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)

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

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Moses Silverman
Gerard E. Harper
Samuel E. Bonderoff

1285 Avenue of the Americas
New York, NY 10019-6064
Tel. (212) 373-3000
Fax (212) 757-3990

Attorneys for Defendant Bryan Cave LLP

November 18, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

STATUTES

OTHER AUTHORITIES

Nothing better shows the inadequacy of Plaintiff Pelican Equity, LLC's ("plaintiff") amended complaint than its misleadingly coy and unconvincing defense of it.

Our main brief ("Main Br.") established that, under applicable pleading standards, plaintiff fails to allege claims against Bryan Cave for misappropriation, aiding and abetting any wrong, breach of fiduciary duty, or legal malpractice. In lieu of identifying the well-pleaded factual allegations from which this Court may draw reasonable inferences of plausible claims for relief, plaintiff misapplies a stale standard to the complaint's conclusory statements – or in some instances, to statements nowhere located there – in search of "implications" (*see, e.g.,* plaintiff's Opposition Brief "P. Br." 2) that Bryan Cave did something wrong. These improbable implications are no surrogate for facts – not detailed evidence, but simple statements of specific fact – indicative of the wrongdoing for which plaintiff seeks to hold Bryan Cave liable. Here, the amended complaint is missing any such facts.

To the contrary, the facts that plaintiff does allege – that Robert Brazell, the co-chairman of its client American Institutional Partners LLC ("AIP"), asked the firm to form a new company; that the firm then received an email suggesting a possible conflict between Brazell and AIP's other principal, Mark Robbins, to which, in an abundance of caution, the firm promptly disclosed the entirety of its actions with an admonition that Robbins seek counsel; and thereafter did no further legal work for Brazell – negate plaintiff's rampant speculation that Bryan Cave misbehaved. This Court should dismiss the amended complaint with prejudice.

REPLY ARGUMENT

Plaintiff expends much energy arguing that the pleading standard under Federal Rule of Civil Procedure 8 remains "minimal" and that "[s]pecific facts still generally need not be alleged." (P. Br. 9, 10.) Plaintiff is wrong, and its own main case shows why. Plaintiff quotes heavily from *Selmanovic* v. *NYSE Group, Inc.*, 2007 WL 4563431 (S.D.N.Y. Dec. 21, 2007), and

in particular its statement that "[s]pecific facts are not necessary" in pleading a claim. (P. Br. 8-9). There, the court said that "the bottom-line principle is that 'once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.'" *Id.* at *2 (quoting *Roth* v. *Jennings*, 489 F.3d 499, 510 (2d Cir. 2007)). Yet this is precisely the standard that the Supreme Court dislodged in *Ashcroft* v. *Iqbal*, in which the Court held that "[w]here 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.'" 1927 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)). Each of the other cases on which plaintiff relies attests to the need for specific factual allegations to satisfy this requirement.[1]

Plaintiff does not cite, nor could it, any post-*Iqbal* case that has sanctified a pleading in the absence of specific factual allegations that are more than "merely consistent" with a pleaded claim. Plaintiff is instead required to allege specific facts about Bryan Cave from which a reasonable inference arises that Bryan Cave committed a tort. Even with a second try, mindful of the defects we had noted, plaintiff has failed to do so.

---

[1] *See Bikur Cholim, Inc.* v. *Village of Suffern*, 2009 WL 1810136, *4-7 (S.D.N.Y. June 25, 2009) (reciting *Iqbal* standard and finding that plaintiff had adequately pleaded specific facts demonstrating a plausible violation of the Religious Land Use and Institutionalized Persons Act); *R.M. Dev. & Constr. LLC* v. *Principle IX Assocs., LLC*, 2009 WL 1813880, * 2-3 (E.D.N.Y. June 26, 2009) (analyzing pleading under *Iqbal* standard and finding that, although existence of contract was not specifically alleged, allegation that there had been a breach of a contract made clear that such a contract plausibly existed); *Intellectual Capital Partner* v. *Institutional Credit Partners LLC*, 2009 WL 1974392, *4 (S.D.N.Y. July 8, 2009) (holding under *Iqbal* that the plaintiff had pleaded plausible and specific factual allegations of contractual performance); *Carb* v. *Lincoln Benefit Life Co.*, *Inc.*, 2009 WL 3049785, *4 (S.D.N.Y. Sept. 22, 2009) (ruling under *Iqbal* that a breach of contract claim was adequately pleaded where the court also took notice of underlying insurance contracts and submitted factual declarations regarding them). Plaintiff's reference to *Tokio Marine and Nichido Fire Ins. Co., Ltd.* v. *Canter*, 2009 WL 2461048, *3 (S.D.N.Y. Aug. 11, 2009), is confusing, because the issue there was whether *res judicata* applied to bar plaintiff's claims; it had nothing to do with the requirement for specific factual allegations.

