2007 BNH 043 **Note: This is an unreported order. Refer to LBR 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 06-11539-JMD
Chapter 7

Simply Media, Inc.,
Debtor

Steven M. Notinger, Chapter 7 Trustee,
and Bradley C. Reifler,
Plaintiffs

v. Adv. No. 07-1030-JMD

Christina Brown a/k/a Christina Rago,
individually and in her capacity as
Trustee of First Marcus Trust,
Elizabeth Brown, Maria Schulman,
Wainwright Bank and Trust Company,
Dudley C. Goar, Esq., The University of Chicago,
Angelika Thumm, K&G Building Management Company,
Camp Nashoba Day, Kathryn San Filippo, and
Middlesex Savings Bank,
Defendants

ORDER

On November 16, 2007, the Court held a hearing on a Motion to Continue Trial Date [of] December 3, 2007, filed by Christina Brown, Elizabeth Brown, and Maria Schulman (collectively, the "Defendants") (Doc. No. 168) (the "Motion"). After considering the Motion, the objection thereto filed by the Plaintiffs (Doc. No. 193), and the arguments of counsel, the Court determined, for the reasons set forth on the record, that it would not continue the trial based on the Defendants' contentions that discovery was incomplete and the Defendants' expert witness was not available for trial on December 3, 2007, but the Court did indicate that it would

further consider the Defendants' request to continue the trial based upon their jury demand. Accordingly, the Court took the Motion under advisement. For the reasons set forth below, the Court has determined that the Defendants do have a right to a jury trial with respect to some of the claims. Accordingly, the Motion is granted. The three-day trial set to commence on December 3, 2007, is hereby continued, subject to the Court's further rulings below.

A. The Complaint

Bradley Reifler ("Reifler"), one of the Plaintiffs, commenced this action in Massachusetts Superior Court prior to Simply Media, Inc. ("Simply Media") filing bankruptcy in New Hampshire on November 13, 2006. The complaint contained twelve counts and asserted claims against the Defendants and others. Counts I through XI alleged Simply Media made fraudulent transfers under M.G.L. c. 109A § 5. Count XII sought to impose a constructive trust. At the hearing on the Motion, the parties agreed that while this action was pending in Massachusetts, the Defendants filed counterclaims against Reifler and made a proper and timely jury demand.

After Simply Media filed bankruptcy, Reifler removed the action to this Court on January 10, 2007. On February 21, 2007, the Court permitted Steven M. Notinger ("Notinger"), Simply Media's chapter 7 trustee, to intervene as a plaintiff. On August 15, 2007, the Plaintiffs filed a motion seeking to amend the complaint by adding Notinger, as the chapter 7 trustee of David Brown's bankruptcy estate, as a plaintiff, by adding Middlesex Savings Bank as a defendant, and by adding additional claims against the Defendants. After a hearing, the Court granted the motion, and an amended complaint was filed on September 7, 2007.

B. The Amended Complaint

The amended complaint contains fifteen counts and asserts claims against the Defendants and others. Counts I through XI still allege Simply Media made fraudulent transfers under

M.G.L. c. 109A § 5; however, new claims have been alleged against the Defendants in some of these counts. Count XII still seeks the imposition of a constructive trust. Counts XIII through XV are new and assert claims against Christina Brown for turnover, unjust enrichment, and civil conspiracy and against Elizabeth Brown and Maria Schulman for unjust enrichment. The Defendants filed answers to the amended complaint and re-asserted their counterclaims against Reifler in filings made with the Court on November 1, 2007.

C. The Counterclaims

The Defendants each filed separate answers, but they each asserted the same four counterclaims against Reifler in this Court. Count I asserts a claim for abuse of process, Count II asserts a claim for tortious interference with advantageous relations, Count III asserts a claim for breach of fiduciary duty, and Count IV asserts a claim for breach of M.G.L. 93A § 11.

