thus, they request Count II be dismissed.[73] Defendant Williams's and Corporate Defendants' second objection concerns Count III.[74] They argue that aiding and abetting breach of fiduciary duty, while recognized by Pennsylvania federal courts,[75] has not been expressly adopted by the Pennsylvania Supreme Court.[76] Alternatively, Plaintiffs cannot allege such a cause of action when they do not own shares and have failed to sufficiently plead Count III.[77] Therefore, Defendant Williams and Corporate Defendants request that Count III be dismissed.[78]

Defendant Williams and Corporate Defendants next argue that Plaintiffs cannot assert a claim for an abuse of minority shareholder rights when Plaintiffs are neither shareholders nor asserted the claim on behalf of LS Inc.[79] Alternatively, they argue that Plaintiffs cannot bring a direct action since Plaintiffs allege the injury occurred to LS Inc.[80] Hence, Defendant Williams and Corporate Defendants request that Count IV be dismissed.[81] Their fourth objection concerns Plaintiffs' attempt to assert a claim of conspiracy based on causes of action, Defendant Williams and Corporate Defendants allege, Plaintiffs cannot assert.[82] Secondarily, they agree with Defendant Bitler that a "single entity cannot conspire with itself, and as such, agents of a single entity cannot

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[72] *Id.*, ¶16 (citing 15 Pa.C.S. ¶ 517).
[73] *Id.*, ¶17.
[74] *Id.*, ¶22.
[75] *Id.*, ¶21 (citing *Fulton Bank, N.A. v. UBS Secs., LLC* , 2011 WL 5386376, at *15-16 (E.D. Pa. 2011)).
[76] *Id.*
[77] *Id.*, ¶¶24-25.
[78] *Id.*, ¶27.
[79] *Id.*, ¶¶32-34.
[80] *Id.*, ¶35.
[81] *Id.*, ¶37.
[82] *Id.*, ¶41.

conspire among themselves."[83] Defendant Williams and Corporate Defendants request that Count V be dismissed.[84]

In Defendant Williams's and Corporate Defendants' fifth objection, they also claim alternatively that Plaintiffs failed to allege facts that Defendants intended to injure Plaintiff.[85] Defendant Williams and Corporate Defendants assert that Plaintiffs' one-hundred and seventy (170) paragraphs that state "Defendants acted maliciously with the intent to injure Plaintiffs financially and acted without legal justification" is insufficient pursuant to Pa.R.C.P. No. 1028(a)(3).[86] Defendant Williams and Corporate Defendants request that Plaintiffs be directed to plead with specificity all facts that support said allegation.[87]

On November 1, 2018, Plaintiffs filed their *Answer to Defendants' Preliminary Objections*.[88] Plaintiffs' response to Defendant Williams's and Corporate Defendants' first objection restates their position regarding shareholder standing.[89] Plaintiffs also disagree with the insinuation that Plaintiffs were required to name LS Inc. as a plaintiff in order to properly bring a derivative suit, especially when Plaintiffs did not demand that LS Inc. file suit because Plaintiffs knew it would be futile.[90] In response to Defendant Williams's and Corporate Defendants' second objection, Plaintiffs believe the cause of action's reverberation in the state and federal court systems permit the action to survive

[83] *Id.*, ¶¶43-44.
[84] *Id.*, ¶46.
[85] *Id.*, ¶¶45, 54.
[86] *Id.*, ¶¶51-54.
[87] *Id.*, ¶55.
[88] Plaintiffs' *Answer to Preliminary Objections of Leo M. Williams, Jr., Kamatoma East, Ltd., and Lycoming Construction Services, LLC* (Nov. 1, 2018).
[89] *Id.*, ¶12.
[90] *Id.*, ¶16. Plaintiffs rely on Pa.R.C.P. No. 1506(a)(2) for support. *Id.*, ¶36.

this preliminary stage.[91] Regarding the third objection, Plaintiffs reiterate that their "beneficial interest" grants them standing.[92] In response to Defendant Williams's and Corporate Defendants' fourth objection, Plaintiffs again state that their claims against Defendant Bitler and Defendant Williams are not limited to their actions as agents of LS Inc.[93] Finally, Plaintiffs disagree that they have alleged insufficient facts for Count V, including the knowledge requirement of the wrong.[94]

