

**IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY**

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| BGA MANAGEMENT, LLC d/b/a<br>ALLIANCE MANAGEMENT, solely in its<br>capacity as court-appointed receiver for Aspen<br>Hills, Inc. and on behalf of Aspen Hills, Inc., | Case No. CVCV019693   |
| Plaintiff,   | <b>RULING AND ORDER ON<br/>PLAINTIFF'S MOTION TO<br/>STRIKE JURY DEMAND</b> |
| v.   |   |
| THOMAS LUNDEEN and NANCY<br>LUNDEED,   |   |
| Defendants.  |   |

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In this case the Plaintiff, BGA Management, LLC d/b/a Alliance Management (“BGA”), brings suit solely in its capacity as court-appointed receiver for Aspen Hills, Inc. and on behalf of the Aspen Hills against the company’s corporate officers and directors to recover funds allegedly belonging to the company and improperly in the possession of the Defendants, Thomas and Nancy Lundeen. In brief, Plaintiff asserts claims for illegal corporate distributions, diversion of funds, unjust enrichment, and breach of fiduciary duties.

The Plaintiff filed a Motion to Strike Jury Demand raised in the Defendants’ answer to this lawsuit on January 18, 2019, contending the Defendants are not entitled to a jury trial in this action in equity. Defendants filed a Resistance to Plaintiffs’ Motion on January 28, 2019, to which Plaintiff replied on February 4, 2019. The parties did not request oral argument and the Court determines this matter can be resolved without hearing. The Court, having considered the written arguments of counsel, and the applicable law, enters the following Ruling and Order GRANTING Plaintiff’s Motion to Strike Jury Demand:

**FACTUAL BACKGROUND**<sup>1</sup>

This action arises out of a receivership proceeding pending before the Hancock County District Court (*A.H. Props., L.L.C. v. Aspen Hills, Inc.*, EQCV019535). BGA, the plaintiff in this case, is the court-appointed receiver for Aspen Hills, Inc. Aspen Hills is an Iowa corporation located in Garner, Iowa that was formerly in the business of manufacturing cookie dough for both sale and inclusion in other products. The defendants in this action, Thomas and Nancy Lundeen, are the corporate officers and directors of Aspen Hills. Thomas serves as President, Co-Owner, director, and manager of Aspen Hills; Nancy is the Secretary, Treasurer, Co-Owner, director, and manager of Aspen Hills.

The petition alleges that on or about August 13, 2016, a batch of cookie dough from the Aspen Hills facility tested positive for *Listeria monocytogenes*. After a series of recalls and an investigation by the Food and Drug Administration (“FDA”), Aspen Hills was forced to cease production and closed its facilities on December 26, 2018. Aspen Hills subsequently became unable to satisfy its debts and applied for a receiver to be appointed on December 23, 2016. That request was granted by the Hancock County District Court on December 28, 2016. Paragraph 39(j) of the Receivership Order authorizes BGA to pursue all legal claims Aspen Hills may have, including those against the Lundeens as the company’s officers, directors, and owners. Order Granting the Joint Motion for Appointment of a Receiver ¶ 39(j), *A.H. Props., L.L.C. v. Aspen Hills, Inc.*, EQCV019535 (Iowa Dist. Dec. 28, 2016).

On September 11, 2018, BGA filed suit against the Lundeens on behalf of Aspen Hills, alleging a plethora of corporate misdeeds. Despite the precarious financial situation of Aspen Hills after the *Listeria* outbreak, BGA alleges the Lundeens engaged in a series of improper

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<sup>1</sup> The facts relied on by the Court for purposes of evaluating BGA’s Motion to Strike are derived from the plaintiff’s petition. *See Rieff v. Evans*, 672 N.W.2d 728, 729–30 (Iowa 2003).