D. Right to Jury Trial

In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), the United States Supreme Court outlined a three-part test for determining when the right to a jury trial exists in the bankruptcy context. Container Recycling Alliance v. Lassman, 359 B.R. 358, 360 (D. Mass. 2007). "Courts must consider (1) whether the party seeking a jury trial would be entitled to one at common law; (2) whether the remedies sought are legal rather than equitable in nature; and, if the first two prerequisites are met, (3) whether Congress has withdrawn jurisdiction over that type of action from courts of law and assigned it exclusively to non-Article III tribunals sitting without juries." Id. at 360-61. In Langenkamp v. Culp, 498 U.S. 42, 44 (1990), the United States Supreme Court "held, emphasizing parts two and three of the Granfinanciera test, that creditors who had filed proofs of claim against a debtor's estate had submitted those claims to

the equitable jurisdiction of the bankruptcy court." Lassman, 359 B.R. at 361. Accordingly, such creditors were not entitled to a jury trial.

In addition to the substantive requirements for finding a right to a jury trial, parties must also satisfy certain procedural requirements. Federal Rule of Bankruptcy Procedure 9015(a) provides that Rule 38, as well as certain other rules, of the Federal Rules of Civil Procedure "apply in cases and proceedings, except that a demand made pursuant to Rule 38(b) . . . shall be filed in accordance with Rule 5005." Rule 38(b) provides that "[a]ny party may demand a trial by jury of an issue triable of right by a jury by (a) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party."

1. Fraudulent Transfer Counts

a. Christina Brown

Upon review of the pleadings filed in this action while pending both in Massachusetts state court and in this Court, the Court finds that Christina Brown is entitled to a jury trial on the fraudulent transfer claims in Count I, both in her individual and in her trustee capacity. Christina Brown is entitled to a jury trial on this count because (1) her demand was timely; (2) she has not filed a claim in Simply Media's bankruptcy; (3) she would be entitled to a jury trial on a fraudulent transfer claim at common law; (4) the Plaintiffs seek a legal remedy; and (5) Congress has not withdrawn jurisdiction over that type of action from courts of law and assigned it exclusively to non-Article III tribunals sitting without juries. See Langenkamp, 498 U.S. at 44; Granfinanciera, 492 U.S. at 36, 42; see also Anderson v. Simchon (In re Southern Textile Knitters, Inc.), 236 B.R. 207, 212 (Bankr. D.S.C. 1999) (noting defendants who had not filed a

proof of claim or asserted a counterclaim against the trustee were entitled to a jury trial with respect to actions seeking to recover for breach of fiduciary duty, for preferential transfers under the Bankruptcy Code, for fraudulent transfers under the Bankruptcy Code and state law, and for civil conspiracy, among other relief). The Court further concludes that Christina Brown would not be entitled to a jury trial on the fraudulent transfer claims in Count III, Count IV, Count V, and Count IX because her demand was not timely under Rule 38(b) with respect to these counts, i.e., her demand was made on November 1, 2007, which is more than ten days after the amended complaint was filed on September 7, 2007.

Thus, while one of the fraudulent transfer claims against Christina Brown is triable to a jury, the others are not. This situation is similar to the situation where a complaint involves both legal claims, for which the right to a jury trial exists, and equitable claims, for which the right to a jury trial does not exist. In those situations,

> [t]he rule which has developed is that where legal and equitable claims are combined in an action, the action must be structured and tried in a manner that preserves the right to jury trial with respect to the legal claim. Where the legal claim and the equitable claim have common issues of fact, the right to a jury trial cannot be negated through prior determination of the equitable claim by the court. This means that if the legal claim and the equitable claim do have common issues of fact, the legal claim must be decided first by the jury.

Magers v. Bonds (In re Bonds Distrib. Co.), No. 98-6044, 2000 WL 33682815, at *4 (Bankr. M.D.N.C. Nov. 15, 2000) (cited in WSC, Inc. v The Home Depot, Inc. (In re WSC, Inc.), 286 B.R. 321, 332 (Bankr. M.D. Tenn. 2002)). As articulated by the First Circuit Court of Appeals in Perez-Serrano v. DeLeon-Velez, 868 F.2d 30, 32 n.1 (1st Cir. 1989), "[u]nder the doctrine of 'law of the case,' a jury cannot re-examine findings made by the court." As a result, issues of common fact must be tried to a jury with the bankruptcy court being bound by those findings. WSC, Inc., 286 B.R. at 334.

