



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 21, 2017

### LETTER OPINION

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RE: *Benjamin Johnson v. MBA Consulting Services Inc., et al.*  
Case No. CL-2017-9199

Dear Counsel:

The Court having entertained Defendant Louis Coleman's Demurrer to Plaintiff Benjamin Johnson's Complaint, sustains the objections to the causes of action for declaratory judgment (Count I), to compel and record transfer of stock certificates (Count II), and for conversion against Louis Coleman ("Coleman") (County V), in each instance with leave to amend. The Court overrules the Defendant's objections to Plaintiff's claims

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for fraud against Coleman (Count III), and for fraud against MBA Consulting Services Inc. ("MBA" or "MBA CSI") (Count VI), finding those claims are properly pled. With respect to Counts III and VI of the Complaint, the Court finds respectively, Plaintiff need not maintain his fraud claim against Coleman derivatively, and may plead his fraud cause against MBA asserting facts already averred inconsistent with those contained in other Counts.

## **BACKGROUND**

On November 4, 1999, MBA allegedly issued to James Mugnolo 100 shares of capital stock. In August of 2007, James Mugnolo sold MBA to Coleman ("Defendant"). At that time, Mr. Mugnolo was the sole owner, sole member of the Board of Directors, and sole stockholder of MBA.

On August 22, 2007, Benjamin Johnson ("Plaintiff") and Defendant entered into negotiations for Plaintiff to buy stock in MBA. The parties agreed Plaintiff would purchase 100 shares of MBA stock for a price of \$100,000.00. Defendant represented that 600 shares of MBA stock were in existence. Therefore, Plaintiff's purchase of 100 shares would make him an approximate 1/6 owner of MBA. On August 29, 2007, Defendant sent Plaintiff three emails containing a draft letter of wire transfer and instructions on how to wire the \$100,000.00 to MBA.

On August 30, 2007, Plaintiff wired \$100,000.00 to MBA through his Charles Schwab account. For the tax years of 2008-2016, Defendant elected that MBA be taxed as an S-Corporation and represented himself to be the sole owner of MBA to the federal government and the IRS. MBA also reported a Compound Annual Growth Rate of 68.64% for the fiscal years 2011-2015.

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On August 12, 2008, MBA offered a general opportunity to investors to loan it money with an option to convert the money owed to common stock of MBA. On August 15, 2008, Defendant sent Plaintiff a draft of a stock agreement containing that option provision. The parties agreed Plaintiff would lend MBA \$120,000.00 pursuant to a promissory note containing a stock conversion provision. MBA delivered to Plaintiff a promissory note for \$120,000.00 dated September 5, 2008. Between August 30, 2007 and July 20, 2016, Defendant verbally assured Plaintiff that the Stock was "safe" and that Defendant was keeping the Stock with his own stock.

Plaintiff lent over \$800,000.00 to MBA to help MBA meet its operating costs. Between 2008 and 2013, Defendant took non-salary distributions from MBA of at least \$350,167.00. On June 2, 2016, in a phone conversation, Defendant told Plaintiff that Plaintiff did not own any stock in MBA. In two subsequent conversations, on June 12, 2016, and July 21, 2016, Defendant again represented that Plaintiff did not own stock in MBA. During the later conversation, Defendant offered to return the initial \$100,000.00 purchase price to him.

Plaintiff initially filed suit for fraud against MBA in this Court last year. However, he nonsuited when he was not granted leave to amend his Complaint to assert 100% ownership of MBA. Plaintiff filed the instant Complaint on June 30, 2017. Following removal of this lawsuit to the District Court for the Eastern District of Virginia, Plaintiff voluntarily dismissed his 10b-5 claim (Count IV) with prejudice, and the District Court remanded this matter back to this Court.

## ARGUMENTS OF THE PARTIES

### Defendants' Argument

Defendant Coleman's Demurrer focuses on Counts I (declaratory judgment), II (compel and record transfer of stock certificates), III (fraud against Louis Coleman), V (conversion against Louis Coleman), and VI (fraud against MBA).

First, Defendant argues Counts III and V must be dismissed because Plaintiff lacks standing. Plaintiff makes these claims in connection with monetary distributions that Defendant allegedly received between 2008 and 2013. Plaintiff has asserted himself to be the sole shareholder of MBA and claims the distributions were unlawful. Defendant contends Plaintiff has failed to recognize and allege that the funds do not belong to him. The funds belong to MBA; therefore, Plaintiff has no individual standing to pursue these claims for his own benefit. Defendant argues Plaintiff must bring a derivative action. In Virginia, an action for injuries to a corporation must be brought derivatively. Further, assuming Plaintiff is the sole shareholder of MBA, any individual harm to him was indirect in nature and entirely dependent upon the direct injury to the corporation.