distributions to themselves in September and December 2016, depleting the company's assets and rendering it unable to satisfy its outstanding financial obligations. (See Pet. ¶¶ 42, 49–50). Count I alleges the Lundeens made improper corporate distributions to themselves in violation of Iowa Code section 490.833. (Pet. ¶¶ 57–60). Count II alleges the Lundeens illegally diverted corporate assets in violation of Iowa Code sections 491.40 and 491.41. (Pet. ¶¶ 62–68). Count III alleges the Lundeens unjustly enriched themselves through the improper distributions and diversion of corporate assets at the expense of Aspen Hills. (Pet. ¶ 70–73). Counts IV and V, respectively, allege the Lundeens breached their fiduciary duties of care and loyalty to the company. (Pet. ¶¶ 75–77, 79–83).

### **APPLICABLE LAW AND ANALYSIS**

#### **I. Introduction.**

Presently, BGA asks the Court to strike the Lundeens' jury demand filed December 31, 2018. "Improper or unnecessary matter in a pleading may be stricken out on motion of the adverse party." Iowa R. Civ. P. 1.434. A jury demand is improper where "the court finds that there is no right thereto." Iowa R. Civ. P. 1.903(1); *see also* 47 Am.Jur.2d *Jury* § 29 (2019) ("A court, . . . in its determination of whether there is a right to a jury trial, examines the nature of the action, or the nature of the issues involved or the rights asserted, and the remedy sought."). BGA asserts this action to recover property of the receivership on behalf of Aspen Hills is one *in custodia legis* and in equity, precluding any right to a jury trial. The Lundeens assert, by contrast, that this action is not one regarding the administration of receivership assets but allegedly illegal acts; it is therefore at law, they argue, triggering their right to a trial by jury under the Seventh Amendment to the United States Constitution.

## **II. Discussion.**

The Court concludes the Lundeens do not have a right to jury trial in this case. While the Seventh Amendment guarantees the right to a jury trial, that amendment has not been incorporated to the States and is therefore inapposite to the present action. Moreover, even if the Lundeens had invoked the right to jury trial under article I, section 9 of the Iowa Constitution, that right is available only in suits at law; this action is brought in equity. The Court will address each constitutional provision in turn.

### **A. Seventh Amendment to the United States Constitution.**

The federal right to a trial by jury is secured by the Seventh Amendment to the United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. But the Seventh Amendment has not been “incorporated” under the 14th Amendment and is therefore not applicable to the states. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217, 36 S. Ct. 595, 596 (1916) (“[T]he 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same.”); *O’Hara v. State*, 642 N.W.2d 303, 314 (Iowa 2002) (citing 47 Am.Jur.2d *Jury* § 5 (1995) (noting the Seventh Amendment “does not apply to the states” and, “[t]herefore, no federal constitutional right to a jury trial exists in state court”); *see also Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 852–53 (Iowa 2001). The Seventh Amendment, therefore, does not entitle the Lundeens to a jury trial in this action in state district court.

**B. Article I, § 9 of the Iowa Constitution.**

Though the Lundeens do not invoke rights arising under the Iowa Constitution in their brief, article I, section 9 of the Iowa Constitution similarly preserves the right to a jury trial:

The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

Iowa Const. art. I, § 9. “While not identical, both federal and state provisions appear to provide the same general preference for jury trials.” *Weltzin v. Nail*, 618 N.W.2d 293, 298 (Iowa 2000).

Generally, though, the right of trial by jury exists only at law; there is no right to a jury trial in cases brought in equity. *Ross v. Bernhard*, 396 U.S. 531,534, 90 S. Ct. 733, 736 (1970) (stating the right to jury trial is only available in suits “in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered”); *Weltzin*, 618 N.W.2d at 296. While some states interpret their constitutions consistently with Seventh Amendment jurisprudence and apply a two-part test<sup>2</sup> to determine whether the right to jury trial is present in a given case, *see, e.g., SCI Mgmt. Corp. v. Sims*, 71 P.3d 389, 398 (Haw. 2003); *Abraham v. Hennepin Cty.*, 639 N.W.2d 342, 353 n.17 (Minn. 2002), Iowa does not follow this analysis. Under article I, section 9 of the Iowa Constitution, “[t]he legal or equitable nature of the proceeding is to be determined by the pleadings, the relief sought, and the nature of the case.” *Carstens v. Central Nat’l Bank &*

<sup>2</sup> “First, [courts] compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, [courts] examine the remedy sought and determine whether it is legal or equitable in nature.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 43, 109 S. Ct. 2782, 2790 (1989) (quoting *Tull v. United States*, 481 U.S. 412, 417–418, 107 S. Ct. 1831, 1835 (1987)). Under the Seventh Amendment, courts place a greater emphasis on the second element. *Id.*

*Tr. Co. of Des Moines*, 461 N.W.2d 331, 333 (Iowa 1990). Iowa courts primarily “look to the essential nature of the cause of action, rather than solely at the remedy.” *Id.* Indeed, the “remedy sought” is “of minimal importance”; rather, “it is the nature of the cause of action, *i.e.*, where the case is properly docketed, that is the deciding factor.” *Weltzin*, 618 N.W.2d at 297.

The receiver’s action against the Lundeens in the present case is in equitable in nature, not legal. Like a shareholder’s derivative action, existing in equity, the receivership brings suit on behalf of the corporation seeking the return of funds allegedly belonging to the company. *Compare Weltzin*, 618 N.W.2d at 303 (denying shareholders right to jury trial in a derivative suit that asserts claims on behalf of the corporation) *with Rieff v. Evans*, 672 N.W.2d 728, 732–33 (Iowa 2003) (finding shareholders possessed a right to jury trial where they asserted their own claims directly against the company, not derivatively on its behalf). While a lawsuit seeking personal liability for damages is ordinarily legal in nature, BGA’s claims inherently seek to reclaim funds that belong to the company and were allegedly obtained by abuse of the Lundeens’ fiduciary duties as officers and directors of the company. These claims are fundamentally equitable in nature. *See Weltzin*, 618 N.W.2d at 300 (“Restitution is defined as an [a]ct of . . . restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury” and “is an equitable remedy which creates no right to a jury.” (quoting *Restitution*, Black’s Law Dictionary 1477 (Rev. 4th ed. 1968)); Restatement of Restitution § 160, cmt. *e* (1936) (“Even though what is transferred is money or a chattel which is not unique, the payor or transferor is entitled to maintain a proceeding in equity for specific restitution if the payment or transfer was procured by an abuse of a fiduciary or confidential relation.”). And at least one court outside Iowa has found an action brought on behalf of a corporation to recover improper distributions and illicit expenditures to be equitable in nature. *See Pereira v. Farace*,

413 F.3d 330, 339 (2d Cir. 2005) *cert. denied* 126 S. Ct. 2286 (2006) (concluding the “nature of the issues” was equitable rather than legal where a bankruptcy trustee filed suit against former officers and directors for breach of fiduciary duties and illicit distributions; but because the nature of the remedy was legal, no right to jury trial existed under federal Seventh Amendment jurisprudence).

The Lundeens assert, however, that the Iowa Supreme Court has recognized an action brought by a receiver to recover allegedly improper dividends paid to various stockholders to be “at law,” not in equity, therefore entitling them to a jury trial in this case. *See Bates v. Brooks*, 222 Iowa 1128, 270 N.W. 867, 868 (Iowa 1937). But that proposition overstates the holding of the *Bates* case. In *Bates*, the Supreme Court, on appeal, merely noted that “[t]he case was tried as a law action” over the objection of the receiver’s motion to transfer the case to equity. *Id.* Because the receiver did not appeal that aspect of the district court’s ruling, the Court declined to address the issue and *assumed* “[the] case must, therefore, be considered an action at law” for purposes of the appeal. *Id.* By contrast, the Supreme Court had previously determined an action by a receiver to collect a statutorily-granted stock assessment from the stockholders of an insolvent bank properly cognizable in equity. *See Broulik v. Henderson*, 218 Iowa 640, 254 N.W. 63, 65 (Iowa 1934) (citing *Andrew v. Commercial State Bank*, 206 Iowa 1070, 221 N.W. 809 (Iowa 1928)).

Even if several of BGA’s individual claims made against the Lundeens could be considered legal in nature, rather than equitable, this does not entitle the Lundeens to a jury trial under article I, section 9 of the Iowa Constitution. The Iowa Supreme Court has expressly rejected the granular and piecemeal inquiry applied by federal courts under the Seventh Amendment when analyzing whether the Iowa Constitution supplies a litigant with a right to jury

trial. *Weltzin*. 618 N.W.2d 293, 296–97, 299–300 (Iowa 2000) (declining to engage in granular inquiry into the nature of each severable claim under *Ross v. Bernhard*, 396 U.S. 531, 90 S. Ct. 733 (1970) because “this would create quite a quandary for the lower courts to distinguish between the claims”); accord *Ross*, 396 U.S. at 550 (Steward, J., dissenting) (“The fact is, of course, that there are, for the most part, no such things as inherently ‘legal issues’ or inherently ‘equitable issues.’ There are only factual issues, and like chameleons take their color from surrounding circumstances.”); see also *Conrad v. Dorweiler*, 189 N.W.2d 537, 538–39 (Iowa 1971) (holding a defendant is not entitled to a jury trial in an otherwise equitable action simply because the defendant asserts legal counterclaims that raise severable issues).

Moreover, the majority of BGA’s individual claims against the Lundeens are equitable in nature. “Breach of fiduciary duty is an equitable claim.” *Weltzin*, 618 N.W.2d at 299. Actions brought under Iowa Code § 490.833 are properly brought in equity. See *Schoening v. Schwenk*, 112 Iowa 733, 84 N.W. 916, 916 (Iowa 1901). Claims for the return of funds on the basis of unjust enrichment are similarly equitable in nature. See *Ahrens v. Ahrens Agric. Indus. Co.*, No. 14-0564, 2015 WL 2089372, at \*7 (Iowa Ct. App. May 6, 2015) (citing *Iowa Waste Sys., Inc. v. Buchanan Cty.*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000)).

Because the nature of the litigation in this case is fundamentally equitable in nature, the Lundeens are not entitled to a jury trial under the Iowa Constitution.

### **RULING**

In conclusion, the Lundeens do not have the right to a jury trial in this case. The Seventh Amendment has not been incorporated to the States and is inapplicable to this action in the Iowa Business Court. Neither do the Lundeens do not have a right to jury trial under article I, § 9 of the Iowa Constitution. As under the Seventh Amendment, the right to jury trial under the Iowa



Constitution is available only in actions at law, not suits brought in equity. Considering “the essential nature of the cause of action” in light of Iowa Supreme Court case law, BGA’s receivership action to recover property alleged to belong to the Aspen Hills receivership estate, on behalf of the distressed company, is equitable in nature. No right to a jury trial exists.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, BGA Management’s Motion to Strike Jury Demand is GRANTED. The Defendants, Thomas and Nancy Lundeen’s jury demand is hereby STRICKEN.

All of the above is SO ORDERED.

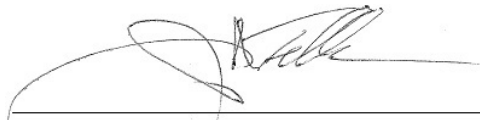


State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV019693  
**Case Title** (JDT) ALLIANCE MANAGEMENT LLC V. THOMAS AND NANCY LUNDEEN

So Ordered



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John Telleen, District Court Judge,  
Seventh Judicial District of Iowa