The Court concludes that the Plaintiffs' separate fraudulent transfer claims involve common facts and that severing Count I from Counts III, IV, V, and IX would be complicated, duplicative, wasteful and unnecessary. See id. Count I alleges that Christina Brown directly received transfers from Simply Media totaling $14,308.57 and that she, individually and as trustee, received transfers from and benefitted from payments made by Simply Media totaling $1,008,629.50, which transfers and payments were made for and on behalf of herself, individually and as trustee, and her children, Elizabeth Brown and Maria Schulman. Count III alleges that Christina Brown, as trustee, benefitted from transfers totaling $206,356.79 made to Wainwright Bank, which payments were for a mortgage on property in Lincoln, Massachusetts, in which Christina Brown and her family live and which is owned by a trust of which Christina Brown is the trustee (the "Lincoln Property"). Count IV alleges that Christina Brown benefitted from transfers totaling $78,447.93 made to her daughter, Maria Schulman, by Simply Media. Count V alleges that Christina Brown benefitted from transfers totaling $17,641.83 made to her attorney by Simply Media. Count IX alleges that Christina Brown benefitted from transfers totaling $4,640.00 made to a camp attended by Christina Brown's minor daughter.

It appears to the Court that the payments outlined in Counts III, IV, V, and IX might very well be included within the payments outlined in Count I of the complaint as well as the same conduct under the actual fraud allegations in all counts. In addition, all of these fraudulent transfer counts make constructive fraud allegations under M.G.L. c. 109A § 5 regarding Simply Media's insolvency, whether Simply Media was left with unreasonably small capital as a result of the transfers, and whether Simply Media received reasonably equivalent value in exchange for the questioned transfers. These are common factual issues. Therefore, in accordance with the Seventh Amendment, the Congressional delegation of authority to the Supreme Court to

promulgate rules of procedure, including Rule 38, and the Supreme Court's limitations on the discretion of trial courts where the constitutional right to a jury trial exists, the factual issues in Counts III, IV, V, and IX must be determined once by a jury in connection with a jury trial of Count I. Wallace Motor Sales, Inc. v. American Motors Sales Corp., 780 F.2d 1049, 1066 (1st Cir. 1985) (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959) ("[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.")). Thus, even though Christina Brown failed to satisfy the procedural requirements for a jury trial with respect to some of the fraudulent transfer counts against her, the Court concludes that the Seventh Amendment and considerations of efficiency and judicial economy require all of the fraudulent transfer counts to be tried by a jury.

b. Elizabeth Brown

Like her mother, Elizabeth Brown properly and timely asserted a jury demand as to Count II of the complaint which seeks to avoid, as fraudulent, transfers totaling $72,212.70 made by Simply Media directly to and for her benefit. After amendment, Elizabeth Brown was added as a defendant to Counts VI and X. Like her mother, Elizabeth Brown did not timely make a jury demand as to these counts as the amended complaint was filed on September 7, 2007, and her demand was made on November 1, 2007. Elizabeth Brown has not filed a claim in Simply Media's bankruptcy case.

For the reasons outlined above, Elizabeth Brown has a right to a jury trial on the fraudulent transfer claim asserted in Count II. The Court also believes that Counts VI and X should be tried with Count II. In Count VI the Plaintiffs allege that Simply Media made fraudulent transfers totaling $16,200.00 for Elizabeth Brown's benefit as the payments were for

her rent. In Count X the Plaintiffs allege that Simply Media made fraudulent transfers totaling $4,500.00 for Elizabeth Brown's benefit as these payments were also for her rent. Again, the payments outlined in Counts VI and X might very well be included within the payments outlined in Count II of the complaint. Counts VI and X allege both actual and constructive fraud as does Count II. For that reason, the Court believes there are common issues of fact related to the transfers as well as to the issues of solvency and reasonably equivalent value as discussed above.

c. Maria Schulman

Like the other Defendants, Maria Schulman properly and timely asserted a jury demand[1] as to Count IV of the complaint which seeks to avoid, as fraudulent, transfers totaling $78,447.93 made by Simply Media directly to and for her benefit. After amendment, Maria Schulman was added as a defendant to Counts VII and VIII. Like the other Defendants, Maria Schulman did not timely make a jury demand as to these counts as the amended complaint was filed on September 7, 2007, and her demand was made on November 1, 2007. Maria Schulman has not filed a claim in Simply Media's bankruptcy case.