Defendant avers Plaintiff admitted in his Complaint that the Defendant received the alleged payments from MBA, and not from Plaintiff. MBA exclusively held title to the money. Plaintiff has not made an effort to bring an action on behalf of the company. Additionally, he has not demonstrated how he suffered a special injury separate from that of MBA. Defendant contends, although Plaintiff claims Defendant failed to transfer the stock into Plaintiff's name, it does not excuse Plaintiff's failure to bring a derivative action against Defendant. *Milstead v. Broadshaw*, 43 Va. Cir. 428 (Va. Cir. Ct. 1997) (the court

allowed divorcee to initiate a derivative action as an equitable owner, even though the stock certificate was still recorded under her former husband's name). Accordingly, Plaintiff's individual claims against Defendant must be dismissed with prejudice as derivative of an injury to the corporation.

Second, Defendant argues Plaintiff's declaratory judgment action is inapposite to the alleged facts under Virginia law. Plaintiff attempts to have the court determine whether the alleged 2007 stock sale ever happened, even though Plaintiff is unable to produce a signed agreement supporting that allegation. Further, Plaintiff requests the Court make this determination ten years after the fact. Declaratory judgments are meant to declare rights so that parties can conform their conduct to avoid future litigation. The alleged transaction is already the subject of this litigation. Defendant emphasizes that "a declaratory judgment is 'unavailable in situations where . . . claims and rights asserted have fully matured, and the alleged wrongs have already been committed.'" Def.'s Mem. 7 (citing *Trull v. Smolka*, 2008 WL 429599, at \*8). Defendant claims a breach of contract claim would have matured ten years ago. Most importantly, Plaintiff is requesting the determination of an element of a breach of contract claim, and attempting to circumvent the burden of proof and statute of limitations applicable in such an action.

Third, Defendant avers Plaintiff's conversion claim does not actually state a claim. The claim is improper because it concerns intangible property that cannot form the basis of a conversion claim, and Plaintiff was not in actual possession or entitled to immediate possession of such property at the time of the conversion. The cause of action for conversion only applies to tangible property. *Flores v. First Home Concepts, Inc.* 61 Va.

Cir. 255, 2 (Va. Cir. Ct. 2003). Money cannot be the subject of conversion. Defendant argues that in some circumstances courts have recognized the tort of conversion in cases where the intangible property rights arise from a document, such as a stock certificate or promissory note, but such an exception does not apply in this case. The right to take distributions is not a tangible asset, and Plaintiff has not alleged that any documents evincing his right to take distributions in MBA exist.

Fourth, Defendant claims Count II (compel and record transfer of stock certificates) is not a cause of action. Instead, it is a remedy and should be dismissed. This is solely a means for enforcing a right or redressing a wrong. This Count is based upon an unalleged contractual claim. Defendant argues this Count seeks specific performance of a decade-old alleged contract. This claim also appears to circumvent the statute of limitations and burden of proof required for a contract claim.

Next, Defendant contends Count VI (fraud against MBA) is barred by the source of duty rule. Defendant argues that Virginia law clearly establishes that a tort action may not arise from the breach of a contractual duty. The duty breached must be a common law duty. MBA did not have a duty to transfer one-sixth ownership to Plaintiff independent of the alleged agreement for the sale of stock.

Lastly, Defendant argues Count VI (fraud against MBA) should be dismissed because it depends on facts that are irreconcilable with the set of facts in the remainder of the Complaint. For the other claims, Plaintiff alleged he purchased 100 shares from Defendant. For this claim, Plaintiff alleged MBA had no outstanding shares as of August 30, 2007. Defendant claims Virginia Code § 8.01-281 allows a party to plead alternative

facts but does not allow a party to take vastly inconsistent and mutually contradictory positions. Further, Plaintiff's allegation that no outstanding MBA stock existed is controverted by documentary evidence that Plaintiff attached to the Complaint. Exhibit 2 contains a copy of a stock certificate for 100 shares issued in James Mugnolo's name.

