UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PELICAN EQUITY, LLC, Plaintiff, v. ROBERT V. BRAZELL, STEPHEN L. NORRIS, TALOS PARTNERS, LLC, RAMA RAMACHANDRAN, DARL McBRIDE, and BRYAN CAVE LLP, Defendants.	09 Civ. 5927 (NRB)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BRYAN CAVE LLP'S MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendant Bryan Cave LLP ("Bryan Cave") respectfully submits this memorandum of law in support of its motion to dismiss the First Amended Complaint (the "Amended Complaint" or "Cmplt.") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Amended Complaint, brought by Plaintiff Pelican Equity, LLC ("Plaintiff"), asserts claims allegedly assigned to it by American Institutional Partners LLC ("AIP"). AIP is not a party to this action and is a petitioner in a Chapter 11 bankruptcy proceeding in Utah.

PRELIMINARY STATEMENT

Plaintiff claims that AIP's senior executives stole AIP's business. The Amended Complaint contains specific allegations of how these executives – the individual Defendants in this action – had access to and misappropriated all of AIP's Confidential Business Information, set up a new business to compete with AIP – defendant Talos Partners, LLC ("Talos") – and diverted AIP's business opportunities.

Bryan Cave was AIP's counsel. Plaintiff charges Bryan Cave with misappropriation of trade secrets, with aiding and abetting the individual defendants' alleged actions, with malpractice and with breach of fiduciary duty. But after charging AIP's executives with specific wrongful acts, the Amended Complaint fails to plead any facts showing what Bryan Cave supposedly did to misappropriate anything, to aid and abet wrongdoing, to commit malpractice or to breach fiduciary duties. The specific facts it does plead flatly contradict the hollow conclusory allegations of wrongdoing by Bryan Cave.

Bryan Cave and all of the Individual Defendants are collectively accused of misappropriating trade secrets. But the Amended Complaint specifically alleges that the individual Defendants obtained all of AIP's Confidential Business Information when they worked for AIP, without any help from Bryan Cave. There are no facts pleaded that show what Bryan Cave did that constitutes misappropriation.

The facts pleaded in the Amended Complaint also contradict, and certainly do not explain or support, Plaintiff's claims of aiding and abetting, malpractice and breach of fiduciary duties. First, Plaintiff alleges that in January 2009, Defendant Robert Brazell asked Bryan Cave to create a new corporate entity, Talos, and asked Bryan Cave to draft some basic documents for Talos including employment agreements. But according to the Amended Complaint, Brazell was an officer, principal and co-chair of AIP when he made these requests. There is simply no explanation in the Amended Complaint of how Bryan Cave committed malpractice, breached a duty or aided and abetted wrongdoing by acting on the instructions of a senior officer and director of AIP.

Second, Plaintiff claims Bryan Cave knew that Brazell was working against AIP's interest because of a January 19, 2009 email sent by Brazell to Bryan Cave suggesting that AIP's founder, Mark Robbins, might not remain "friendly." At best, this email suggested a possible conflict between AIP's two principals, Brazell and Robbins. It does not explain how Bryan Cave was supposed to know which of the two was properly acting for AIP. The Amended Complaint then pleads facts showing that Bryan Cave did exactly what one would expect a responsible law firm to do when confronted with a possible conflict between principals of a client. Plaintiff acknowledges in its pleadings that, two days after receiving the January email, Bryan Cave sent a conflict-waiver request to Robbins that disclosed Brazell's and Talos's plans and asked Robbins to obtain counsel before executing the requested waiver. There is no specific allegation of anything Bryan Cave did for Brazell and Talos after requesting the waiver.

Finally, the Amended Complaint charges that Bryan Cave kept information about Brazell's and Talos's planned activities secret from Robbins. But the Amended Complaint

quotes Bryan Cave's conflict-waiver request that discloses precisely what Plaintiff says was not disclosed.

In addition to its failure to plead facts showing wrongdoing by Bryan Cave, the Amended Complaint is also deficient for its failure to plead facts showing that anything Bryan Cave did was the proximate cause of harm to AIP.

Plaintiff amended its complaint once following the pre-motion conference, which was designed to give plaintiffs an opportunity to fix deficiencies in their pleading in advance of a motion to dismiss. Because it still fails to allege specific facts showing a claim against Bryan Cave, the Amended Complaint should be dismissed with prejudice.