For the reasons outlined above, Maria Schulman has a right to a jury trial on the fraudulent transfer claim asserted in Count IV. The Court also believes that Counts VII and VIII should be tried with Count IV. In Count VII the Plaintiffs allege that Simply Media made fraudulent transfers totaling $27,479.44 for Maria Schulman's benefit as the payments were for her tuition and other charges at The University of Chicago. In Count VIII the Plaintiffs allege that Simply Media made fraudulent transfers totaling $4,422.50 for Maria Schulman's benefit as

[1] Although the Court cannot find in its file an answer or a separate jury demand filed by Maria Schulman while the case was still pending in Massachusetts, at the hearing on the Motion the Plaintiffs agreed that the Defendants made a timely jury demand while the case was pending in Massachusetts state court. The Court will accept the Plaintiffs' position.

these payments were for her rent. Again, the payments outlined in Counts VII and VIII might very well be included within the payments outlined in Count IV of the complaint. Counts VII and VII allege both actual and constructive fraud as does Count IV. For that reason, the Court believes there are common issues of fact related to the transfers as well as to the issues of solvency and reasonably equivalent value as discussed above.

2. Constructive Trust

In Count XII of the amended complaint, the Plaintiffs seek to impose a constructive trust with respect to the Lincoln Property. According the Plaintiffs, Simply Media provided the funds to pay the mortgage, utility payments, professional house cleaning services, landscaping services, tree services, cable television services, repairs and improvements, and general maintenance services with respect to the Lincoln Property and that without these payments Christina Brown, as trustee, would not have been able to maintain the Lincoln Property. The Plaintiffs seek an order finding Simply Media the beneficiary of a constructive trust and that the Lincoln Property should be held for the benefit of Simply Media's bankruptcy estate.

The Plaintiffs seek equitable relief. Therefore, Christina Brown, as trustee, has no right to a jury trial on this claim. See America Universal Ins. Co. v. Pugh, 821 F.2d 1352, 1356 (9th Cir. 1987) ("The imposition of a constructive trust is purely an equitable remedy and equitable remedies are not triable of right by a jury."). Accordingly, this is one of those situations described above where a complaint seeks both legal and equitable relief. Therefore, "the action must be structured and tried in a manner that preserves the right to jury trial with respect to the legal claim" and issues of common facts must be tried to a jury with the bankruptcy court being bound by those findings. Bonds Distrib. Co., 2000 WL 33682815, at *4 (cited in WSC, Inc., 286 B.R. at 332).

Generally, under New Hampshire law, the Court may impose a constructive trust if it finds a confidential or fiduciary relationship existed between the parties and the potential that the person holding the property would be unjustly enriched if equitable relief is not granted. Carroll v. Daigle, 123 N. H. 495 (1983). A confidential relationship exists if there is a personal relationship of such character that the transferor is justified in believing that the transferee will act in his interest. Cornwell v. Cornwell, 116 N.H. 205, 209 (1976) (citing Kachanian v. Kachanian, 100 N.H. 135, 137 (1956)). It is not necessary to allege and prove a fiduciary relationship, fraud or undue influence to establish a constructive trust. Kachanian, 100 N.H. at 137. Rather it is sufficient to establish that the character of a personal relationship is such that the party seeking to establish the trust was justified in believing that a transferee would act in his interest and that the transferee failed to perform that promise. Id.