C. Defendant LS Inc.'s Preliminary Objections

On October 22, 2018, LS Inc. filed two Preliminary Objections to Plaintiffs' Complaint. LS Inc. seeks dismissal of Count III for reasons articulated above—lack of standing and a non-cognizable claim.[95] Alternatively, LS Inc. requests that the Court not grant the "drastic remedy" of appointing a receiver.[96] In its second, and final, objection, LS Inc. argues that an entity and its agents cannot conspire against themselves.[97] On November 1, 2018, Plaintiffs filed their *Answer to LS Inc.'s Preliminary Objections*, staking similar positions as noted *supra*.[98]

At the argument on February 8, 2019, LS Inc. asserted an additional objection that the Court should dismiss it as a party because Plaintiff failed to plead criminally accusatory facts. Plaintiffs replied that they sufficiently pled that LS Inc. was involved in relation to the aiding and abetting and civil conspiracy counts.

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[91] *Id.*, ¶22 (relying on the analysis in *In re Student Finance Corp,* 335 B.R. 539 (D. Del. 2005), but not its conclusion).
[92] *Id.*, ¶32. Plaintiffs note that their claims are based on a derivative action; however, they also reserve argument on the question of whether fiduciary duties were due to them directly as owners of a beneficial interest. *Id.*
[93] *Id.*, ¶43.
[94] *Id.*, ¶¶52-53.
[95] Defendant Lycoming Supply, Inc.'s Preliminary Objections to Plaintiffs' Complaint, ¶23 (Oct. 22, 2018).
[96] *Id.*, ¶30.
[97] *Id.*, ¶¶35-38.
[98] Plaintiffs' Answer to Preliminary Objections of Lycoming Supply, Inc., ¶¶22, 26-28, 37 (Nov. 1, 2018).

III. DISCUSSION

In a laconic effort, the Court will address the various objections in topical form.

A. Derivative Action Based on a "Beneficial Interest"

1. Pennsylvania Statutory Authority

Pennsylvania law concerning fiduciary duties broadly permits a "shareholder" to bring "an action in the right of the corporation," but prevents the "shareholder" from enforcing the corporation's right as his or her own right.[99] In relation to this statute, "shareholder" is defined in 15 Pa.C.S.A. § 1103 as a "record holder or record owner of shares of a corporation, including a subscriber to shares."[100] However, the 2014 committee comment to § 1103 notes that the "status of 'shareholder' is generally limited to record owners, but see the definition of 'shareholder' in 15 Pa.C.S. § 1572."[101] Under § 1572, which concerns dissenter rights, "Shareholder" includes an "ultimate beneficial owner of shares [. . .] where the beneficial interest owned includes an interest in the assets of the corporation upon dissolution."[102] The 2001 committee comment to § 1572 notes that § 1103's inclusion of "ultimate beneficial owner" was "intended to broaden the availability of dissenters rights."[103]

Related to corporations generally, Pennsylvania law requires a plaintiff's derivative suit to allege that he or she "was a shareholder or was a member of the corporation at the time of the transaction."[104] Regarding domestic corporations, Pennsylvania corporate law authorizes a "shareholder of the corporation or owner of a

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[99] 15 Pa.C.S.A. § 1717.
[100] 15 Pa.C.S.A. § 1103 (defining a "subscriber" as "[o]ne who subscribes for or otherwise takes shares by agreement from the issuing corporation, whether before or after incorporation.").
[101] *Id.*, cmt.
[102] 15 Pa.C.S.A. § 1572.
[103] *Id.*, cmt. The comment states that this beneficial ownership is dependent on an interest in distribution upon liquidation, a right to dividends or voting rights are insufficient. *Id.*
[104] 15 Pa.C.S.A. § 523.