I.

Plaintiff Has Failed To State a Claim for Misappropriation against Bryan Cave

Our main brief shows that, in trying to plead that Bryan Cave misappropriated trade secrets, the amended complaint alleges only that Bryan Cave merely followed a client's instructions and gave information to AIP employees that they already had. (Main Br. 11-12) In response, plaintiff puts words in the pleading that are not there, and solicits an "implication" that strains the words that are.

Specifically, plaintiff says it "clearly alleges Bryan Cave's use and disclosure of AIP's confidential information for Mr. Brazell and the other defendants after Bryan Cave learned that they were wrongfully forming and operating a competing business." (P. Br. 12 (emphasis in original).) But that is not what the amended complaint says. Rather, the pleading alleges only that "Brazell also told Bryan Cave partner Bart Fisher, and on information and belief also Alan Pearce, that he and his confederates [that is, other AIP employees] were moving forward with a new, separate business to exploit [that is, use and expand] the stock loan program." (Amended Complaint ("Cplt.") ¶ 38.) (clarification added). In other words, the client's co-chair was expanding the business and wanted Bryan Cave to help. Utterly missing from the allegation are any facts to suggest *when* this alleged communication took place, and certainly none from which to infer that it occurred before or after the January 19, 2009 email on which Plaintiff rests so much of its case. (*Id.*) In short, plaintiff supplies no factual basis for an "implication," let alone a reasonable inference, that Bryan Cave misappropriated AIP's information "after" Bryan Cave "learned" of alleged wrongdoing.

Equally absent and equally important is an allegation that Bryan Cave knew that Brazell and others were allegedly embarking on a wrongful scheme. All this sentence says is

that Brazell told Bryan Cave that he – still an "officer" and "co-chairman" of AIP (*id.* ¶ 8.) – was launching a new business for the stock loan program. There is nothing inherently sinister, nor may any plausible inference of such arise, from Bryan Cave's being told by the co-chairman of its client that the client wanted help in launching a new business, nor from Bryan Cave's agreeing to follow its client's instructions. On top of this, the amended complaint admits, and plaintiff's response nowhere refutes, that Brazell and others already had access to whatever information Bryan Cave may have possessed. The amended complaint explicitly so states: Talos and Brazell, et al. "used detailed transaction documents, *including but not limited to* the form of Master Loan Agreement that AIP's former counsel, Bryan Cave, prepared specifically for AIP" and that "*Robbins* sent certain documents to Brazell *including but not limited* to the Master Loan Agreement[.]" (Main Br. 12; *see* Cplt. ¶¶ 4, 23 (emphasis added).) Plaintiff thus cannot alter what the amended complaint evinces – that everything Bryan Cave is alleged to have disclosed to Brazell was already in his possession. (*Id.*) Accordingly, no misappropriation claim can lie. *Marietta Corp.* v. *Fairhurst*, 301 A.D.2d 734, 736-38 (3d Dep't 2003).[2]

II.

Plaintiff Has Failed Adequately To Plead Aiding And Abetting Liability against Bryan Cave

Our main brief established, and plaintiffs do not dispute, that a pleading of aiding and abetting liability may not survive a motion to dismiss absent well-pleaded allegations that Bryan Cave both had actual knowledge of alleged wrongdoing and substantially assisted its commission. (Main Br. 13; *see* P. Br. 13). Plaintiff argues that the amended complaint "has

[2] Plaintiff's brief, but not its pleading, says that Byran Cave is alleged to have provided "other documents used in the loan program" to Brazell. (P. Br. 12) Yet the paragraphs plaintiff cites in support of this claim make no mention of such "other documents" disclosed by Bryan Cave. (Cplt. ¶¶ 39, 42.)

adequately alleged that Bryan Cave had actual knowledge of the other defendants' misconduct" (P. Br. 13), but in so doing plaintiff misapprehends both the import and the importance of the "actual knowledge" standard. Put simply, plaintiff tries to confuse an alleged "implication" of knowledge into special facts attesting to "actual knowledge." The confusion does not work.