In Massachusetts the law is similar. Under a constructive trust theory, a plaintiff does not have to show that the defendant intended to create a trust in the plaintiff's favor; rather, the plaintiff must allege and show that there is evidence of fraud, breach of fiduciary duty, or other misconduct on the part of the defendants. Feinman v. Lombardo, 214 B.R. 260, 265 (D. Mass. 1997) (citing Collins v. Guggenheim, 631 N.E.2d 1016, 1017 (Mass. 1994) (refusing to impose a constructive trust where there was no evidence of fraud or breach of duty by the defendant, even though both plaintiff and defendant, an unmarried couple, contributed to the maintenance and improvement of their residential farm and joint bank account); Fortin v. Roman Catholic Bishop of Worcester, 625 N.E.2d 1352, 1357-58 (Mass. 1994)). "Such a showing is required to be made because a constructive trust is an equitable remedy that the court imposes to prevent unjust enrichment." Feinman, 214 B.R. at 265 (emphasis in the original) (citing In re Nat'l Reserve Corp., 199 B.R. 241, 247 (Bankr. D. Mass. 1996); In re Monarch Capital Corp., 130 B.R. 368,

376 (Bankr. D. Mass. 1991); In re Mill Concepts Corp., 123 B.R. 938, 944 (Bankr. D. Mass. 1991); 76 Am.Jur.2d Trusts § 163 (1992)).

In the Court's view, there will be an overlap in evidence regarding the actual fraud allegations in Counts I through XI and the fraud elements of the constructive trust claims. For that reason, the Court believes the right to a jury trial on those issues under Counts I through XI require that the constructive trust claim be tried to a jury.

3. Turnover

In Count XIII, the Plaintiffs seek turnover of the Lincoln Property on the grounds that David Brown, Christina Brown's husband, has retained a secret interest in and/or controls and exercises dominion over the use of the Lincoln Property and treats it as his own. The Plaintiffs argue that it is equitable to treat the Lincoln Property as if it belongs to him and not to Christina Brown, as trustee. The Plaintiffs seek an order that Christina Brown, as trustee, holds the Lincoln Property in trust and for the benefit of David Brown, thus making it an asset of the bankruptcy estate of David Brown. It is clear that the Plaintiffs seek equitable relief. Thus, Christina Brown, as trustee, has no right to a jury trial on this claim. See Walker v. Weese, 286 B.R. 294 (D. Md. 2002) (concluding that the defendants had no right to a jury trial in an action brought by the trustee seeking a declaratory judgment that the debtors' prepetition attempts to transfer assets to an offshore trust were ineffective as a matter of law because the remedies sought in the various counts were equitable in nature); Welt v. Leshin (In re Warmus), 252 B.R. 584, 586-87 (Bankr. S.D. Fla. 2000) (concluding that claims seeking turnover and recovery of estate property under 11 U.S.C. §§ 542 and 550 are "clearly and uniquely equitable claims under the Bankruptcy Code" for which there is no right to a jury trial); Southern Textile Knitters, 236

B.R. at 213 (holding that a cause of action requesting turnover of property is equitable in nature and therefore the defendants were not entitled to a jury trial on that cause of action).

Despite having no right to a jury trial on Count XIII, the Court believes that the evidence needed to establish that the Lincoln Property is an asset of David Brown's estate will overlap with the evidence needed to establish that the transfers by Simply Media for the benefit of the Lincoln Property were fraudulent under state fraudulent transfer law. For that reason, Count XIII should be tried to a jury.

4. Unjust Enrichment

The Court finds that the Defendants have no right to a jury trial with respect to the Plaintiffs' claim of unjust enrichment in Count XIV of the amended complaint because the Defendants' demand was untimely. In addition, under New Hampshire law, "there is no right to a jury on an unjust enrichment claim because New Hampshire courts traditionally have understood unjust enrichment as an equitable claim and restitution is an equitable form of monetary relief." Massachusetts Eye and Ear Infirmary v. QLT, Inc., 495 F.Supp.2d 188, 192 (D. Mass. 2007). In Massachusetts, the "requirement that there be no available legal remedy expressly marks unjust enrichment as an equitable remedy." Id. at 193. Thus, even if a demand had been timely made, there is no right to a jury trial on an unjust enrichment claim.