### **Plaintiffs' Response**

First, Plaintiff argues that pursuant to Virginia Code section 13.1-672.1, he does not fit into any of the classes permitted to file a derivative suit against MBA. A person who does not fit into one of the classes specified in the statute is precluded from bringing a derivative suit. Even though Plaintiff bought 100 shares of stock, he is not a "shareholder" for the purposes of standing in a derivative suit. Virginia Code section 13.1-603 defines a "shareholder" as:

The person in whose name shares are registered in the records of the corporation, the beneficial owners of shares to the extent of the rights granted by a nominee certificate on file with a corporation, or the beneficial owner of shares held in a voting trust.

Va. Code Ann. §13.1-603. Plaintiff has not alleged any facts that would place Plaintiff under this definition. In fact, it is inferred from the facts Plaintiff alleged that no records exists within the corporate records establishing Plaintiff's ownership of any stock. The facts Plaintiff alleges in the Complaint do not support the argument that Plaintiff's claims are corporate waste claims.

Further, Plaintiff is a creditor of MBA because he lent money to the corporation. His damages in fraud flow from the money he lent MBA. A creditor is adverse to the corporation, and may not sue on the corporation's behalf. *Firestone v. Wiley*, 485 F. Supp.

2d 694, 701 (E.D. V.A. 2007). Additionally, the duty alleged in Count II (compel and record transfer stock certificates) arises out of common law fraud and it may be inferred from the allegations of Count III (fraud against Coleman). With respect to Count V (conversion against Coleman), Plaintiff is entitled to the distribution that Defendant converted because of his equitable ownership interest in the 100 shares. "In conversion, the party who receives the possession of the converted benefit may be held liable, regardless of which party directed the payment." Pl.'s Mem. 6 (citing *Fed. Ins. Co. v. Smith*, 144 F. Supp. 2d 507, 521 (2001)).

Whether Plaintiff may bring a derivative suit under his equitable ownership status, is an open question under the Virginia Stock Corporation Act. Defendant only provides one case as an example, which has facts that completely differ from this case. In *Milstead*, the case Defendant cites, there was a separation agreement that conferred the stock at issue to the wife who then filed a derivative suit. *Milstead v. Bradshaw*, 43 Va. Cir. 428 (Va. Cir. Ct. 1997).

Plaintiff next contends his declaratory judgment claim does present an actual controversy that is ripe for adjudication. Plaintiff is not requesting the Court determine whether Defendant breached any contract pertaining to the stock. Plaintiff is only asking the Court to declare that he is the legal and equitable owner of the stock. The facts alleged show that Plaintiff paid \$100,000 to Defendant for the stock and received equitable title in exchange. The parties are at odds as to whether any stock existed in MBA, and if so, to whom it belonged. Plaintiff further avers that Defendant's theory that this declaratory judgment claim must be considered as a breach of contract claim cannot be supported at

the demurrer stage. In addition, Plaintiff is not requesting the Court make a determination of facts. Plaintiff is requesting the Court declare Plaintiff's rights pertaining to the stock.

Subsequently, Plaintiff argues he does state a valid claim for conversion. Plaintiff cites to *United Leasing Corporation*, a case which Defendant also cites. *United Lease Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305 (1994). In *United Leasing Corporation*, the plaintiff agreed to finance a business venture secured by a pledge of 86 shares of stock. The stock certificate, however, was forged. The owners of the shares redeemed the stock with Thrift. The plaintiff could not compel Thrift to honor the forged certificate because the right the plaintiff asserted did not amount to a clear, undisputed, and obvious property right to which they were entitled to immediate possession. Plaintiff argues that in this case, Plaintiff's rights are clear. He had a right to the stock that was not subject to any security interest, or condition. His rights are the rights of a stockholder pursuant to the stock certificate Plaintiff attached as an exhibit to the Complaint. Defendant should not be allowed to argue that his failure to create a new certificate bars Plaintiff from recovering on this claim. Moreover, Plaintiff contends he had the right to immediate possession. Defendant does not advance any authority as to how or why the inquiry of standing under Virginia Code section 13.1-672.1 impacts the analysis for conversion.

Plaintiff asserts Count II (compel and record transfer of stock certificates) prays for relief that is required by statute. A corporation must maintain a record of its shareholders. Va. Code Ann. § 13.1-770(c). If Plaintiff prevails on Count I (declaratory judgment), the corporation will be required to note the change in its records. Plaintiff alleges that Defendant made certain representations which should give the Court reason to compel

MBA to make the change. Plaintiff concedes that if he does not prevail on the declaratory judgment claim, there will be no basis for Count II.