beneficial interest in the shares" to file a derivative action on behalf of the corporation.[105] "Beneficial interest" is not defined in relation to this statute, 15 Pa.C.S. § 1782. The 2016 committee comment to § 1782 states: "Subsections (a) and (b) were suspended by [Pa.R.C.P. No. 1506(e)], amended April 12, 1999, insofar as inconsistent with Rule No. 1506 relating to stockholder's derivative action."[106] Rule 1506(e) states that § 1782 "shall be suspended only insofar as it is inconsistent with the provisions of this rule."[107] Rule 1506(a) authorizes a derivative action to be bought by a "stockholder or owner of an interest in the corporation or other entity."[108] The explanatory comment to Rule 1506 adopts § 1782's language "owner of a beneficial interest" when discussing its pleading requirement under subsection (a)(3)(i), which only uses the language "owner of an interest in the corporation."[109]

Based on a plain reading of the applicable statutes, the Court disagrees with Defendants that the "owner of a beneficial interest" language in § 1782 is inconsistent with Rule 1506's language, "owner of an interest." Indeed, it is unclear how the latter's word choice of "interest" could denote an unbeneficial connotation in this context. Surprisingly, the Court's own research has failed to reveal a case, and the parties have not cited to a case, that directly analyzes the issue now raised—*whether a trust beneficiary can bring a derivative action on behalf of a corporation based on a claim of devaluation of the corporations shares that are held as part of the trust corpus*. To be sure, this issue was raised in *Gehris Family Trust v. Bowlorama, Inc.*; however, the

[105] 15 Pa.C.S.A. § 1782 ("shareholder of the corporation or owner of a beneficial interest in the shares at the time of the transaction of which he complains, or that his shares or beneficial interest in the shares devolved upon him by operation of law from a person who was a shareholder or owner of a beneficial interest in the shares at that time.").
[106] *Id.*, cmt.
[107] Pa.R.C.P. No. 1506(e)(1).
[108] Pa.R.C.P. No. 1506(a)(1).
[109] Pa.R.C.P. No. 1506(a)(3).

Pennsylvania Superior Court found that the Berks County Court of Common Pleas failed to engage in proper fact-finding and remanded the matter.[110] Similarly unhelpful is *Spear v. Fenkell*, where the United States District Court for the Eastern District of Pennsylvania denied a motion to dismiss on the issue of whether a participant in an employee stock ownership plan could bring a derivative claim on behalf of the corporation as an "equitable shareholder," noting the "uncertain state of Pennsylvania law."[111]

Plaintiffs' counsel has provided the Court with a York County Court of Common Pleas's decision that holds an "equitable interest" is sufficient to grant "shareholder standing;" yet, the court simply cites to a corporate encyclopedia.[112] Moreover, the Court does not ultimately decide the issue of what constitutes an "equitable interest" because the decedent's will was subject to a "Restrictive Stock Agreement" that required the shares be apportioned in installments.[113] Therefore, the shares were not yet part of the Trust corpus.[114] In the case *sub judice*, there is no dispute that the LS Inc. shares are held in Trust.

Because this corporate issue appears to remain unresolved, this Court turns to our sister jurisdiction with considerable authority in corporate law for further guidance.[115]

2. Delaware Precedent

[110] *See Gehris Family Trust v. Bowlorama, Inc.*, 2018 WL 2437977, at *4 (Pa. Super. Ct. May 31, 2018).
[111] *Spear v. Fenkell*, 2015 WL 3643571, at *25 (E.D. Pa. June 12, 2015).
[112] Plaintiffs' Answer to Preliminary Objections, ¶9 (citing *Carey v. Landis*, 15 Pa. D. & C. 3d 17 (York Com. Pl. 1980)); *see also Carey v. Landis*, 1980 WL 594, 15 Pa. D. & C. 3d 17, 20 (York Com. Pl. 1980).
[113] *Carey*, 15 Pa. D. & C. 3d at 21.
[114] *Id.*
[115] Lewis S. Black, Jr., *Why Corporations Choose Delaware* 1 (Del. Dep't of State 2007).