In their unjust enrichment claims against the Defendants, the Plaintiffs specifically make reference to (1) transfers to Christina Brown totaling $1,008,629.50, which are the same transfers referenced in Count I for which there is a right to a jury trial; (2) transfers to Elizabeth Brown totaling $72,212.70, which are the same transfers referenced in Count II for which there is a right to a jury trial; and (3) transfers to Maria Schulman totaling $78,447.93, which are the same transfers referenced in Count IV for which there is a right to a jury trial. There can be no

doubt then that the evidence to be presented and the factual issues to be decided with respect to Counts I, II, IV, and XIV will overlap. In order to preserve the Defendants' right to a jury trial with respect to Counts I, II, and IV, Count XIV must necessarily be tried along with them.

5. Civil Conspiracy

The Court finds that the Defendants have no right to a jury trial with respect to the Plaintiffs' claim of civil conspiracy in Count XV because the Defendants' demand was untimely. If the demand had been timely, the Defendants would have been entitled to a jury trial. See Redmond v. Hassan (In re Hassan), 375 B.R. 637, 649-50 (Bankr. D. Kan. 2006) (recommending that the district court conclude that the right to a jury trial attaches to the trustee's claim for civil conspiracy as a "claim based on an alleged civil conspiracy is a legal claim"); WSC, Inc., 286 B.R. at 332 (concluding that the debtor had a right to a jury trial with respect to its civil conspiracy claim against defendants that were not creditors and had made no claim to participate in assets of the estate); Hayes v. Equitex, Inc. (In re RDM Sports Group, Inc.), 260 B.R. 915, 919 (Bankr. N.D. Ga. 2001) (ruling that the trustee did not waive his right to a jury trial on his claim of civil conspiracy, among others, as "civil conspiracy is a common law, or legal, claim"); Southern Textile Knitters, Inc., 236 B.R. at 212 (noting defendants who had not filed a proof of claim or asserted a counterclaim against the trustee were entitled to a jury trial with respect to actions seeking to recover for breach of fiduciary duty, for preferential transfers under the Bankruptcy Code, for fraudulent transfers under the Bankruptcy Code and state law, and for civil conspiracy, among other relief).

To establish a claim of civil conspiracy, there must be a common design or agreement, express or implied, between two or more persons to do a wrongful act, and proof of some tortious act in furtherance of the agreement. Allandale Farm, Inc. v. Koch, No. 97350, 1997 WL

1229248, at *3 (Mass. Super. Nov. 3, 1997); see also Movitz v. Home Depot U.S.A., Inc., 82 Fed. Appx. 230 (1st Cir. 2003) ("Under New Hampshire law, a civil conspiracy consists of: (1) two or more persons; (2) an unlawful object to be accomplished; (3) an agreement on the object or course of action; (4) one or more unlawful over acts; and (5) damages proximately resulting from the acts."). The Plaintiffs allege that the Defendants and others acted in concert to transfer, or to permit to be transferred, Simply Media property in order to hinder, delay or defraud creditors. The Plaintiffs allege that the Defendants have caused the Plaintiffs to suffer damages totaling $1,159,290.13, which seemingly represents the amount of the transfers outlined in Count I to Christina Brown totaling $1,008,629.50, in Count II to Elizabeth Brown totaling $72,212.70, and in Count IV to Maria Schulman totaling $78,447.93. Because the unlawful object that purportedly was accomplished through the Defendants' conspiracy were the fraudulent transfers described in Counts I, II, and IV of the amended complaint, the factual issues under these counts with respect to actual fraud and the conduct of the Defendants and acts of the Defendants under Count XV will be common and overlap. For that reason, Count XV should also be tried to a jury at the same time as Counts I, II, and IV.

6. Abuse of Process

The Defendants allege that Reifler has used the legal process by filing this and other actions in order to accomplish an ulterior and unlawful purpose, i.e., to coerce and extort money from the Defendants in order satisfy Reifler's judgment against Simply Media and David Brown. "The elements of the tort of abuse of process in Massachusetts are: (1) that the process is used (2) for an ulterior or illegitimate purpose, (3) resulting in damage to the plaintiff." Refuse & Envtl. Sys., Inc. v. Indus. Servs. of America, Inc., 932 F.2d 37, 41 (1st Cir. 1991). The Defendants seek monetary damages from Reifler on this claim. Accordingly, the Court

concludes that the Defendants' claim is a legal one and therefore the Defendants are entitled to a jury trial on Count I of the counterclaim.