STATEMENT OF FACTS

1. The Individual Defendants' Relationships with AIP

Plaintiff, a Delaware limited liability company based in California, alleges that it has, "[b]y virtue of a written assignment," the authority to bring AIP's legal claims against Defendants. (Cmplt. ¶¶ 1, 7.) Founded by Mark Robbins, AIP is described as a company that developed a stock lending program between 2004 and 2009. (*Id.* ¶¶ 1, 17.) Plaintiff defines as "Confidential Business Information," the stock lending program, as well as "the structure of the transactions effected in it, the model contracts and other documents created for it, the substance of the discussions and agreement in principle with insurers and financial institutions, the names of the institutions and person in them with which AIP conducted those discussions, and the models and methodologies relating to the AIP stock loan program." (*Id.* ¶ 19.) Plaintiff alleges that "detailed knowledge" of the Confidential Business Information was limited "to [AIP's] principals and to others who were involved in that aspect of AIP's business and agreed to keep it confidential." (*Id.*)

Defendant Robert V. Brazell is alleged to have become an AIP principal in November 2008 and to have "moved into an office at AIP's Salt Lake City headquarters" at that same time. (*Id.* ¶¶ 23-28.) Plaintiff claims that "[o]n or about November 8, 2008, Brazell told Robbins that he believed the AIP stock loan product was 'the best opportunity he has seen in his lifetime.'" (*Id.* ¶ 24.) Also in November 2008, Brazell is alleged to have "almost immediately started introducing potential borrowers to AIP." (*Id.*) The Amended Complaint states that "Robbins sent certain documents to Brazell including but not limited to the Master Loan Agreement, a detailed summary of the AIP stock loan product, and an overview explaining in detail the process by which AIP structured and sold its loan product." (*Id.* ¶23.)

Defendant Stephen L. Norris is alleged to have been a partner with Mark Robbins "in other ventures" since "early 2007" and to have become "a consultant to AIP and a member of AIP's investment committee" beginning in late 2008. (*Id.* ¶ 9.) Plaintiff claims that, "[b]y November 25, 2008, Norris was working full time with Brazell, Rama, and others at AIP deploying AIP's stock loan product." (*Id.* ¶ 29.)

Defendant Rama Ramachandran was, according to the Amended Complaint, "until January 2009 an AIP employee." (*Id.* ¶ 11.) Ramachandran is alleged to have been working at AIP "for months" by November 2008. (*Id.* ¶ 26.) He is also alleged to have given "Brazell passwords for all of AIP's information technology platforms." (*Id.* ¶ 27.)

Plaintiff alleges that, "[b]eginning in 2007," Defendant Darl McBride "expressed an interest in joining AIP" and "[i]n or about the fall of 2007 … he moved into AIP's Salt Lake City offices and remained there for more than a year." (*Id.* ¶ 20.) McBride is alleged to have become "a trusted confidante of Robbins" and to have "had access to virtually all of AIP's files

and [to have] learned the details of AIP's stock lending business that constituted its Confidential Business Information, which he agreed to keep confidential." (*Id.*)

2. Bryan Cave's Relationship with AIP

Plaintiff alleges that, as of April 30, 2008, Bryan Cave executed an engagement agreement with AIP and began performing legal work for AIP. (*Id.* ¶ 21.) Bryan Cave allegedly "assisted AIP in structuring the stock loan program, consulted with AIP's principals regarding regulatory considerations affecting it, and drafted documents necessary to implement the program, including a Master Loan Agreement specifically devised for AIP for use in its stock loan business." (*Id.* ¶ 22.) Plaintiff further alleges that Bryan Cave "became privy to virtually every aspect of the Confidential Business Information." (*Id.*)

3. The Individual Defendants' Alleged Conspiracy To Steal and Misappropriate AIP's Confidential Business Information

According to Plaintiff: "In November 2008, Brazell also told Robbins that he had identified office space in New York for AIP and began negotiating the terms of a lease for it." (*Id.* ¶ 30.) Plaintiff alleges that "Brazell also started interviewing and hiring staff" around this time. (*Id.*) During December 2008, Plaintiff alleges that Brazell was "purportedly acting for AIP" and that Brazell and Norris "traveled extensively to New York City, Los Angeles, and Salt Lake City work on the stock loan program." (*Id.* ¶¶ 31-32.) Significantly, Plaintiff alleges that "[f]rom approximately November 2008 through January 2009, Brazell was an AIP officer and held himself out as its 'partner' and 'co-chairman.'" (*Id.* ¶ 8.)[1]

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[1] The qualification that Brazell "held himself out" as a partner and co-chairman, was added in the Amended Complaint. Paragraph 9 of the original complaint alleged: "From approximately November through January 2009, Brazell was a partner in and the Co-Chairman of AIP." To the extent this qualification was made to suggest that Brazell was not really a partner or co-chair of AIP, it should be ignored. As this Court has previously held: "Where a plaintiff blatantly changes his statement of the facts in order to respond to the