Implicative of Pennsylvania's criteria for a derivative action,[116] Delaware law requires the following:

> In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was *a stockholder of the corporation at the time of the transaction* of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law.[117]

Despite the restrictive language of "shareholder" in the Delaware Code, the Delaware Court of Chancery has held that the term "shareholder" incorporates an "equitable owner" of stock.[118] In *Rosenthal v. Burry Biscuit Corporation*, the Court of Chancery was confronted with a corporate board, controlled by the President of Burry Biscuit Corporation (the "Corporation"), who voted to pass a resolution that would grant the President, or his estate, an option to purchase 50,000 shares of common stock at $6.00 per share within five (5) years of September 28, 1945.[119] In the bald adoptive resolution, the stated purpose was to allow the President an ability to gain a "substantial interest" in the corporation.[120] Prior to the adoption of this resolution, the plaintiff had purchased 2,500 shares of common stock in the Corporation through a broker.[121] The plaintiff's stocks were not transferred into his name on the Corporation's books until January 28, 1946.[122] Thus, the Court of Chancery was required to determine whether a non-record owner of stock could bring a derivative action.[123]

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[116] 15 Pa.C.S.A. § 523 ("the plaintiff or plaintiffs must aver and it must be made to appear that the plaintiff or each plaintiff was a shareholder or was a member of the corporation at the time of the transaction of which he complains or that his stock or membership devolved upon him by operation of law from a person who was a shareholder or member at that time[. . .]").
[117] 8 Del. Code § 327 (emphasis added).
[118] *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 108 (Del. Ch. 1948).
[119] *Id.*
[120] *Id.*
[121] *Id.* at 107.
[122] *Id.*
[123] *Id.* at 110, 111

The *Rosenthal* Court noted that prior to the state's adoption in 1945 of § 327's predecessor, Delaware law did not require a complaining "stockholder" to own actual shares.[124] Previously, once the shares were received they granted the new possessor the right to sue for past wrongs.[125] Delaware, as well as Pennsylvania,[126] lifted this new corporate share requirement from the United States Supreme Court's language in *Hawes v. Oakland*.[127] The purpose of Delaware's adoption of this facet of *Hawes* was to curb the purchasing of shares solely to dispute the appropriateness of an earlier transaction.[128] In light of this purpose, the *Rosenthal* Court viewed the question of whether equity ownership itself was sufficient to assert a derivative claim as unmoored from the technicality of the share ownership requirement in § 327's predecessor.[129] Because a corporation's right to recover is not lost when an equitable owner brings a derivative suit, the court saw no need to adhere to the "rigidity" of actual share ownership.[130] Indeed, the corporation's interests are not negatively impacted as long as the plaintiff can establish that he or she has a stake in the outcome of the action in so far as his or her ownership will be disturbed.

The Court of Chancery distinguished its decision in *Rosenthal* from its prior decision in *Salt Dome Oil Corporation v. Schenck* based on the latter rigidly interpreting

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[124] *Id.* at 110.
[125] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1047 (Del. Ch. 2015), *judgment entered sub nom.*, 2015 WL 2415559 (Del. Ch. May 20, 2015) (citing *Rosenthal v. Burry Biscuit Corp.,* 60 A.2d 106, 111 (Del. Ch. 1948)) ("Before [8 Del. C. § 327's predecessor's] adoption, both the right to sue and the right to benefit indirectly from any derivative recovery passed with the shares.").
[126] *See Weston v. Reading Co.*, 282 A.2d 714, 722 (Pa. 1971).
[127] *Rosenthal*, 60 A.2d at 110-11. The doctrine of contemporaneous ownership is not without its critics. *See, e.g.*, *In re Activision Blizzard, Inc.*, 124 A.3d at 1048 ("For reasons discussed at length elsewhere, I do not believe that a coherent and credible policy justification has ever been offered for Section 327's limitation on the ability of stockholders to assert pre-transfer claims.") (citing J. Travis Laster, *Goodbye to the Contemporaneous Ownership Requirement*, 33 DEL. J. CORP. L. 673 (2008)).
[128] *Rosenthal, 60 A.2d at 110-11.*
[129] *Id.*
[130] *Id.* at 112.