Plaintiff maintains the case Defendant cites distinguishes between fraud within the contract and fraud in the inducement. *Richmond Metro. Auth. v. McDevitt Street Bovis*, 501 S.E. 2d 344, 347 (Va. 1998). The dividing line is whether the promisor intended to fulfill the promise at the time of making the promise. Plaintiff claims the allegations in the Complaint establish that Defendant did not intend to deliver the stock pursuant to the sale. In the alternative, it alleged that MBA had no stock to sell. Such allegations constitute present, material facts. The fraud MBA constituted was fraud in the inducement.

Lastly, Count VI (fraud against MBA CSI) only pleads one alternative fact and Defendant's previous statements provide a reasonable basis to plead the alternative fact. The facts alleged in Count VI only differ from the facts alleged in the other counts in two respects. Count VI alleges that neither Defendant Coleman nor Defendant MBA had any stock to sell on August 30, 2007, and that Defendant Coleman was president of MBA. The existence of stock on August 9, 2007, does not preclude the possibility that Defendants redeemed and cancelled that stock prior to August 30, 2007. Defendants will not face any prejudice in preparing their case as a result of inclusion of the alternative facts. Defendant Coleman has consistently taken differing positions on the number of outstanding shares in MBA. He swore under oath, twice, that he owned 5,000 shares but later said he owned 100 shares. Virginia Code section 8.01-281(A) permits a party to plead alternative facts and theories that arise from the same transaction or occurrence.

**Defendant's Reply**

Defendant claims Plaintiff concedes the viability of Count V (Conversion against Coleman) is dependent on Plaintiff's ability to maintain an individual claim. Plaintiff offers no legal basis for requesting the Court to construe the Virginia Stock Corporation Act as requiring "record" ownership. Further, Defendant argues that Plaintiff misstates the court's ruling in *Milstead v. Bradshaw*. 43 Va. Cir. 428 (Va. Cir. Ct. 1997). Defendant contends that in *Milstead*, the court only referred to the parties' agreement as evidence of the equitable shareholder's contractual expectancy with respect to the stock at issue. The court did not hold that the equitable shareholder had standing to sue derivatively based upon the existence of the signed agreement.

Next, Defendant argues Plaintiff does not sufficiently identify the alleged misrepresentation at issue and does not identify any loan that was correspondingly induced. Further, the Complaint does not establish that there was any harm to Plaintiff as a creditor and it does not establish a claim for damages in the amount Plaintiff alleges he distributed over several years. In addition, Plaintiff does not allege that the loans to the company were never repaid or that the loaned sums were for improper uses.

Defendant avers that Count I impermissibly seeks a declaratory judgment. This claim requires the assumption that the parties agreed to the sale and purchase of the stock. That is an issue that is at the center of discovery for this case. Defendant denies ever having agreed to make such a transfer. This means it is a disputed fact, and the determination of this fact is not appropriate for a declaratory judgment determination.

Lastly, Defendant emphasizes that Plaintiff concedes Count II is entirely dependent on Count I. It is not a cause of action, but a prayer for relief. Defendant also argues that Count VI (fraud against MBA) must also be dismissed because Plaintiff cannot maintain a position that is entirely contradictory to every other claim included in the Complaint. This claim alleges the non-existence of the subject matter that gives rise to all of the other claims.

## ANALYSIS

A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations. See *McDermott v. Reynolds*, 260 Va. 98, 100 (2000). A demurrer does not, however, admit the correctness of the pleader's conclusions of law. *Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 102 (2001) (quoted in *Durrette Bradshaw, P.C. v. MRC Consulting, L.C.*, 277 Va. 140, 142–43 (2009)). To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment. While it is "unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer," the Complaint must state a cause of action. *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22 (1993) (citing *Hunger v. Burroughs*, 123 Va. 113 (1918)).

### I. Whether Plaintiff alleged a cause of action for a declaratory judgment (Count I)

The Declaratory Judgment Act states:

In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of

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right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

Va. Code Ann. §8.01-184. "The authority to enter a declaratory judgment is discretionary and *must be exercised with great caution.*" *Id.* (with emphasis).