Plaintiff alleges that, "[i]n December 2008 or early January 2009," at the same time that Brazell and Norris were working on generating business for AIP's stock loan program, "Brazell and Norris agreed to steal AIP's business, destroy AIP, and move forward with its stock loan product but without AIP's founder and principal, Robbins." (*Id.* ¶ 37.) Plaintiff also alleges that, "[i]n that same time period McBride and Rama [Ramachandran] agreed to join them in that endeavor." (*Id.*) Plaintiff claims that Brazell, Norris, McBride and Ramachandran "stole Confidential Business Information from AIP's computer system and caused AIP's computer and emails systems to be sabotaged and its service interrupted." (*Id.*) Plaintiff further claims that Ramachandran "knowingly participated in the conspiracy by, among other things, securing website addresses and performing trademark searches for the new business." (*Id.)*

Plaintiff alleges that, subsequent to this purported theft and misappropriation of the Confidential Business Information, Talos – the AIP executives' new company – "usurped" numerous of AIP's "business opportunities." (*Id.* ¶¶ 44-48.) Plaintiff also alleges that the individual Defendants undertook "a smear campaign against Robbins and AIP" that began "[o]n or before February 11, 2009." (*Id.* ¶ 49.) Plaintiff alleges that McBride "established a website named skylinecowboy.com, the purpose of which was to make disparaging and misleading statements about Robbins and his business and to discredit him." (*Id.*) These statements are alleged to have included that "Robbins had 'pled No Contest to fraud,' owes more than $40,000,000 to others, and had 'become dubbed "the Bernie Madoff of Utah"' due to 'Ponzi-

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defendant's motion to dismiss . . . and directly contradicts the facts set forth in his original complaint, a court is authorized to accept the facts described in the original complaint as true." *Colliton* v. *Cravath, Swaine & Moore LLP*, No. 08 Civ. 0400 (NRB), 2008 WL 4386764, at *6 (S.D.N.Y. Sept. 24, 2008) (Buchwald, J) (quoting *Wallace* v. *New York City Dep't of Corr.*, No. 95 Civ. 4404, 1996 WL 586797, at *2 (E.D.N.Y. Oct. 9, 1996) (internal quotation marks and brackets omitted)).

type swindling.'" (*Id.* ¶ 50.) Plaintiff claims that the purpose of these statements was "to assist in the Individual Defendants' effort to destroy AIP while they started up Talos and competed against it." (*Id.*) Plaintiff has not brought a defamation claim and has not alleged that Bryan Cave had anything to do with this "smear campaign."

4. Bryan Cave's Limited Legal Work for Talos

Plaintiff alleges that Brazell "told" Bryan Cave "that he and his confederates were moving forward with a new, separate business to exploit the stock loan program." (*Id.* ¶ 38.) According to Plaintiff, "[o]n Brazell's instructions, Bryan Cave formed a new Delaware limited liability company named Talos Partners, LLC." (*Id.*) Plaintiff claims that, in a January 19, 2009 email, Brazell informed Bryan Cave "that Norris and he would be managers of Talos and Norris would be co-chairman." (*Id.*) Plaintiff alleges that Bryan Cave "also prepared agreements for [Talos] at Brazell's direction," including "employment agreements." (*Id.* ¶ 39.) Plaintiff further alleges that Bryan Cave's "attorneys also revised the stock loan agreements they had drafted for AIP to delete references to AIP and replace them with references to Talos." (*Id.*)

Plaintiff claims that the January 19 email from Brazell to Bryan Cave stated: "'Please let me know what I need to do to facilitate this. I don't know how long Mark [Robbins] will remain friendly.'" (*Id.* ¶ 38 (brackets in Amended Complaint).) As noted above, the Amended Complaint admits that, at the time Brazell sent this email, and "through January 2009, Brazell was an AIP officer" and "its 'partner' and 'co-chairman.'" (*Id.* ¶ 8.) The Amended Complaint does not allege that Bryan Cave was specifically told by Brazell or anyone else that Talos was formed to misappropriate AIP's Confidential Business Information. Rather, it states in conclusory terms, without supporting factual allegations, that Bryan Cave "knew that Brazell and his co-conspirators were misappropriating that [Confidential Business] information in their own virtually identical competing stock loan business." (*Id.* ¶¶ 38-39.) The January 19 email is

the only specific information about a possible rift in Brazell's relationship with Robbins and AIP that Bryan Cave is alleged to have had. (*Id.*)

According to the Amended Complaint, promptly after receiving the January 19 email Bryan Cave sent a conflict-waiver request to Robbins for him to sign on behalf of AIP that included the following language, which is quoted in the Amended Complaint:

> As you are aware, American Institutional Partners, LLC ("AIP"), Mark Robbins and various entities related to AIP and Mr. Robbins (collectively, the "AIP Parties") have been engaged in various business activities related to the formation and operation of a lending business. Bryan Cave LLP has represented the AIP Parties in connection with such business activities.
>
> We understand that Robert V. Brazell intends to pursue such business activities and we hereby consent to Mr. Brazell and any entities formed by him (the "RB Parties") pursuing such business activities and we hereby agree that we shall have no claim against the RB Parties for pursuing such business activities or against Bryan Cave LLP for advising and assisting the RB Parties in that endeavor. Moreover, we also consent to the RB Parties using the work product of Bryan Cave LLP resulting from its representation of the AIP Parties. Finally, we consent to Bryan Cave LLP representing the RB Parties in connection with the previously referred to business activities, to Bryan Cave's disclosure to the RB Parties of any of the AIP Parties' confidences or secrets, and to Bryan Cave LLP's use of the aforementioned work product therewith. In providing this consent, we have sought and received the advice of counsel.