the term "stockholder" where equitable principles were not at play.[131] The court in *Salt Dome* was concerned with whether an individual could mount a direct claim against the corporation.[132] The *Rosenthal* Court believed its analysis rightfully diverged from *Salt Dome* in order to: (1) accommodate an equitable owner of stock, (2) who requested an equitable remedy, (3) before a court of equity.[133] Since *Rosenthal*'s promulgation, the Delaware Supreme Court has approvingly cited its holding on this issue.[134] Although *Rosenthal* did not define the scope of the equitable ownership interest for derivative purposes, the Court of Chancery subsequently held that a trust beneficiary qualifies as an equitable owner and may bring a derivative action if the trustee refuses.[135] Congruously, since *Rosenthal*, the Court of Chancery has liberally construed § 327's "shareholder" requirement as long as there is an eventuality that the plaintiff will become record owner of the shares.[136]

3. An Equitable Analysis

Based on the well-reasoned opinion of the Delaware Court of Chancery in *Rosenthal*, and its progeny, the Court is unable to propose a valid reason why a trust beneficiary should be disallowed from bringing a corporate derivative suit when the self-

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[131] *Id.* (citing *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 586, 589 (Del. Ch. 1991)).
[132] *Id.*
[133] *Id.*
[134] *See Gamble-Skogmo, Inc. v. Saks*, 122 A.2d 120, 121 (Del. 1956) (finding that a stockholder whose stock is held on margin under a broker contract is an equitable stockholder). *Rosenthal* has also been relied on by the United States Court of Appeals for the Third Circuit. When addressing an appeal from the United States District Court for the Western District of Pennsylvania, the Third Circuit relied on *Rosenthal* in holding that a nonregistered owner of stock is a "shareholder" for derivative suit purposes because the plaintiff was an "equitable or beneficial owner." *See Murdock v. Follansbee Steel Corp.*, 213 F.2d 570, 572 (3d. Cir. 1954) (Plaintiffs' stock was unregistered, but represented by street certificates in the name of stockbrokers).
[135] *See Brown v. Dolese*, 154 A.2d 233, 239 (Del. Ch. 1959), *affirm'd*, 154 A.2d 784 (Del. 1960); *accord The Revival of the Derivative Suit*, 116 U. PA. L. REV. 74, 94 (1967); R. Franklin Balotti & Jesse A. Finkelstein, *Requirements of Stock Ownership*, DEL. L. OF CORP. & BUS. ORG. § 13.11 (3d. ed. 2019).
[136] *Jones v. Taylor*, 348 A.2d 188, 190-92 (Del. Ch. 1975) (finding that the daughter could bring a derivative suit as an equitable owner on behalf of the corporation because her mother had agreed to execute a will bequeathing one-half of the mother's shares to the daughter).

interested trustee is unwilling.[137] As Delaware precedent clarifies, it strikes this Court that a determination amidst equitable doctrines should focus on the "substance of the relationship," instead of the formality of title.[138] As has been recognized:

> Since equity regards substance rather than form, [. . .] the owner of the equitable title to shares of stock is a stockholder in a fuller sense than is the owner of the naked legal title. Assuredly it is not the purpose of ... [the federal equivalent of 15 Pa.C.S. § 523] to afford the holder of the naked legal title to shares of stock a right of action and to deny the holder of a higher right, the equitable title, such a privilege. The protection of the law would hardly be denied to the owner of the substance, meanwhile being accorded to the holder of the shadow.[139]

One of the arguments offered against allowing a trust beneficiary to bring a derivative suit is because class status is required, so other beneficiaries' interests are also protected.[140] However, this misunderstands the goal of a derivative action; the plaintiff is not suing on behalf of the beneficiaries, but the corporation.[141] Further, such a stance confuses the requirements of a class action and a derivative suit.[142] A second concern is the usurpation of power from the trustee and trust beneficiaries with lesser equitable