"A plaintiff has standing to institute a declaratory judgment proceeding if it has a 'justiciable interest' in the subject matter of the proceeding, either in its own right or in a representative capacity." *Henrico County v. F. & W., Inc.*, 222 Va. 218, 223 (1981); *Lynchburg Traffic Bureau v. Norfolk and Western Railway*, 207 Va. 107, 108 (1966). "In order to have a 'justiciable interest' in a proceeding, the plaintiff must demonstrate an actual controversy between the plaintiff and the defendant, such that his rights will be affected by the outcome of the case." *W.S. Carnes, Inc. v. Chesterfield County*, 252 Va. 377, 383 (1996). "The action must include 'specific adverse claims' that are 'ripe for judicial adjustment.' The plaintiff must be an 'aggrieved party' with a 'justiciable controversy' against another party." *Barnes v. Orange County BOS*, 78 Va. Cir. 392, 393 (Va. Cir. Ct. 2009).

"In the absence of an 'actual controversy' between the parties to the case, declaratory judgment is not an available remedy...whether an 'actual controversy' exists and whether it has been sufficiently stated in the pleadings must first be resolved." *Pedigo v. Flattop Mt. Landowners Ass'n*, 73 Va. Cir. 26, 27 (Va. Cir. Ct. 2006). Where a declaratory judgment as to a disputed fact would be determinative of issues, rather than

a construction of definite stated rights, status, and other relations, commonly expressed in written instruments, the case is not one for declaratory judgment. *Williams v. Southern Bank of Norfolk*, 203 Va. 657, 663 (1962). The Act does not authorize courts to render advisory opinion, decide moot questions, or answer speculative inquiries. *Hoffman Family, LLC v. Mill Two Assocs. P'ship*, 259 Va. 685 (2000).

In this Count, Plaintiff is requesting that the Court make a declaration as to who owns the stock at issue. Defendant argues that Plaintiff is attempting to circumvent the statute of limitation for a contract claim by bringing this claim instead. Defendant also alleges Plaintiff is requesting the Court make a determination as to an element of a breach of contract claim, which is improper.

Defendant makes several intriguing arguments that the Court will have the opportunity to explore at a later time. For purposes of a demurrer, however, these arguments fall short. If Defendant intends on defeating this Count by arguing the applicable statute of limitation has passed, a plea in bar, for example, would be a more appropriate avenue for doing so. The Court cannot make any sort of determination about the appropriateness of the legal adequacy of the claims brought. The Court may only determine whether the Plaintiff alleged enough facts in the Complaint to support a cause of action.

Plaintiff has alleged that there is an actual controversy between the parties as to the ownership of the stock. Plaintiff has also alleged the controversy is ripe for adjudication. Plaintiff has not sufficiently alleged, however, the specific adverse claims at

play in this case. Although one can easily infer what the claims are, Plaintiff has not sufficiently identified and specified what the conflicting claims are.

The objection to Count I is thus sustained with leave to amend.

**II. Whether Plaintiff alleges a cause of action to compel and record transfer of stock certificates (Count II)**

Plaintiff has conceded that this Count is entirely dependent on Count I. Defendant argues that this Count is a remedy and not a cause of action. Defendant is correct.

The objection to Count II is thus sustained with leave to amend, and merge this Count into Count I.

**III. Whether Plaintiff alleges a cause of action for fraud against Louis Coleman (Count III)**

A "litigant who prosecutes a cause of action for actual fraud must prove by clear and convincing evidence: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 85 (1999) (citing *Bryant v. Peckinpaugh*, 241 Va. 172, 175 (1991); *Winn v. Aleda Constr. Co.*, 227 Va. 304, 308, 315 (1984)).

In the Complaint, Plaintiff alleges:

56. At the time he negotiated Johnson's purchase of the Stock in 2007, Coleman knew that the Stock was the only stock MBA CSI had issued and the only shares outstanding in the company.

57. Rather than disclose the truth to Johnson, Coleman made the following false misrepresentations and material omissions about the Stock after August 30, 2007:

a. That MBA CSI had issued 600 shares of stock, and that Coleman owned 500 shares of that stock....

58. The number of outstanding MBA CSI shares in August 2007 was a present, material fact to the transaction.

59. The existence of outstanding MBA CSI shares at all points in the litigation was a present, material fact to the transaction.

60. Coleman's ownership of MBA CSI stock, or lack thereof, was a present, material fact to the transaction.

61. Coleman made all those false representation or material omissions contained in Paragraph 56 with the intent to mislead Johnson into purchasing the Stock and wiring Coleman the \$100,000....