(*Id.* ¶ 40.) This conflict-waiver request disclosed Brazell's intention to engage in the same "business activities" as AIP; it disclosed Bryan Cave's intent to "advis[e] and assist[]" Brazell and "any entities formed by him" in connection with those activities; it disclosed the possibility of "Bryan Cave's disclosure … of any of the AIP Parties' confidences or secrets" and its "use of the aforementioned work product"; and it asked Robbins not to provide his consent unless he had "sought and received the advice of counsel." (*Id.*)

Plaintiff's original complaint alleges (at ¶ 87) that this request was sent on January 21, 2009 – one business day after the January 19 email could have been reviewed (January 19 was Martin Luther King Day). The Amended Complaint is less specific, claiming that it was sent "in late January." (Cmplt. ¶ 40.) Either way, it is apparent that the request was sent promptly after Talos was formed and immediately after the January 19 email was received.

Plaintiff alleges that Robbins did not sign the conflict-waiver request. (*Id.*) Plaintiff further alleges that at some point Bryan Cave "ceased its representation of AIP," although the Amended Complaint does not specify when this took place. (*Id.* ¶ 42.) Plaintiff does allege that Bryan Cave "performed legal work for Talos . . . after, and on information and belief also before, it ceased its representation of AIP." (*Id.*) But Plaintiff does not allege whether any of this work was performed after the conflict-waiver request was sent. Nor does it allege that any work Bryan Cave did for Talos hurt AIP in any way. (*Id.* ¶¶ 40-42.)

THE COMPLAINT AND AMENDED COMPLAINT

This action was filed on June 29, 2009. By letter dated August 19, 2009, Bryan Cave's counsel requested a pre-motion conference concerning a proposed motion to dismiss and outlined the grounds for dismissing the five causes of action pleaded against it in the original complaint. Following a telephonic pre-motion conference on September 10, 2009, Plaintiff filed its Amended Complaint on September 18, 2009.

The Amended Complaint asserts ten causes of action, three of which name Bryan Cave: The Second Claim for "Misappropriation of Trade Secrets," against all defendants; the Sixth Claim for "Aiding and Abetting Breach of Fiduciary Duty, Duty of Loyalty, Misappropriation, and Unfair Competition," against Bryan Cave alone; and the Ninth Claim for "Malpractice/Breach of Fiduciary Duties," against Bryan Cave alone.

ARGUMENT

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). As a general matter, a court that is ruling on a Rule 12(b)(6) motion to dismiss "is required to accept the material facts alleged in the Amended Complaint as true." *Frasier* v. *Gen. Elec. Co.*, 930 F.2d 1004, 1007 (2d Cir. 1991). Nevertheless, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). *See also, Ashcroft* v. *Iqbal*, 129 S.Ct. 1937, 1949 (2009) (holding that "threadbare recitals of the element's of a cause of action, supported by mere conclusory statements" cannot support a complaint sufficient to withstand a Rule 12(b)(6) motion).

In the recent *Twombly* and *Iqbal* decisions, the Supreme Court set forth the "[t]wo working principles" courts must adhere to in judging a complaint's adequacy under Rule 12(b)(6): (1) "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"; and (2) "[O]nly a complaint that states a *plausible* claim for relief survives a motion to dismiss. . . . Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Iqbal*, 129 S.Ct. at 1949-50 (italics added) (internal quotation marks and brackets omitted).

Here, the allegations that Plaintiff has asserted against Bryan Cave, when stripped of the numerous conclusory statements, do not give rise to a plausible claim for relief. Accordingly, Bryan Cave's motion to dismiss should be granted in its entirety.

I.

Plaintiff Has Failed to State a Claim for Misappropriation Against Bryan Cave

In its Second Claim, Plaintiff indiscriminately alleges that each of the Defendants, "disclosed and used, and is continuing to disclose and use, such Confidential Business Information and other confidential information about AIP and its contacts and negotiations with other entities, for their benefit and that of Talos, in competition with and to the detriment of Pelican, AIP's successor in interest." (Cmplt. ¶ 59.) As a result of this disclosure, Plaintiff alleges, "AIP and [Plaintiff] . . . have been damaged . . . in an amount to be determined at trial but which is on information and belief in excess of $100,000,000." (*Id.* ¶ 60.) The Amended Complaint does not allege to whom outside of AIP (if anyone) Bryan Cave disclosed this information nor how Bryan Cave used it.