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[137] This Court's holding is not unique. *See, e.g.*, *Pearce v. Berry Holding Co.*, 149 Ca. 3d 1058 (Cal. App. Dep't super. Ct. 1983) (holding that a trust beneficiary possesses a beneficial interest in a corporation); *1993 Trust of Joan Cohen v. Baum*, 2017 NY Slip Op. 30894, at 6 (NY Supr. Ct. May 2, 2017) (finding the third party plaintiff could not maintain a derivative action since he was not a beneficiary of the trust). Moreover, some states have avoided such peculiarities now addressed by including language in the definition of "shareholder" which dispels most of the uncertainty (a variant of, "or held by a nominee on behalf of the beneficial owner"). *See, e.g.*, Robert J. McGaughey, *Derivative Lawsuits* 6 (2010), http://www.law7555.com/wp-content/uploads/2015/08/derivativelawsuits4-5-10.pdf (last visited Apr. 13, 2019) (citing ORS 60.261(4)); Mary C. Burdette, Presentation at Tx. Adv. Estate Plan. & Prob. Symposium, *Fiduciary Duties within Fiduciary Duties: Trust Owning Stock in a Closely-Held Corporation* 18 (June 27, 2012) (citing Tx. Bus. Orgs. Code § 21.551).

[138] *See In re Carlisle Etcetera LLC*, 114 A.3d 592, 607 (Del. Ch. 2015).

[139] *One of Many Beneficiaries of an Active Trust Is Not A Shareholder of the Corporation Whose Stock Is Held*, 108 U. PA. L. REV. 1231, 1234 (1960) (quoting *Hurt v. Cotton States Fertilizer Co.*, 145 F.2d 293, 295 (5th Cir. 1944), *cert. denied*, 324 U.S. 844 (1945)).

[140] *See Matthies v. Seymour Mfg. Co.*, 270 F.2d 365, at *9 (2d. Cir. 1959), *reconsid. denied*, 271 F.2d 740 (2d. Cir. 1959), https://law.justia.com/cases/federal/appellate-courts/F2/270/365/348331/ (last visited Apr. 13, 2019).

[141] *Id.* at 12 (Waterman, J., concurring in part and dissenting in part).

[142] *Id.* at 13.

interests—for example, defeasible interests versus remainder interests.[143] This concern similarly misunderstands the purpose of a derivative suit.

According to the Court's independent research, a "beneficial interest" has only been deemed insufficient to grant standing in a derivative action when the interest is not equitable (i.e. when an "intermediate step," beyond gaining possession of the shares, is required).[144] For instance, in *Harff v. Kerkorian* the Delaware Court of Chancery held that debenture holders could not sue derivatively on behalf of the corporation.[145] This is because convertible debentures are not equitable until converted under limited circumstances.[146] In other words, it is not an eventuality that the plaintiff will become record owner of the shares. While a regular citizen can purchase stock with cash, the citizen is not granted the right to sue on behalf of the corporation pre-purchase.[147] As *Harff* is not analogous, and Plaintiffs' interest in protecting their future shares align with LS Inc.'s corporate interests,[148] the Court finds that a trust beneficiary can assert a derivative claim pursuant to Pennsylvania law as an equitable owner of a "beneficial interest" when the corporation's shares are part of the Trust corpus.

Based on the aforementioned, Defendant Bitler's first preliminary objection, Defendant Williams's and Corporate Defendants' first preliminary objection, and

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[143] *See* Judith Schemel Suelzle, *Trust Beneficiary Standing in Shareholder Derivative Actions*, 39 STAN. L. REV. 267, 287, 290 (1986) (arguing that a trust beneficiary should be able to sue derivatively if he or she can demonstrate that the trustee cannot, or will not, sue).

[144] *Harff v. Kerkorian*, 324 A.2d 215, 219-20 (Del. Ch. 1974), *aff'd on this ground only*, 347 A.2d 133 (Del. 1975) ("The Court of Chancery ruled that debenture holders lack standing under Delaware law to sue derivatively because they are not 'stockholders' under 8 Del.C. s 327. We affirm that ruling for the reasons stated in the Opinion below.").

[145] *Harff*, 324 A.2d at 219-20.

[146] *Id.* at 220.