63. Johnson reasonably relied on Coleman's misrepresentations and omission when he wired \$100,000 to MBA CSI during the Stock Sale....

68. Between August 2007 and July 2016, Coleman engaged Johnson in a continuous and documented sequence of lies and deceit with the intention of inducing him to fund MBA CSI's business under fraudulent circumstances and then subsequently convincing him to lend significant sums of money so as to protect the investment Johnson believed he had....

Comp. ¶¶ 56-68.

Plaintiff sufficiently pleads that Defendant made a false misrepresentation of a material fact, that he did it intentionally and knowingly, with the intent to mislead, and that Plaintiff relied on the misrepresentation. Plaintiff also alleges that he suffered damages as a result of the misrepresentation.

Defendant argues that Plaintiff does not have standing to bring this claim and he should have brought a derivative suit instead. A derivative suit is appropriate when the corporation has a valid cause of action, but has refused to pursue litigation. In this case, Plaintiff is not alleging that Defendant Coleman wronged the Corporation or that Plaintiff, and not Defendant, was entitled to the distribution from MBA. The confusion appears to

arise from the fact that Plaintiff requests relief in the amount of \$350,167.31, which is the exact amount of the distribution that Defendant received from MBA. The Complaint however is clear that Plaintiff is claiming fraud as an individual, and not as a stockholder or as a stockholder bringing suit on behalf of MBA.

The Court overrules the objection to Count III, which is properly pled.

**IV. Whether Plaintiff alleges a cause of action for conversion against Louis Coleman (Count V)**

As a threshold matter, standing to assert a conversion claim requires both: (1) an ownership interest in the allegedly converted chattel; and (2) the right to immediate possession of the chattel. See *Economopoulos v. Kolaitis*, 259 Va. 806, 814 (2000) ("An action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted.") (quoting *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305 (1994)). See generally Restatement (Second) of Torts § 225 (1965) ("For a conversion the actor is subject to liability to one who at the time was entitled to immediate possession of the chattel.").

Once standing is established, two additional elements must be proven: (1) a wrongful exercise or assumption of authority or dominion over the plaintiff's goods; (2) depriving him of possession. *PGI, Inc. v. Rathe Prods., Inc.*, 265 Va. 334, 344 (2003). Or, as the Supreme Court of Virginia has expressed it on multiple occasions:

[T]he tort of conversion encompasses any wrongful exercise or assumption of authority over another's goods, depriving him of their possession; and any act of dominion wrongfully exerted over property in

denial of the owner's right, or inconsistent with it.

*Id.* (quoting *United Leasing Corp.*, 247 Va. 299, 305 (1994) and *Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 75 (1956)) (quotation marks omitted). In order to sufficiently plead a cause of action for conversion, a plaintiff must allege the conversion of a specific, tangible item by the defendant. See *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305 (1994) ("A cause of action for conversion does not encompass claims for interference with undocumented intangible property rights."). The general rule is that conversion only applies to tangible property, although Virginia has found that an action may lie for the unlawful conversion of certain intangible property rights. *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305-06 (1994).

In the Complaint, Plaintiff alleged:

86. Coleman, at all times relevant to this suit, knew, or should have known, that Johnson possessed the clear equitable right to possession of the Stock.

87. Coleman, at all times relevant to this suit, wrongfully and unlawfully paid himself distributions from MBA CSI which he knew to be the rightful property of Johnson.

88. As a result of Coleman's wrongful and unlawful acceptance of those distributions, Johnson was damaged in the amount of at least \$350,167.22.

89. Coleman deceived Johnson with the design and intention that his misrepresentations would deceive and prevent Johnson from learning the extent of his ownership interest, thus obstructing the filing of this action.

90. Coleman's deception and affirmative misrepresentations were designed to prevent and obstruct Johnson from filing this lawsuit and until March of 2017, did obstruct and prevent him from discovering these causes of action.

Comp. ¶¶ 86-90.

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Plaintiff did not allege all of the elements required for a claim of conversion. Plaintiff claims that he had an equitable right to possession of the stock, but he does not claim he had a right to immediate possession of it. Further, Plaintiff does not allege that Defendant wrongfully exercised control over the stock. Plaintiff focuses primarily on Defendant's control over the distributions. This presents a problem, because Plaintiff has not alleged sufficient facts to prove he has standing to bring this cause of action. If Plaintiff's primary allegation is that he is entitled to the distribution, Defendant's standing arguments are valid. In turn, Plaintiff would have to bring a derivative suit. If Plaintiff's primary allegation is that the stock itself was converted, then a derivative suit is not required, but Plaintiff must still allege sufficient facts to support each element for conversion.