Under New York law, "[t]he elements of a cause of action for misappropriation of trade secrets are that (1) plaintiff possesses a trade secret and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means." *Universal Marine Med. Supply, Inc.* v. *Lovecchio*, 8 F. Supp. 2d 214, 221 (E.D.N.Y. 1998). Plaintiff cannot meet this standard.

The only Confidential Business Information that Bryan Cave is alleged to have disclosed are AIP's "loan agreements" that were used "as models for Talos transactions." (Cmplt. ¶¶ 39, 42.) Plaintiff alleges that Bryan Cave disclosed these agreements to Brazell and the other co-defendants who formed Talos. (*Id.* ¶ 42.) Yet Plaintiff also alleges that Bryan Cave did so "at Brazell's direction" (*id.* ¶ 39) at a time – January 2009 – when, according to Plaintiff, Brazell "was an AIP officer" and AIP's "partner" and "co-chairman." (*Id.* ¶ 8.) Thus, Plaintiff's claim is that Bryan Cave "disclosed" AIP's Confidential Business Information to AIP's co-chair.

Common sense dictates that disclosing AIP's confidential information to the co-chair of AIP at his direction is not misappropriation. *See Marietta Corp.* v. *Fairhurst*, 301 A.D.2d 734, 736-38 (N.Y. App. Div. 2003) (rejecting misappropriation claim where defendant had not disclosed the trade secrets at issue to an outside party).

The Amended Complaint specifically alleges that Brazell received from Mark Robbins in November 10, 2008 the "Master Loan Agreement that . . . Bryan Cave prepared specifically for AIP" and other Confidential Business Information. (Cmplt. ¶¶ 4, 23.) Thus, Brazell, and therefore Talos, possessed the Master Loan Agreement and other Confidential Business Information with or without Bryan Cave's purported "disclosure" because Mark Robbins gave it to Brazell. (*Id.*) The Amended Complaint alleges that the other Individual Defendants also obtained AIP's Confidential Business Information while working for AIP without help from Bryan Cave. (*Id.* ¶¶ 9, 11, 12, 20, 23-35.)

It is untenable for Plaintiff to claim that Bryan Cave misappropriated AIP's Confidential Business Information by giving AIP documents to AIP's co-chair and other AIP employees while they were working for AIP and already had those documents.

II.

Plaintiff Has Failed to Adequately Plead Aiding and Abetting Liability Against Bryan Cave

In its Sixth Claim, Plaintiff alleges that Bryan Cave aided and abetted the breaches of fiduciary duties, misappropriation, and unfair competition allegedly committed by Defendants Brazell, Norris, and Ramachandran. (Cmplt. ¶ 74.) Plaintiff claims that Bryan Cave "came to know that Messrs. Brazell, Norris, and Rama were breaching their duties to AIP, were misappropriating its trade secrets, preparing to compete unfairly with it, and then that they were

competing unfairly with it." (*Id.*) Plaintiff seeks "an amount … in excess of $100,000,000" from Bryan Cave in damages on this claim. (*Id.* ¶ 75.)

To establish aiding and abetting, Plaintiff must plead facts sufficient to show that Bryan Cave had actual knowledge of, and provided substantial assistance to, the alleged wrongdoing. *See Goldson* v. *Walker*, 885 N.Y.S.2d 133, 134 (N.Y. App. Div. 2009). Only actual knowledge, and not constructive knowledge, is sufficient in pleading aiding and abetting. *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 169 (N.Y. App. Div. 2003).

Plaintiff has not pleaded facts showing that Bryan Cave had knowledge of wrongdoing. The Court should not credit Plaintiff's vague and conclusory allegation that Bryan Cave "came to know" about the Individual Defendants' improper conduct. *See Iqbal*, 129 S.Ct. at 1951 (disregarding as conclusory plaintiff's allegation that defendants "knew of" and "condoned" allegedly discriminatory government policy); *Air Atlanta Aero Eng'g Ltd.* v. *SP Aircraft Owner I, LLC*, No. 08 Civ. 8852 (VM), 2009 WL 2191318, at *12 (S.D.N.Y. July 23, 2009) ("conclusory statements … presented without alleging any facts supporting this conclusion, cannot suffice"). For the same reason, this Court should not credit Plaintiff's vague and conclusory allegation that Bryan Cave "knew that Brazell and his co-conspirators were misappropriating [the Confidential Business] information in their own virtually identical competing stock loan business." (Cmplt. ¶ 39.)