[147] *Id.*

[148] *See Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) ("Mismanagement which depresses the value of stock is a wrong to the corporation; i.e., the stockholders collectively, to be enforced by a derivative action." (quoting *Bokat v. Getty Oil Co.*, 262 A.2d 246, 249 (Del. 1970)); *see also Kenworthy v. Hargrove*, 855 F. Supp. 101, 107 (E.D. Pa. 1994) (diminution in the value of a partner's interest in the partnership is a wrong to the partnership).

Defendant LS Inc.'s first preliminary objection are **OVERRULED**. Defendant Williams's and Corporate Defendants' alternative argument that Plaintiffs did not bring this action on behalf of LS Inc. is unpersuasive. Defendant Williams's and Corporate Defendants' argument is not specific regarding what is required to "bring" the action on behalf of the corporation, as they generally rely on 15 Pa.C.S.A. §§ 512, 1717.[149] Yet, neither statute establishes a specific pleading requirement. Plaintiffs have alleged a derivative action on behalf of LS Inc., and LS Inc. is a defendant in this suit based on the futility of demanding LS Inc. sue on its own behalf.[150] Plaintiffs' pleading is sufficient.[151] Likewise, Defendant Bitler's second objection as to the pleading specificity of Count II is **OVERRULED**. A plaintiff is not required to restate factual averments in his or her cause of action paragraphs when the factual averments are sufficiently specific.[152]

B. Aiding & Abetting Breach of Fiduciary Duty

Defendant Williams's and Corporate Defendants' second preliminary objection is **SUSTAINED**. This Court finds that the claim of aiding and abetting breach of fiduciary duty is not actionable in the Commonwealth since the Pennsylvania Supreme Court has

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[149] Defendant Williams also relies on *In re Insulfoams, Inc.*, but *In re Insulfoams* just generally discusses the derivative standing issue. Defendant Williams's Objections, ¶16 (citing 184 B.R. 694, 703 (Bankr. W.D. Pa. 1995), *aff'd*, *Donaldson v. Bernstein*, 104 F.3d 547 (3d Cir. 1997)). It does not establish specific pleading requirements.
[150] *See In re Westinghouse Sec. Litig.*, 832 F. Supp. 989, 996 (W.D. Pa. 1993) ("Demand will be excused where the plaintiff states with particularity allegations of participation, self-dealing, bias, bad faith or corrupt motive, such as an allegation that a majority of the defendant directors are insiders who have depleted and misappropriated corporate assets for their own personal gain (internal citation omitted) [. . . .]").
[151] Pa.R.C.P. No. 1506(a)(2); *see also Dukas v. Edwardsville Amusement Co.*, 50 Pa. D. & C. 622, 624 (Luz. Com. Pl. 1944) (corporation was pled as a defendant in a stockholder derivative action); *accord Khoury v. Oppenheimer*, 540 F. Supp. 737, 738 (D. Del. 1982) (noting the corporation is a "necessary party" in a shareholder's derivative suit).
[152] *See Shaheen v. The Williamsport Hospital*, No. 18-0188, Opinion & Order: Three Preliminary Objections 4 (Lyco. Com. Pl. Jan. 22, 2019) (citing *Estate of Denmark ex rel. Hurst v. Williams*, 117 A.3d 300, 307 (Pa. Super. Ct. 2015)).

not formally adopted it as a cause of action.[153] Granted, the United States District Court for the Eastern District of Pennsylvania strongly believes the Supreme Court will adopt the claim as a cause of action.[154] However, because it has not been formally adopted by the Pennsylvania Supreme Court,[155] no cause of action exists in the Commonwealth.[156] Therefore, Plaintiffs' Count III is stricken from the complaint.

C. Abuse of Minority Shareholder Rights

As previously discussed, Plaintiffs have standing as "beneficial owners" to allege a claim of abuse of minority shareholder rights.[157] Therefore, Defendant Williams's and Corporate Defendants' third objection is **OVERRULED**.