In addition, Plaintiff has not sufficiently alleged that Defendant deprived him of his possession of the stock. His primary argument is that Defendant's "deception" was designed to prevent him from discovering the truth about his ownership interest and from filing a lawsuit. Moreover, as Defendant points out, a tort for conversion only applies when the property converted is tangible property. There is an exception for intangible property, however, which applies when the intangible property is linked to a tangible document, such as a stock certificate. Although Plaintiff attached the stock certificate to the Complaint, Plaintiff does not refer to the exhibit in this Count. Additionally, Plaintiff does not allege any facts to prove that his claim falls within the intangible property exception to a tort for conversion.

The objection to Count V is thus sustained with leave to amend.

## V. Whether Plaintiff alleges a cause of action for fraud against MBA CSI (Count VI)

To state a claim for fraud, “the plaintiff must prove a false representation, of a material fact, made intentionally and knowingly, with intent to mislead, reliance by the party misled, and resulting damages.” *Elliot v. Shore Stop, Inc.*, 238 Va. 237, 244 (1989). Fraud in the inducement is ground for rescission of the contract and for damages. *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 362 (2010). However, in order for a claim of fraud in the inducement to be successful, a common law duty must exist. *Id.* The Supreme Court of Virginia has held that “a single act or occurrence can, in certain circumstances, support causes of action both for breach of contract and for breach of a duty arising in tort, thus permitting a plaintiff to recover both for the loss suffered as a result of the breach and the traditional tort damages...” *Dunn Construction Co. v. Cloney*, 278 Va. 260 (2009) (citing *Foreign Mission Bd. v. Wade*, 242 Va. 234 (1991)). In *Abi-Najm v. Concord Condo*, the Supreme Court of Virginia further explained that when a party alleges that fraud occurred “before a contract between the two parties came into existence . . . it cannot logically follow that the duty . . . was one that finds its source in the Contracts.” *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 363-64 (2010).

In the Complaint Plaintiff alleges:

81. At all times relevant to this count, Coleman was acting as an officer of MBA CSI and on behalf of the corporation.

82. As of August 30, 2007, when he paid MBA CSI \$100,000.00, Johnson believed he was the owner of 100 shares of and an approximate 1/6 owner of MBA CSI.

83. MBA CSI, however, had no outstanding shares to sell as of August 30, 2007 and through its president, Coleman misrepresented this fact to Johnson. MBA CSI misrepresented this fact with the intent that Johnson would pay for stock that did not exist and then that Johnson would continue

to lend money to MBA CSI in order to protect the investments he reasonably thought he had.

84. Over the next 9 years, Johnson lent over \$800,000.00 to MBA CSI because he wished to protect the stock investment he believed he had.

85. On or about June 2, 2016, Coleman verbally told Johnson that Johnson did not own any stock in MBA CSI because MBA CSI had never issued stock and no stock existed in MBA CSI.

104. At the time he negotiated Johnson's purchase of MBA CSI stock in 2007, Coleman, as an officer of MBA CSI and acting on its behalf and for its benefit, knew, or should have known, that MBA CSI had not issued any new stock and/or that no outstanding stock existed.

105. MBA CSI, therefore, made a false representation as to the existence of its own stock when it agreed to accept \$100,000.00 in return for 100 shares of its stock.

106. The existence of MBA CSI stock was a present, material fact to the transaction.

107. MBA CSI, through its president, Coleman, made the false representation intentionally and knowingly.

108. MBA CSI, through its president, Coleman, made the false representation with the intent to mislead Johnson into wiring the \$100,000.00 to MBA CSL.

109. Rather than disclose the truth to Johnson, MBA CSI continued to deceive Johnson as to the existence of its stock by offering a stock conversion option to its subsequent promissory note with Johnson.

112. MBA CSI made all of these misrepresentations to Johnson with the intention that he rely upon them.

113. MBA CSI made all of these misrepresentations to Johnson with the intention to conceal the fact that MBA CSI had never issued any stock.

114. Johnson reasonably relied upon MBA CSI's misrepresentations when he wired the \$100,000.00 to MBA CSI as part of the fraudulent stock purchase in 2007.