There is a reason. "[A]ctual knowledge is the prevailing standard set forth by most courts in analyzing aiding and abetting claims." Christine L. Eid, Comment, *Lawyer Liability for Aiding and Abetting Squeeze-Outs*, 34 Wm. Mitchell L. Rev. 1177, 1184 (2008). "[K]nowledge of the underlying misconduct has been held to mean an awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 Bus. Law. 1135, 1160 (2006) (internal quotation marks omitted). Every case to consider the question under New York law has so held.[3]

To hold otherwise – to allow a pleader to allege only that defendant "should have known" or to ask for an "implication" that a defendant knew – is to impose burdens the law nowhere else imposes. This is particularly troublesome in the context of lawyers. Lawyers provide assistance, often substantial, to the business ventures that hire them. Yet the act of

---

[3] State cases: *See, e.g.*, *Eurycleia Partners, LP* v. *Seward & Kissel, LLP*, 12 N.Y.3d 553, 560 (N.Y. 2009); *Int'l Strategies Group, Ltd.* v. *ABN AMRO Bank N.V.*, 853 N.Y.S.2d 878, 878 (1st Dep't 2008); *AHA Sales, Inc.* v. *Creative Bath Prods., Inc.*, 867 N.Y.S.2d 169, 182 (2d Dep't 2008); *Williams* v. *Sidley Austin Brown & Wood LLP*, 832 N.Y.S.2d 9, 11 (1st Dep't 2007); *Caprer* v. *Nussbaum*, 825 N.Y.S.2d 55, 70 (2d Dep't 2006); *Briarpatch Ltd., L.P.* v. *Frankfurt Garbus Klein & Selz, P.C.*, 13 A.D.3d 296, 297-98 (1st Dep't 2004); *Kaufman* v. *Cohen*, 307 A.D.2d 113, 125-26 (1st Dep't 2003); *Nat'l Westminster Bank USA* v. *Weksel*, 124 A.D.2d 144, 149 (1st Dep't 1987); *Nixon Peabody LLP* v. *De Senilhes, Valsamdidis, Amsallem, Jonath, Flaicher, Assocs.*, 873 N.Y.S.2d 235 (Table), 2008 WL 4256476, *9 (NY Sup. Ct. Sept. 16., 2008) (appears in addendum at A-64). Federal cases: *See, e.g.*, *In re Sharp Int'l Corp.*, 403 F.3d 43, 49-50 (2d Cir. 2005) (citing cases); *In re Bayou Hedge Funds Inv. Litig.*, 472 F. Supp.2d 528, 532-33 (S.D.N.Y. 2007) (collecting cases); *JP Morgan Chase Bank* v. *Winnick*, 406 F. Supp. 2d 247, 253 n.4 (S.D.N.Y. 2005); *VTech Holdings, Ltd.* v. *Pricewaterhouse Coopers, LLP*, 348 F. Supp.2d 255, 269-70 (S.D.N.Y. 2004); *Kolbeck* v. *LIT Am., Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y. 1996), *aff'd*, 152 F.3d 918 (2d Cir. 1998).

providing legal services is of course not wrongful, though it may assist a wrongful venture. Such conduct should only become wrongful in the eyes of society and the courts when the party providing the service knowingly seeks to forward the primary tortfeasor's malevolent ends. Otherwise, the law would place on lawyers a duty to investigate their clients – to police those they would serve in order to assure that their own, innocuous efforts are not assisting some wrongful end – and would make lawyers the insurers for wrongs committed by their clients – a costly, and inefficient, proposition. *See Stark* v. *Nat'l City Bank of N.Y.*, 278 N.Y. 388, 400-01 (N.Y. 1938) (observing that in third party liability cases, the law in New York is restricted to the same extent as that in England, where the courts have recognized that "a rule of responsibility based on notice or even constructive knowledge would to some degree hamper ordinary commercial transactions").