The only factual allegation regarding Bryan Cave's purported "knowledge" of the alleged wrongdoing by its co-defendants is the January 19, 2009 email sent by Brazell to Bryan Cave that stated: "Please let me know what I need to do to facilitate this. I don't know how long Mark will remain friendly." (*Id.* ¶ 38.) On its face, this does not impart any knowledge of misappropriation, breach of fiduciary duty, or unfair competition. As set forth above, Plaintiff

alleges that at the time of this email Brazell was still "an AIP officer," "partner" and "co-chairman." (*Id.* ¶ 8). Thus, the most reasonable interpretation of this email and the actions that preceded it was that Brazell, still an officer and co-chair of AIP, instructed AIP's counsel, Bryan Cave, to set up a new business to utilize the stock lending program. There is nothing particularly unusual about such a request. To the extent that the email questions whether "Mark will remain friendly," the more reasonable inference is that there may have been a conflict brewing between the two principals of AIP – Robbins and Brazell. Bryan Cave's prompt request to Robbins for a waiver, which disclosed Brazell's intention to form a new business, strongly rebuts any possible inference that Bryan Cave was aware of or participated in any wrongdoing.

Iqbal directs a court in considering whether a plaintiff's factual allegations state a plausible claim for relief "to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* at 1949 (quoting *Twombly*). The recent case of *United States* v. *Lloyds TSB Bank PLC*, No. 07 Civ. 9235 (CSH), 2009 WL 23715762 (S.D.N.Y. Aug. 4, 2009), is instructive. In that case, the United States government alleged that a bank had participated in a conspiracy with two overseas depositors to commit securities fraud. *Id.* at *2. In finding that the government's pleading did not meet *Iqbal*'s standard, the court stated:

> [C]ommon sense counsels against inferring that a substantial international bank, bearing an historic name and presumably wishing to maintain a global reputation for integrity and honorable dealing, would, with no stake in the criminal securities fraud itself, and no financial incentive other than to maintain the patronage of a fee-generating client, enter into a conspiracy with two Cypriot depositors to defraud investors in the United States.

Id. at *16. The *Lloyds* court used its common sense to determine that the government's factual allegations did not suggest a plausible cause of action. *Id.* It makes equally little sense for Bryan Cave – "bearing an historic name and presumably wishing to maintain a global reputation for integrity and honorable dealing" – to risk a malpractice suit and possible ethical sanction merely to assist a client in stealing another client's intellectual property in the absence of pleaded facts to support the allegation.

Because Plaintiff's one factual allegation of Bryan Cave's actual knowledge of wrongdoing is consistent with perfectly lawful conduct, Plaintiff's aiding and abetting claim fails under the *Iqbal* standard and should be dismissed. *See Kregler* v. *City of New York*, No. 08 Civ. 6893 (VM), 2009 WL 2524628, at *4 (S.D.N.Y. Aug. 17, 2009) (where complaint "contains no factual allegations about any direct, personal knowledge of" alleged wrongdoing, claim failed under *Iqbal*); *Willey* v. *J.P. Morgan Chase, N.A.*, No. 09 Civ. 1397 (CM), 2009 WL 1938987, at *4 (S.D.N.Y. July 7, 2009) (where factual pleadings did not "rise above the speculative level," motion to dismiss was granted under *Iqbal*) (internal quotation marks omitted).

Plaintiff's pleading is also deficient because it does not plead that Bryan Cave had any knowledge of wrongdoing *before* it did work for Talos. The Amended Complaint is deliberately vague as to when it claims Bryan Cave "came to know" of wrongdoing in relation to when it did anything for Talos. Without an allegation of actual knowledge at the time of Bryan Cave's actions, Plaintiff's claim must fail because Plaintiff has failed to allege that Bryan Cave took any actions while knowing of wrongdoing. In the absence of knowledge at the time of action, there can be no claim that Bryan Cave substantially assisted wrongdoing. *See Bullmore* v. *Ernst & Young Cayman Islands*, 45 A.D.3d 461, 464 (N.Y. App. Div. 2007) (without pleading

of actual knowledge, substantial assistance is "inadvertent" assistance and aiding and abetting is not adequately pleaded).

III.

Plaintiff Has Failed to Adequately Plead Malpractice/Breach of Fiduciary Duties Against Bryan Cave

Plaintiff's Ninth Claim, alleging both malpractice and breach of fiduciary duties, relies on the same recitation of alleged facts to support both legal theories. (Cmplt. ¶¶ 82-86.) As an initial matter, the breach of fiduciary duty claim is redundant and for this reason should be dismissed. *Romano* v. *Ficchi*, No. 376/09, 2009 WL 1460781, at *3 (N.Y. Sup. Ct. May 22, 2009) ("A claim for … breach of fiduciary duty, premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action, is redundant and should be dismissed"). *See also*, *Schweizer* v. *Mulvehill*, 93 F. Supp. 2d 376, 400 (S.D.N.Y. 2000) ("[P]laintiff's fiduciary-breach claim based on defendants' alleged plan to settle the case should be dismissed, since it duplicates plaintiff's claim of malpractice"); *CVC Capital Corp.* v. *Weil, Gotshal, Manges*, 192 A.D.2d 324, 325 (N.Y. App. Div. 1993) ("Plaintiff's cause of action alleging breach of fiduciary duty merely tracks the allegations of the malpractice claim and does not alleged any independent intentional tort, and was, therefore, properly dismissed").