7. Tortious Interference with Advantageous Relations

In Count II of the counterclaim, the Defendants allege that Reifler tortiously and maliciously interfered with the Defendants' relationships, both personally and as directors and shareholders of Simply Media, by bringing this and other actions. An action claiming tortious interference with contractual relations is an action sounding in contract and tort and for which a right to a jury trial exists as the action "is legal in nature and involves a matter of private right." Wakefern Food Corp. v. C & S Wholesale Grocers, Inc. (In re Big V Holding Corp.), No. 00-4372(RTL), 01-758, Civ. A 01-233 (GMS), 2002 WL 148292, at *5 (D. Del. July 11, 2002). Accordingly, the Defendants have a right to jury trial on Count II of the counterclaim.

8. Breach of Fiduciary Duty

The Defendants assert a counterclaim against Reifler for breach of fiduciary duty for which they seek monetary damages. Such relief is legal in nature. The Court finds the Defendants are entitled to a jury trial on Count III of the counterclaim. See Pereira v. Farace, 413 F.3d 330, 340-41 (2d Cir. 2005) (concluding defendants were entitled to a jury trial on the trustee's breach of fiduciary duty claims as the trustee sought compensatory damages--a legal claim); Southern Textile Knitters, 236 B.R. at 212 (noting defendants who had not filed a proof of claim or asserted a counterclaim against the trustee were entitled to a jury trial with respect to actions seeking to recover for breach of fiduciary duty, for preferential transfers under the Bankruptcy Code, for fraudulent transfers under the Bankruptcy Code and state law, and for civil conspiracy, among other relief).

9. Unfair and Deceptive Business Practices

In Count IV of the counterclaim, the Defendants allege that by bringing this and other actions Reifler committed an unfair and deceptive act and practice within the meaning of M.G.L. c. 93A § 11 for which the Defendants seek monetary damages. Because the Defendants seek actual damages and not injunctive relief, the Court concludes that the Defendants have a right to a trial by jury. See QLT, Inc., 495 F.Supp.2d at 197 ("The trinity of cases considering the right to trial by jury on an unfair trade practices claim is thus in agreement. There is a right to trial by jury when the plaintiff seeks actual and treble damages. . . By contrast, there is no right to trial by jury to the extent that the plaintiffs seek injunctive relief. . . The most manageable way to sort out chapter 93A claims is to look to the nature of the remedy sought. This rule is in keeping with the First Circuit's observation that chapter 93A provides for both legal and equitable remedies.").

E. Right to Jury Trial in the Bankruptcy Court

In the Court's view the Defendants have timely requested and have a right to jury trial on Counts I, II, and IV of the amended complaint and on Counts I through IV of their counterclaim. In addition, in order to preserve their right to a jury trial on these counts, the Court believes that Counts III and V through XV of the amended complaint should also be tried to a jury at least with respect to common factual issues.

The United State Code provides:

> If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of the all the parties.

11 U.S.C. § 157(e). Rule 77.4(e) of the Local Rules of the United States District Court for the District of New Hampshire states "[p]rovided all parties expressly consent, the bankruptcy judges of this district are authorized to conduct jury trials in those instances where a right to a jury trial attaches in a proceeding that may be heard by a bankruptcy judge under 28 U.S.C. § 157."

In this proceeding, neither the Plaintiffs nor the Defendants have expressly consented to have a jury trial conducted by this Court. Accordingly, the Court hereby orders the Plaintiffs and the Defendants to file a statement on or before **December 12, 2007**, indicating whether they consent to this Court conducting such a jury trial. If both sides do not consent, the Court will issue a report and recommend to the United States District Court for the District of New Hampshire that the reference for this proceeding be withdrawn. See LR 77.4(d).

F. Continuance of Trial

Pending the filing of the statements referenced above, the trial of this matter shall be continued generally.

ENTERED at Manchester, New Hampshire.

Date: November 28, 2007

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge