

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

<b>MOTOROLA, INC.</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 04-4940</b>
	:	
<b>AIRDESK, INC. and MICHAEL LANG</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**April 15, 2005**

Plaintiff Motorola, Inc. (“Motorola”), brings this diversity action against Defendants Airdesk, Inc. (“Airdesk”) and Michael W. Lang (“Lang”) (collectively “Defendants”) alleging Breach of Contract (Counts I and II); Piercing of the Corporate Veil (Count III); Breach of Fiduciary Duty (Count IV); and Unjust Enrichment (Count V). Now before the Court is Defendants’ Motion to Dismiss Counts III, IV, and V of Motorola’s Complaint and to dismiss Motorola’s claim for punitive damages. For the following reasons, the Court will grant in part and deny in part Defendants’ Motion.

**I. Background**

Motorola alleges: Motorola manufactures, markets, and sells equipment used in wireless communications. Complaint ¶ 2. Airdesk resells wireless communications equipment that it purchases from vendors such as Motorola. Id. ¶ 3. In February 2000, pursuant to a Distributor’s Agreement, Motorola began selling various products to Airdesk for resale. Complaint ¶ 11. Airdesk did not timely pay for all of the products it received from Motorola. Id. ¶ 12. In February 2002, Motorola and Airdesk executed a Settlement Agreement and a Promissory Note, in which Airdesk agreed to pay its \$2.5 million debt, with interest, to Motorola. Id. ¶¶ 17-18.

Until approximately the end of 2002, Airdesk made monthly payments under the Settlement Agreement and Promissory Note. Id. ¶ 19. At the beginning of 2003, however, Motorola agreed to a temporary reduction of Airdesk's monthly payments, with the understanding that Airdesk would resume making full payments in 2004 and that there would be no decrease in the total amount due. Id. ¶ 21. In approximately September 2003, Airdesk ceased making any payments. Id. ¶ 23. The amount Airdesk owes Motorola under the Settlement Agreement and Promissory Note exceeds \$1.8 million. Id. ¶ 25.

At all relevant times, Lang was the 100% shareholder and the Chief Executive Officer of Airdesk. Id. ¶ 5, 47-48. Lang exercised complete or near-complete control over the affairs of Airdesk and personally executed the Settlement Agreement and Promissory Note. Id. ¶¶ 49-50. In approximately September 2002, Airdesk, through Lang, offered to purchase transceivers, a type of wireless communications equipment, from Motorola. Id. ¶ 29. Lang agreed that Airdesk would pay approximately \$550,000 for the equipment and personally assured Motorola that Airdesk would be able to sell the transceivers. Id. ¶ 31, 51. Motorola shipped the transceivers to Airdesk, Airdesk acknowledged receipt and subsequently acknowledged its debt for the transceivers in writing. Id. ¶¶ 32-33. At the end of 2002, Motorola agreed to reduce Airdesk's monthly payments on the transceivers, again with the understanding that Airdesk would resume making full payments in 2004 and that there would be no decrease in the total amount due to Motorola. Id. ¶ 36. In approximately September 2003, Airdesk ceased making any payments for the transceivers it received in 2002. Id. ¶ 37. Airdesk owes Motorola in excess of \$450,000 for the transceivers. Id. ¶ 38.

Motorola further alleges that: Airdesk has been insolvent under Pennsylvania law since

the end of 2002 because its debt, including its debt to Motorola, exceeded the value of all of its assets. Id. ¶¶ 41-44. At Lang's direction, Airdesk has paid and is paying him an excessive amount of remuneration. Id. ¶ 54. Lang has used Airdesk funds to repay debts to himself, rather than repaying Airdesk's other creditor's including Motorola. Id. ¶ 55. Lang has engaged in mismanagement and waste of Airdesk's corporate assets and has engaged in a pattern of mismanagement that has caused and deepened Airdesk's insolvency. Id. ¶¶ 53, 56.

## **II. Legal Standard**

When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

## **III. Analysis**

### **A. Count III – Piercing the Corporate Veil**

Defendants claim that Count III must be dismissed because piercing the corporate veil is not a proper independent cause of action. As this is a diversity case, this issue is governed by Pennsylvania law. While Pennsylvania courts do not squarely address whether a claim for piercing the corporate veil is an independent cause of action, they do allow such a claim to

proceed if it is supported by specific factual averments, rather than mere legal conclusions. See Lumax Indus., Inc. v. Aultman, 669 A.2d 893, 895 (Pa. 1995). In this case, the averments contained in the Complaint alleging intermingling of corporate and personal funds and the use of Airdesk funds for personal purposes are sufficient to allow a claim for piercing the corporate veil to proceed. See id; see also Goldenberg v. Royal Petroleum Corp., 2004 WL 3051577, at \*2 (Pa. Com. Pl. Dec. 16, 2004).

Defendants also argue that Count III must be dismissed because it is not pled with sufficient particularity. Although Defendants contend that the pleading of Count III should have complied with the fraud pleading standard of Fed. R. Civ. P. 9(b), fraud has not been alleged. This Court has held that where a claim for piercing the corporate veil does not rely on allegations of actual fraud, a plaintiff is not required to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b). See River Road Dev. Corp. v. Carlson Corp., 1990 WL 6092, \*3 (E.D. Pa. 1990) (“although a claim that the use of the corporate form will work an injustice may very well involve allegations of injustice akin to fraud, an element of fraud is not necessary to pierce the corporate veil under Pennsylvania law”). A plaintiff “need not assert that the corporation is being used to perpetrate a fraud or crime[;] the corporate veil can still be pierced under appropriate circumstances where [a party] alleges that it is necessary to avoid injustice.” Fort Washington Resources, Inc. v. Tannen, 153 F.R.D. 565, 567 (E.D. Pa. 1994); Plastipak Packaging, Inc. V. DePasquale, 75 Fed. Appx. 86, 88 (3d. Cir. 2003) (listing the factors that Pennsylvania courts consider when deciding whether to pierce the corporate veil). Motorola’s allegations meet the federal requirement of notice pleading under Fed. R. Civ. P. 8(a), and are sufficient to withstand a motion to dismiss. See Laborers’ Combined Funds of Western

Pennsylvania v. Ruscitto, 848 F. Supp. 598, 601 (W.D. Pa. 1994) (finding that notice pleading applies to claims of piercing the corporate veil unless an element of fraud is a necessary element of the claim).

**B. Count IV – Breach of Fiduciary Duty**

Defendants assert that Motorola has failed adequately to plead its breach of fiduciary duty claim against Lang. Defendants first argue that, under Pennsylvania law, officers and directors of a corporation owe a fiduciary duty to its creditors only when the corporation is insolvent. See Travelers Cas. & Surety Co. v. Irex Corp., 2002 WL 32351176, at \*2-4 (E.D. Pa. 2002) (denying motion to dismiss breach of fiduciary claim brought by creditor against sole shareholder of an insolvent corporation). However, Motorola alleges that Airdesk “has been insolvent since at least the end of 2002” and that Lang caused this insolvency. Complaint ¶¶ 79-84. Thus, if the allegations in the Complaint are true, which must be accepted at this stage of the proceedings, a fiduciary duty exists.

Defendants also argue that Motorola’s breach of fiduciary duty count has its foundation in allegations of fraud, and thus must satisfy the Fed. R. Civ. P. 9(b) pleading requirement.<sup>1</sup> However, Motorola responds that claims of fraud “have not yet been alleged against Mr. Lang ...” Motorola’s Response to Defendants’ Motion to Dismiss at 8 fn.3. Further, “Rule 9(b) should be ‘construed narrowly and not extend to other legal theories or defenses’.” Laborers’ Combined Funds, 848 F. Supp. at 601 (citing 5 Charles A. Wright and Arthur R. Miller, Federal Practice

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<sup>1</sup> Fed. R. Civ. P. 9 reads in pertinent part: “Rule 9. Pleading Special Matters .... (b) Fraud, Mistake, Condition of Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”

and Procedure: Civil 2d § 1297 at 615 (1990)). As fraud is not a necessary element to a breach of fiduciary duty, Motorola has sufficiently pled its claim to withstand the present motion to dismiss.

**C. Count V – Unjust Enrichment**

Defendants claim that Count V must be dismissed because an equitable claim based on unjust enrichment is not available where the parties’ relationship is governed by contract. See Benefit Trust Life Ins. Co. v. Union Nat’l Bank, 776 F.2d 1174, 1177 (3d Cir. 1985) (finding that, in Pennsylvania, there can be no claim for unjust enrichment when the relationship between the parties is founded upon a written or otherwise express agreement). Motorola agrees that the doctrine of unjust enrichment is unavailable where the parties’ relationship is based upon an express agreement, but notes that a plaintiff may “also plead inconsistent claims in the alternative.” See Motorola’s Reply to Defendants’ Motion to Dismiss at 8 (citing Valley Forge Convention & Visitors Bureau v. Visitor’s Services, Inc., 28 F. Supp. 947, 950 (E.D. Pa. 1998)); see also Arber v. Equitable Beneficial Life Ins. Co., 889 F. Supp. 194, 199 (E.D. Pa. 1995) (refusing to dismiss unjust enrichment count in complaint containing breach of contract claim as validity of contract had yet to be proven). Accordingly, the Court will not dismiss Count V.

**D. Punitive Damages**

In the “Wherefore” clause of the Complaint, Motorola requests that the Court award punitive damages. Complaint ¶ 2.<sup>2</sup> The prayer for punitive damages will be dismissed as to Counts I and II because Pennsylvania law prohibits the recovery of punitive damages on breach

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<sup>2</sup> Inexplicably, Motorola begins renumbering its Complaint in the “Wherefore” clause. Thus the paragraph 2 referred to above is actually the second paragraph 2.

of contract claims. See Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392, 402 (3d Cir. 2004) (citing Thorsen v. Iron & Glass Bank, 476 A.2d 928, 932 (Pa. Super. 1984) (“the law is clear that punitive damages are not recoverable in an action for breach of contract”). Count III also cannot support an award of punitive damages, as the piercing of the corporate veil, if allowed, would be based on the underlying contract claim. The unjust enrichment alleged in Count V is also a “quasi-contract” remedy, and thus punitive damages would be unavailable. See Schott v. Westinghouse Elec. Corp., 259 A.2d 443, 448 (Pa. 1969) (describing unjust enrichment as a “quasi-contact” remedy).

Punitive damages, however, may be available for the claim of breach of fiduciary duty. See Travelers Ins. Co. v. Swolsky, 1992 WL 150698, \*2 (E.D. Pa. June 17, 1992) (“punitive damages are available for claims for conversion and for breach of fiduciary duty where a plaintiff demonstrates harm independent of the contractual breach and establishes that defendant’s conduct was outrageous or recklessly indifferent to plaintiff’s rights”). At this early stage in the litigation, the prayer for punitive damages as to Count IV will not be dismissed. As to Counts I, II, III, and V, the claim for punitive damages will be dismissed.

#### **IV. Conclusion**

For the foregoing reasons, the Court will deny in part and grant in part Defendants’ Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). An appropriate Order follows.

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<b>AIRDESK, INC. and MICHAEL LANG</b>	:	

**ORDER**

**AND NOW**, this 15<sup>th</sup> day of April, 2005, upon consideration of Defendants' Motion to Dismiss (docket no. 8), Motorola's response thereto (docket no. 11), Defendants' reply (docket no. 12), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that Defendants' Motion to Dismiss is **DENIED** in part and **GRANTED** in part. It is **FURTHER ORDERED**:

- (1) Defendants' Motion to Dismiss Count III of the Complaint is **DENIED**.
- (2) Defendants' Motion is Dismiss Count IV of the Complaint is **DENIED**.
- (3) Defendants' Motion to Dismiss Count V is **DENIED**.
- (4) Defendants' Motion to Dismiss the prayer for punitive damages is **GRANTED** in part. The prayer for punitive damages is **DISMISSED** as to Counts I, II, III, and V.

**BY THE COURT:**

S/Bruce W. Kauffman  
**BRUCE W. KAUFFMAN, J.**