To state a claim for malpractice, Plaintiff must allege that Bryan Cave intentionally engaged in wrongdoing or misconduct or was negligent, and in either case that Bryan Cave's actions were the proximate cause of Plaintiff's damages. *Morelli & Gold, LLP* v. *Altman*, No. 602145/07, 2009 WL 2152138, at *8-11 (N.Y. Sup. Ct. June 12, 2009). Plaintiff alleges six acts by Bryan Cave to support its malpractice claim:

> (a) failing to inform AIP promptly when it learned that Brazell and/or his accomplices were preparing to compete with AIP while acting as AIP principals and/or employees and owed fiduciary duties to AIP,

> (b) actively providing legal counsel to Brazell and Talos,
>
> (c) assisting Brazell in the formation and establishment of a competing business, Talos, without previously obtaining an informed waiver of their conflict of interests from AIP,
>
> (d) working for Brazell and the competing venture both before and after his and his confederates' departures from AIP while Bryan Cave possessed AIP's Confidential Business Information and information regarding its development and use, and even billing AIP for work they performed for Brazell and Talos,
>
> (e) providing Brazell with confidential AIP information and work product and disclosing it to, and using it for, Brazell and Talos, and
>
> (f) seeking a release from AIP and Robbins on behalf of Brazell and Talos of all claims against them without adequately informing them of the import of that release or of the position in which they had put themselves.

(Cmplt. ¶ 83.) None of these allegations suffices to make out a claim for malpractice. Indeed, some are contradicted by Plaintiff's allegations elsewhere in the Amended Complaint.

First, Plaintiff claims that Bryan Cave committed malpractice because it did not "inform AIP promptly when it learned that Brazell and/or his accomplices were preparing to compete with AIP." (Cmplt. ¶ 83.) Plaintiff alleges that Bryan Cave was "told" by Brazell that "he and his confederates" were starting a new business, Talos, "to exploit the stock loan program." (*Id.* ¶ 38.) Plaintiff does not allege that at the time Bryan Cave was asked to form Talos, Brazell said he planned to have Talos compete with AIP; it alleges only that Brazell was creating a new company for a stock loan program. As discussed above, Brazell was still an AIP officer, partner, and co-chair of AIP (*see* pp. 11, 13-14, *supra)*. Under these circumstances, it is difficult to understand what would be suspicious about an officer and the co-chair of a company asking counsel to form a new corporate entity to house a particular business.

When, according to the Amended Complaint, Bryan Cave had reason to suspect that work for Talos might create a potential conflict with AIP, it immediately sent Mark Robbins

of AIP a conflict-waiver request disclosing precisely the work that it proposed to do for Brazell and the fact that the "business activities" of his new entity would be the same as those of AIP. (Cmplt. ¶ 40.)[2] Thus, even if the January 19 email gave Bryan Cave knowledge of Brazell's and Talos's alleged plans, Plaintiff's own allegations make clear that Bryan Cave acted swiftly to disclose those facts to Robbins of AIP.

Second, Plaintiff alleges that Bryan Cave committed malpractice by "actively providing legal counsel to Brazell and Talos." (Cmplt. ¶ 83.) Again, however, the Amended Complaint concedes that, at the time that Bryan Cave allegedly provided this counsel, Brazell was still "an AIP officer," "partner," and "co-chairman." (*Id.* ¶ 8.) It defies reason that doing legal work for the co-chairman of its own client – AIP – could be the basis of a malpractice claim.

Third, Plaintiff's claim that Bryan Cave assisted "Brazell in the formation and establishment" of Talos without "obtaining an informed waiver" from AIP makes no sense for the same reasons stated previously: Plaintiff concedes that, "through January," when the Amended Complaint claims that Bryan Cave did the legal work, Brazell was still an AIP officer, a partner and co-chair. (Cmplt. ¶ 8.) As soon as Bryan Cave learned of the possibility of a conflict, it sent Robbins a conflict-waiver request disclosing the possible conflict and seeking the very waiver Plaintiff complains about in this cause of action. *See* pp. 7-8, *supra*. There is no

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[2] The original complaint alleged (¶ 87) that this request was sent on January 21, 2009. In its Amended Complaint, Plaintiff changes the date to "late January 2009." (Cmplt. ¶ 40.) Plaintiff's alteration of this detail is suspect. Bryan Cave's August 19, 2009 letter to the Court requesting a pre-motion conference for a possible motion to dismiss first drew attention to Bryan Cave's "prompt" sending of the letter according to Plaintiff's complaint. Plaintiff's revision of the date seems to be an attempt to blur the timeline and make it appear that Bryan Cave waited too long in acting on the possibility of conflict suggested by the January 19 email. Plaintiff is bound by its original allegation; its effort to run away from it must be rejected. *See Colliton*, 2008 WL 4386764, at *6; *see* p. 5 n. 1, *supra*.

specific allegation that Bryan Cave did anything for Talos after sending or failing to receive the waiver request.

Fourth, Plaintiff claims that Bryan Cave was "working for Brazell" and Talos "both before and after" Brazell left AIP. (Cmplt. ¶ 83.) Nowhere in the Amended Complaint, however, does Plaintiff identify the work that was performed by Bryan Cave for Talos *after* Brazell left AIP. Bryan Cave is only alleged to have worked for Talos in January 2009, at which time Brazell was still part of AIP. (*Id.* ¶¶ 8, 38-42.)

Fifth, Plaintiff faults Bryan Cave for allegedly "providing Brazell with confidential AIP information and work product," but as discussed above, Brazell was still a part of AIP, and thus still Bryan Cave's client, at the time this disclosure was supposedly made; and in any event, it was Mark Robbins, and not Bryan Cave, who first provided Brazell with the Confidential Business Information described in the Amended Complaint. *See* pp. 11-12, *supra*.

Finally, Plaintiff claims that Bryan Cave committed malpractice by "seeking a release from AIP and Robbins . . . without adequately informing them of the import of that release or of the position in which they had put themselves." (Cmplt. ¶ 83.) Plaintiff fails to explain how the mere *seeking* of a release, with a request that it be reviewed by counsel, could be malpractice.

Thus, because none of these alleged actions could plausibly constitute malpractice, Plaintiff is left with conclusory allegations of liability that are simply insufficient to state a malpractice claim. *See Russo* v. *Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 A.D.2d 63, 67 (N.Y. App. Div. 2002) ("Nor may speculative damages or conclusory claims of damage be a basis for legal malpractice") (citation omitted); *see also, Wald* v. *Berwitz*, 62 A.D.3d 786, 787 (N.Y. App. Div. 2009).

Plaintiff's malpractice claims fail for the additional reason that Plaintiff has not pleaded facts showing that Bryan Cave's actions proximately caused damage to AIP. *See AmBase Corp.* v. *Davis Polk & Wardwell*, 8 N.Y.3d 428, 436 (N.Y. 2007) (malpractice claim should be dismissed where alleged malpractice could not have been the "'but for' cause of the loss" to plaintiff). "This causation requirement [is] a 'high bar' to attorney malpractice liability." *Flutie Bros. LLC* v. *Hayes*, No. 04 Civ. 4187 (DAB), 2006 WL 1379594, at *5 (S.D.N.Y. May 18, 2006). The Amended Complaint does not explain how AIP was harmed by any legal work Bryan Cave did for Talos. And the Amended Complaint makes no sense when it alleges that Bryan Cave's actions and omissions "prevented AIP from immediately terminating the access of Brazell and any existing confederates to its computer system and Confidential Business Information," preventing other employees from leaving AIP or joining the alleged conspiracy, or "taking other measures to limit the damages it suffered as a result." (Cmplt. ¶ 85.) As discussed, Bryan Cave's January 21 conflict-waiver request disclosed this information and was sent at the time Talos was created and immediately after Bryan Cave received the January 19 email that may have raised the possibility of a conflict. *See* pp. 7-8, *supra*.

Without facts to establish a chain of causation between Bryan Cave's alleged actions and Plaintiff's alleged damages, Plaintiff is left only with its conclusory allegations of causation. This cannot support a malpractice claim. *See Waggoner* v. *Caruso*, 2009 WL 3079237, at *2 (N.Y. App. Div. Sept. 29, 2009) (upholding granting of motion to dismiss as to malpractice claim in part because of plaintiff's failure to allege that attorneys' alleged negligence proximately caused plaintiff's damages); *Hashmi* v. *Messiha*, 2009 WL 3048417, at *2 (N.Y. App. Div. Sept. 22, 2009) (finding that lower court should have granted motion to dismiss on malpractice claim where the plaintiff's allegations of wrongdoing were "conclusory and

speculative"); *Reichenbaum* v. *Cilmi*, 64 A.D.3d 693, 694 (N.Y. App. Div. 2009) ("The factual allegations in support of the cause of action to recover damages for legal malpractice do not establish the necessary element of causation that 'but for' the defendants' alleged acts or omissions, the plaintiffs would not have incurred any damages") (internal citations omitted).

CONCLUSION

Plaintiff was given an opportunity to amend its complaint to state a claim against Bryan Cave. Since its Amended Complaint is deficient, we respectfully submit that the Amended Complaint should be dismissed against Bryan Cave in its entirety with prejudice.

Dated: October 13, 2009
New York, NY

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