

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>BRIAN FERNANDER AND</b>	:	
<b>HELENE FERNANDER,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiffs</b>	:	
	:	
<b>v.</b>	:	<b>NO. 02-603</b>
	:	
<b>DIALA AMANZE a/k/a</b>	:	
<b>DEE AMANZE,</b>	:	
<b>Defendant</b>	:	

**STENGEL, J.**

**November 15, 2007**

**FINDINGS OF FACT**

1. Plaintiffs are Brian Fernander and Helene Fernander, who are residents of Florida.
2. Defendant is Diala Amanze, who is a resident of Pennsylvania.
3. In 1999, the pastor of Amanze’s church introduced him to Charles Lowry and Charles Groom.
4. At that time Lowry and Groom were operating what the Amanze and the Fernanders now agree was a Ponzi scheme involving a company called High Yield, Inc.
5. Lowry and Groom offered Amanze the opportunity to invest in High Yield, Inc.
6. The minimum investment was \$50,000.
7. In 1999 Amanze suggested to Brian Fernander that he had an investment opportunity in which he suggested hat the Fernanders should participate.
8. Amanze never specifically mentioned High Yield, Inc. or Lowry or Groom to them prior to mid-2001.

9. The Fernanders agreed to commit \$25,000 to the venture.
10. Amanze drew up a contract entitled Memorandum of Understanding.
11. It obligated Amanze to pay interest for 10 months and at the end return the principal.
12. The Fernanders gave Amanze the \$25,000, Amanze fully performed the contract, and he returned the \$25,000 at the end of the year.
13. Amanze took the Fernanders \$25,000 and another \$25,200 of his own money and wired it to Lowry and Groom.
14. Lowry and Groom defaulted on their payments to Amanze but ultimately returned to him the sum of \$50,000 from Amanze's initial investment.
15. Shortly after the first Memorandum of Understanding went into effect, Lowry and Groom offered to Amanze another opportunity to invest in High Yield, Inc.
16. In this deal, Lowry and Groom offered Amanze a car or a \$50,000 car credit if he was one of the first investors.
17. Amanze went back to the Fernanders and solicited another \$50,000 from them in August, 1999.
18. Amanze issued a second Memorandum of Understanding to the Fernanders.
19. The second Memorandum of Understanding was substantially similar to the first and did not disclose the existence of Lowry, Groom or High Yield, Inc.
20. Amanze took the money and wired it to Lowry and Groom.
21. Lowry and Groom defaulted on the second investment.
22. Not only did Lowry and Groom fail to make the interest payments on time, but they failed to provide Amanze with his car or car allowance.
23. Amanze did not disclose to the Fernanders that Lowry and Groom were in default on the second investment.

24. Rather, Amanze simply paid to the Fernanders what he was obligated to pay under the second Memorandum of Understanding.
25. The money to pay the Fernanders did not come from the “investment;” rather, it came from his own pocket.
26. In September, 2000, the contract memorialized by the second Memorandum of Understanding ended on its own terms.
27. At that time, Amanze was obligated to return the \$50,000 the Fernanders had given him.
28. He did not have those funds available at that time.
29. To have raised that money, he would have had to take a loan from a bank or sell property.
30. Amanze did not disclose to the Fernanders that he was not in position to pay them back.
31. Amanze did not disclose to the Fernanders that Lowry and Groom had failed to reimburse their capital.
32. In late 2000, Amanze solicited another investment from the Fernanders.
33. The Fernanders ultimately committed only \$200,000, \$50,000 of which was the money Amanze had not yet returned pursuant to the second Memorandum of Understanding.
34. The Fernanders wired \$150,000 to Amanze on December 12, 2000.
35. On March 16, 2001, Amanze finally faxed the Fernanders a third Memorandum of Understanding.
36. The third Memorandum of Understanding was similar to the first and second except as to amounts and dates.
37. By the time Amanze received the \$150,000 wire transfer, Groom and Lowry were seriously in default on the first and second investments as well as the third \$50,000 investment Amanze had made with his own money in September, 1999, and had

been over a year.

38. Amanze did not disclose the Lowry and Groom default to the Fernanders at this point.
39. Amanze had intended to wire the additional funds to Groom and Lowry, but he said they arrived “too late” to take advantage of the most recent High Yield, Inc. opportunity.
40. Instead, Amanze transferred \$120,000 of the Fernanders’ money to his own personal online stock and options account.
41. Amanze did not have any expertise in trading stocks and options.
42. Amanze purchased stocks and options with the cash, and within a matter of months he lost it all.
43. The trading began almost immediately after the funds were wired to Amanze by the Fernanders.
44. By the time Amanze faxed the third Memorandum of Understanding, a substantial portion of the funds had already been lost.
45. In January, 2001, Amanze sent a fax to the Fernanders disclosing that he was unable to invest in the Fernanders' money as expected in 2000, and he attempted to renegotiate the deal.
46. Amanze did not disclose that most of the money went into his stock and option account at that time.
47. Amanze made one \$7,000 “interest” payment to the Fernanders.
48. Amanze knew at the time he received the \$150,000 wire transfer that he would be unable to put the money into a High Yield, Inc. transaction.
49. Amanze knew at the time he received the \$150,000 wire transfer that the Fernanders would never have consented to have him use their money to trade stocks and bonds.
50. Amanze knew at the time he received the \$150,000 wire transfer that Lowry and

Groom were in default.

51. Amanze knew at the time he received the \$150,000 wire transfer that if he had disclosed the ongoing default of Groom and Lowry to the Fernanders that the Fernanders would never have entered into the transaction.
52. In June, 2001, Amanze finally disclosed to the Fernanders that he was having problems with their money.
53. In July, 2001, he gave a detailed explanation of the problems, but he still did not disclose the existence of Groom, Lowry and High Yield, Inc., nor did he mention to stock account.
54. To the contrary, he continued falsely to assure the Fernanders that their money was safe.
55. The relationship between the parties was one of trust.
56. The relationship between the parties was enhanced by the parties' common religious beliefs.
57. Amanze understood that he was being entrusted with the Fernanders' money, and he made reference to that trust in several communications.
58. Amanze alone had access to Lowry, Groom and High Yield, Inc.; the Fernanders had none.
59. Amanze wrote the contract in such a way as to ensure he had full control over the handing of funds.
60. Amanze directly benefitted from the use of the Fernanders' money in the Lowry/Groom/High Yield, Inc. transactions as he was to take a high percentage of the profits had there been any, and he was to receive an automobile or an automobile allowance by virtue of having been an early investor.
61. Amanze was aware that the Fernanders were totally reliant on Amanze to handle the investment and to make the investment decisions.
62. Amanze initiated the transactions in issue.

63. Amanze admitted liability on the Memorandum of Understanding numerous times in his communications with the Fernanders.
64. Amanze owns two homes, his equity in which does not exceed \$100,000.
65. Were Amanze to borrow \$100,000 on the equity, he would be unable to afford the debt service.

### CONCLUSIONS OF LAW

1. A United States district court has original jurisdiction over civil actions that, among other requirements, are between citizens of different states. 28 U.S.C. § 1332(a).
2. The Fernanders are citizens of Florida for diversity purposes. The fact that the Fernanders moved to Florida from Pennsylvania before initiating this action is of no moment; “[e]ven if the *sole* motive of such a move is the creation of diversity, jurisdiction is valid if the change of citizenship is actual and not temporary or illusory.” Nobel v. T.J. Morchesky, et al., 697 F.2d 97, 102-03 (3d Cir. 1982) citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 51 (1928) (emphasis in original).
3. Amanze is a citizen of Pennsylvania for diversity purposes.
4. The parties are therefore citizens of different states, fulfilling the diversity of citizenship required to vest this court with subject matter jurisdiction under 28 U.S.C. § 1332.
5. To successfully maintain a cause of action for breach of contract the plaintiff must establish: (1) the existence of a contract, including its terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. Hart v. Arnold, 2005 Pa. Super. 328 (Pa. Super. 2005); J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc., 2002 Pa. Super. 39 (2002).
6. The Fernanders and Amanze made an agreement.
7. Amanze reduced the agreement to a writing entitled “Memorandum of Understanding.”
8. The terms of the contract are definite, and the obligations of the parties are

specifically stated.

9. Amanze signed the Memorandum of Understanding, dated it December 12, 2000, and faxed it to the Fernanders who accepted it.
10. The agreement includes consideration running from each side to the other.
11. The Fernanders fully performed the contract by wire transferring \$150,000 to Amanze and by foregoing their right to a refund of \$50,000 on a previous contract.
12. Amanze breached the contract by failing to make nine \$7,000 payments totaling \$63,000 and by failing to return the \$200,000 initial investment on the termination date or at all.
13. The Fernanders have been damaged by Amanze's breach in the amount of \$263,000 plus interest at the legal rate from and after March 16, 2002.
14. The elements of common law fraud are: (a) that the defendant made a misrepresentation to the plaintiff; (b) that the misrepresentation made by defendant was fraudulent; (c) that the misrepresentation was of a material fact; (d) that the defendant intended that the plaintiff rely on the defendant's misrepresentation; (e) that the plaintiff relied on the misrepresentation and (f) that the plaintiff's reliance on the defendant's misrepresentation was a substantial factor in bringing about the harm suffered by the plaintiff. RESTATEMENT (SECOND) OF TORTS §§ 525 et seq.
15. A misrepresentation is any assertion by words or conduct which is not in accordance with the facts. Id.
16. A misrepresentation is fraudulent when the person making the misrepresentation knows that it is untrue or does not believe it is true or is indifferent as to whether it is true, or by reason of a special circumstance, has a duty to know whether it is true. Id.
17. A fact is material if it is one which would be of importance to a reasonable person in determining a choice of action. Id.
18. Reliance means that a person would not have acted or would not have failed to act as he did unless he considered the misrepresentation to be true. Id.
19. An omission is actionable as a fraudulent misrepresentation where there is a duty

- to disclose. ITT, An Int'l Inv. Trust v. Cornfield, 619 F.2d 909, 927 (2d Cir. 1980).
20. To establish a claim for common law fraud, there must be a misrepresentation made for the purpose of inducing reliance on the false statement. RESTATEMENT (SECOND) OF TORTS § 551(2)(a).
  21. One who fails to disclose material information prior to the consummation of a transaction commits common law fraud only when he is under a duty to do so. Id.
  22. The Pennsylvania common law requires the existence of a confidential relationship as prerequisite to liability for omissions. City of Harrisburg v. Bradford Trust Co., 621 F. Supp. 463 (M.D. Pa. 1985).
  23. A duty to disclose arises when there is a fiduciary duty or some relationship of confidence or trust. Dirks v. SEC, 463 U.S. 646, 654 (1983); Chiarella v. United States, 445 U.S. 222, 232 (1980).
  24. A fiduciary relationship exists where there is “a relationship involving trust and confidence, and the proof must show confidence reposed by one side and domination and influence exercised by the other.” Lehner v. Crane Co., 448 F. Supp. 1127, 1131 (E.D. Pa. 1978) (citations omitted).
  25. A fiduciary relationship “arises whenever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property, or pecuniary interest, in the whole or in a part . . . is placed in the charge of another, it may exist in the absence of a specific or technical trust agency.” Consolidated Oil and Gas, Inc. v. Ryan, 250 F. Supp. 600, 604 (W.D. Ark. 1966), aff'd, 368 F.2d 177 (8th Cir. 1966).
  26. In addition to the plaintiff reposing its trust in the defendant, the defendant must also have accepted the fiduciary relationship - mere trust and confidence in another, may not, in itself, create a fiduciary duty. Id.
  27. Amanze was a fiduciary for the Fernanders and therefore had an independent duty to disclose material facts.
  28. The facts omitted were material in that the Fernanders would not have entered into the transaction had Amanze disclosed all or any of them.

29. Amanze knew that the Fernanders would not have entered into the transaction had Amanze disclosed all or any of the omitted facts.
30. The Fernanders relied to their detriment upon Amanze's misrepresentations.
31. As a result of their reliance, they have been damaged in the amount of \$200,000, plus \$63,000 in interest which constitutes plaintiff's actual pecuniary loss plus the profit they would have made. RESTATEMENT (SECOND) OF TORTS §§ 525 et seq.

### **DISCUSSION**

It is clear from the trial that no material factual dispute exists in this case. The parties entered into a series of three mutual agreements (“Memoranda of Understanding”) and exchanged consideration in support of each agreement. These agreements were reduced to writing in clear and definite terms, and created undisputed legal obligations on the part of both parties. Thus, in the case of each agreement, the elements necessary for the formation of a contract exist. See Channel Home Ctrs., 795 F.2d 291, 299 (3d Cir. 1986); Johnston the Florist, Inc. v. Tedco Constr. Corp., 657 A.2d 511, 516 (Pa. Super. Ct. 1995).

There is likewise no question that the plaintiffs have established a breach of these legal obligations, and damages flowing from that breach. See Hart v. Arnold, 2005 Pa. Super. 328 (Pa. Super. 2005); J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc., 2002 Pa. Super. 39 (2002). The Fernanders fully performed their obligation under the third Memorandum of Understanding by wire transferring \$150,000 to Amanze and by foregoing their right to receive the \$50,000 owing under a previous contract. Amanze breached by failing to make \$63,000 in interest payments and failing to return the

\$200,000 as required by the language of the contract. The Fernanders have therefore suffered damages in the amount of \$263,000 plus interest at the legal rate from and after March 16, 2002.

Finally, the elements of common law fraud have been satisfied. See RESTATEMENT (SECOND) OF TORTS §§ 525 et seq. The facts established at trial showed that Amanze, on numerous occasions, misrepresented the status and nature of the investments he was making on behalf of the Fernanders. These misrepresentations were material to the subject matter of the contracts granting Amanze authority to perform these services, and the Fernanders reasonably relied on the misrepresentations and suffered damages as a result of their reliance in the amount of \$263,000.

At trial, the parties' principal dispute arose over the element of fraudulent intent. In order for a communication to be fraudulent, the individual making it must know it is untrue, not believe it to be true, or act with indifference as to its truth or falsity. Id. In this case, Amanze held a duty to disclose information to the Fernanders because the agreements between them engendered a relationship of confidence and trust. See City of Harrisburg v. Bradford Trust Co., 621 F. Supp. 463 (M.D. Pa. 1985). Amanze therefore became liable for his many omissions of highly relevant information about his involvement with the investment project of Charles Lowry and Charles Groom. Id. Plaintiff Brian Fernander testified at trial that he would not have entered into any of the agreements had Amanze disclosed any or all of the omitted facts, particularly concerning

the role of Lowry and Groom and the existence of High Yield, Inc. Based on the testimony at trial and the submissions of both parties, I find that Amanze knew that the Fernanders would not have agreed to invest their money through him if he had disclosed the omitted facts. Such knowledge satisfies the intent requirement where, as here, there is a duty to disclose. ITT, An Int'l Inv. Trust v. Cornfield, 619 F.2d 909, 927 (2d Cir. 1980).

I further find that, given the facts disclosed at trial, Amanze had sufficient information at his disposal to question the truth of his own reassurances to the Fernanders. At best the defendant acted with indifference as to the truth of his own representations. Based on these findings, the plaintiffs have succeeded in establishing the requisite intent, as well as the other elements required to prove common law fraud.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>BRIAN FERNANDER AND</b>	:	
<b>HELENE FERNANDER,</b>	:	
<b>Plaintiffs</b>	:	<b>CIVIL ACTION</b>
	:	
	:	
<b>v.</b>	:	<b>NO. 02-603</b>
	:	
<b>DIALA AMANZE a/k/a</b>	:	
<b>DEE AMANZE,</b>	:	
<b>Defendant</b>	:	

**VERDICT**

**AND NOW**, this        day of November, 2007, following a bench trial on the merits, and upon consideration of the parties' Proposed Findings of Fact, Proposed Conclusions of Law, trial briefs, and oral argument, and pursuant to the attached Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that the Court finds for the Plaintiffs and against the Defendant. The Court hereby enters a verdict in favor of the Plaintiffs and against the Defendant in the amount of \$352,404.00, which amount includes the \$263,000.00 owed by the defendant to the plaintiffs plus interest at the legal rate of 6% per annum, from March 16, 2002 until November 15, 2007.<sup>1</sup> The Clerk of

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<sup>1</sup>Under Pennsylvania law, pre-judgment interest is a matter of right in breach of contract cases. Fernandez v. Levin, 548 A.2d 1191, 1193 (Pa. 1988). "Unless otherwise specified by the parties, the rate of prejudgment interest is calculated as simple interest at a rate of six percent per year." McDermott v. Party City Corp., 11 F. Supp. 2d 612, 632 (E.D. Pa. 1998).

Court shall mark this case as **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel  
LAWRENCE F. STENGEL, J.