115. Johnson continued to rely, with reason to do so, on the representations of MBA CSI and Coleman, its president, over the next nine-years.

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116. As a result, Johnson has been damaged in an amount equal to 1/6 of the present market value of MBA CSI which, using the compound annual growth rate MBA CSI itself reported for the years 2011-2015, is not less than \$13 million and may be as much as \$39 million or more.

Compl. ¶¶ 81-116.

Plaintiff sufficiently alleges each of the elements required for fraud. Plaintiff avoids the source of duty rule by alleging that the misrepresentation is what induced him to purchase the alleged stock in the first place. If he were solely alleging that he lent money to MBA, or took some other action, because of the stock transfer, then the source of duty rule would apply. In addition, Defendant argues that Plaintiff may not allege that MBA had no outstanding shares to sell in August 2007, because this is wholly inconsistent with the factual allegation that MBA had 100 outstanding shares at that point in time.

In Virginia,

[a] party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. Such claim, counterclaim, cross-claim, or third-party claim may be for contribution, indemnity, subrogation, or contract, express or implied; it may be based on future potential liability, and it shall be no defense thereto that the party asserting such claim, counterclaim, cross-claim, or third-party claim has made no payment or otherwise discharged any claim as to him arising out of the transaction or occurrence.

Va. Code Ann. § 8.01-281 (A). The statute allows a party to plead facts in the alternative, as long as the facts arise from the same transaction or occurrence. Defendant cites a case that appears compelling at first glance, but is less persuasive after closer examination. Defendant quotes the following from *United Leasing v. Resource Bank*:

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In making this ruling, the court is aware, as United Leasing points out, that Va. Code § 8.01-281 and Supreme Court Rule 1:4(k) allow a party to plead alternative facts and theories of recovery against alternative parties. Nothing in the statute or rule, however, allows a party to take the vastly inconsistent positions which United Leasing has taken here.

*United Leasing Corp. v. Res. Bank*, 58 Va. Cir. 96, 108 (Va. Cir. Ct. 2001) (citing *Burch v. Grace Street Building Corp.*, 168 Va. 329, 340, 191 S.E. 672 (1937)). The court in *United Leasing v. Resource Bank* relied heavily on the *Burch* case in making its determination, however, Lexis Nexus provides the following advisory for the *Burch* case:

The opinion of the case you are *Shepardizing*™ has been affected adversely by a subsequent legislative enactment (e.g. a new, amended or repealed statute), constitutional amendment, or court rule, as stated in the opinion of the later case, thereby casting doubt on the continuing validity or precedential value of the case you are *Shepardizing*.

Although Va. Code § 8.01-281 does not expressly allow or disallow pleading facts that contradict one another, the Supreme Court of Virginia has subsequent to *Burch*, "sanctioned the pleading of alternate sets of facts where the one defendant would be equally liable under either set." *Baker v. Doe*, 211 Va. 158, 160 (1970) (citing *Development Company v. Offutt*, 203 Va. 382 (1962)). This is not to say a party may plead whatever facts it pleases. However, when as here, the Defendant is alleged to have taken factually inconsistent positions which lead to alternative independent theories of liability, the Plaintiff is entitled to plead inconsistent factual theories to allow the trier of fact, in assessment of the credibility and weight to be given the evidence, to determine the distinct cause of action proven.

The Court consequently overrules the objection to Count VI, which is properly pled.

## CONCLUSION

The Court having entertained Defendant Louis Coleman's Demurrer to Plaintiff Benjamin Johnson's Complaint, sustains the objections to causes of action for declaratory judgment (Count I), to compel and record transfer of stock certificates (Count II), and for conversion against Coleman (County V), in each instance with leave to amend. The Court overrules the Defendant's objections to Plaintiff's claims for fraud against Coleman (Count III), and for fraud against MBA (Count VI), finding those claims are properly pled. With respect to Counts III and VI of the Complaint, the Court finds respectively, Plaintiff need not maintain his fraud claim against Coleman derivatively, and may plead his fraud cause against MBA asserting facts already averred inconsistent with those contained in other Counts.

The Defendant shall forthwith prepare, circulate and submit to the Court an order incorporating the ruling in this letter opinion and setting the time for leave to amend as twenty-one days from entry of such order.

AND THIS CAUSE CONTINUES.

Sincerely,

David Bernhard  
Judge, Fairfax Circuit Court

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