D. Civil Conspiracy

The Court agrees with Defendants that an entity (and its agents) cannot commit civil conspiracy against itself.[158] However, Plaintiffs have not solely alleged that

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[153] *See Fulton Bank, N.A. v. UBS Sec., LLC*, 2011 WL 5386376, at *15 (E.D. Pa. Nov. 7, 2011) ("[T]he Pennsylvania Supreme Court has not expressly adopted the Restatement (Second) Torts § 876(b) [. . . .]").
[154] *See Schwartzman v. Morningstar, Inc.*, 2014 WL 3843875, at *25 (E.D. Pa. Aug. 5, 2014).
[155] Importantly, it is unclear whether the Pennsylvania Supreme Court would formally recognize this claim as a cause of action, as it declined to do so previously when an opportunity *in dicta* arose. *See Official Comm. of Unsecured Creditors v. P.W.C.*, LLP, 293, 989 A.2d 313, 327 n.14 (Pa. 2010) ("Under present Pennsylvania law as established by the Commonwealth Court as the highest appellate court which has reached the issue, aiding and abetting a breach of fiduciary duty is a recognized cause of action. The Third Circuit has asked us to consider only whether *in pari delicto* applies in the context of such a claim, not the underlying viability of such a claim under Pennsylvania law." (internal citations omitted)).
[156] *See In re Student Finance Corp.*, 335 B.R. 539, 550-51 (D. Del. 2005) (concluding that the Pennsylvania Supreme Court would not adopt aiding and abetting breach of fiduciary duty as a valid cause of action after analyzing the conflicting positions taken by intermediate Pennsylvania state courts and federal Pennsylvania trial courts).
[157] *See Hill v. Ofalt*, 85 A.3d 540, 550 (Pa. Super. Ct. 2014) (noting "the long-recognized principle of Pennsylvania law that 'majority shareholders have a duty to protect the interests of the minority' ") (quoting *Ferber v. Am. Lamp Corp.*, 469 A.2d 1046, 1050 (Pa. 1983)).

Defendant Bitler and Defendant Williams were acting in their agential capacity.[159] Plaintiffs also alleged that Defendant Bitler was acting in his capacity as an insurance agent.[160] Therefore, Defendant Bitler's third objection, Defendant Williams's and Corporate Defendants' fourth objection, and Defendant LS Inc.'s second objection are **OVERRULED**. Defendant Williams's alternative fifth objection regarding pleading specificity is also **OVERRULED**, as Plaintiffs' Count V incorporates specific factual averments.

E. LS Inc.'s Status as a Defendant

LS Inc.'s oral amendment to its preliminary objections is **OVERRULED**. First, Plaintiffs have alleged that LS Inc. participated in the civil conspiracy.[161] Second, LS Inc. has been included as a defendant based on Plaintiffs' derivative action.[162] For these reasons, Defendant LS Inc. will not be dismissed as a defendant in this case.

IV. CONCLUSION

AND NOW, for the reasons discussed above, Defendant Williams's and Corporate Defendants' second preliminary objection regarding Plaintiffs' aiding and abetting claim is *sustained*. The remaining twelve preliminary objections are *overruled*.

IT IS SO ORDERED this 17th day of April 2019.

BY THE COURT:

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[158] *See Grose v. P & G Paper Prods. (In re Grose)*, 866 A.2d 437, 441 (Pa. Super. Ct. 2005). Defendants correctly rely on *Grose* for this proposition. However, Plaintiffs are also correct that *Grose* involves a claim of civil conspiracy by an employee against his supervisors. *Id.* at 439, 441. That is, *Grose* is dissimilar to this case where Plaintiffs assert civil conspiracy against Defendant Bitler and Defendant Williams in other capacities.

[159] Plaintiffs' Complaint, ¶123 (Defendant Bitler as trustee), ¶159 (Defendant Williams as shareholder and operator of LS Inc.).

[160] *Id.*, ¶¶ 5, 123, 148.

[161] *Id.*, ¶166.

[162] *See Fitzpatrick v. Shay*, 461 A.2d 243, 246 (Pa. Super. Ct. 1983) ("Moreover, in a derivative action, the corporation is a required party.") (citing Pa.R.C.P. No. 2177).

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Eric R. Linhardt, Judge

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