Such is the import of plaintiff's allegations here. The only two specific allegations on which plaintiff depends for allegations of "actual knowledge" – first, that Brazell "told" Bryan Cave of his intention to launch a new business and second, the January 19 email – do not tolerate the stress plaintiff puts on them. That Brazell told Bryan Cave of a plan to expand AIP's business is simply not, in any rational world, an allegation that Bryan Cave actually knew that Brazell was allegedly doing something wrong. As for the January 19 email – which says only "Please let me know what I need to do to facilitate this. I don't know how long Mark [Robbins] will remain friendly" (Cplt. ¶ 38) – plaintiff contends that this brief message "obviously implies that Mr. Fisher was assisting Messrs. Brazell and Norris in their new business and that they needed to hurry because Mr. Robbins might take some adverse action, presumably when he found out what they were doing." (P. Br. 14) But we ask: So what? Even crediting plaintiff's conjecture on the meaning of the email, the email does not show actual knowledge of

wrongdoing; even plaintiff does not contend that the email spelled out, or even implied, that trade secrets had been stolen and that a conspiracy had been hatched to usurp AIP's business. As stated in Bryan Cave's moving brief, the email at most suggests the possibility of a conflict between AIP's principals. (Main Br. 13-14)

Plaintiff argues that the email also "implies that Mr. Brazell had previously disclosed that surreptitious matter to Mr. Fisher," supposedly because "Mr. Brazell's statement about Mr. Robbins remaining friendly in itself implied, by the absence of further explanation, that Mr. Fisher already knew of the matter." (P. Br. 14) Again, however, even if plaintiff's mind-reading is correct, the result is not an allegation that Bryan Cave actually knew that malfeasance was afoot, but speculation that Bryan Cave may or should have known. To state a claim, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citations omitted). That a defendant knew "red flags were waving" about business associates' behavior is not notice that they "were or may have been breaching their fiduciary duty." *Briarpatch Ltd., L.P.* v. *Geisler Roberdeau, Inc.*, 2007 WL 1040809, *23 (S.D.N.Y. Apr. 4, 2007). Accordingly, unsupported allegations of wrongdoing, without more, do not give rise to an inference of knowledge. *Lerner* v. *Fleet Bank, N.A.*, 459 F.3d 273, 292-93 (2d Cir. 2006); *Renner* v. *Chase Manhattan Bank*, 2000 WL 781081, *7 (S.D.N.Y. June 16, 2000).

Plaintiff's allegations thus dwindle to a series of conclusory statements – that "[t]he Bryan Cave attorneys knew that … Brazell and his co-conspirators were misappropriating [the Confidential Business Information] in their own virtually identical competing stock loan business" and 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." (Cplt. ¶¶ 39, 74 (P. Br.

13).) But the pleading that a party "knew" something without facts to support it is exactly the kind of conclusory allegation that *Twombly* and *Iqbal* counsel courts to ignore. *See Meisel* v. *Grunberg*, 2009 WL 2777165, *10 (S.D.N.Y. Aug. 31, 2009) ("'[A] plaintiff may not merely rely on conclusory and sparse allegations that the abider or abettor knew or should have known about the primary breach of fiduciary duty'") (quoting *Global Minerals & Metals Corp.* v. *Holme*, 35 A.D.3d 93, 101-02 (1st Dep't 2006)).

III.

Plaintiff Has Failed Adequately To Plead
Malpractice/Breach Of Fiduciary Duties against Bryan Cave

Our opening brief showed that plaintiff's claims for malpractice and breach of fiduciary duty should be dismissed as redundant. (Main Br. 16) Plaintiff argues its pleading "has not alleged identical conduct to support separate claims," (P. Br. 18), but plaintiff should re-read its amended complaint: The ninth claim for relief is denominated "Malpractice/Breach of Fiduciary Duties"; the paragraphs setting forth this claim for relief do not distinguish Bryan Cave's alleged "malpractice" from its alleged "breach of fiduciary duties"; Bryan Cave is alleged to have breached "duties of due care and undivided loyalty" in exactly the same ways. (Cplt. ¶¶ 82-86) The claims are one and the same.

Plaintiff also argues that its fiduciary duty claim should not be held to a but-for causation standard (P. Br. 19-21), but again plaintiff is wrong on the law. The weight of judicial authority holds that, "to recover under a claim for damages against an attorney arising out of the breach of the attorney's fiduciary duty, the plaintiff must establish the 'but for' element of malpractice, irrespective of how the claim is denominated in the complaint." *Ulico Cas. Co.* v. *Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 10-11 (1st Dep't 2008). Here, plaintiff contends that Bryan Cave's ostensible failure to tell AIP what its own co-chair was

doing supposedly prevented AIP from taking remedial steps. Yet the amended complaint concedes that Bryan Cave sent a conflict-waiver letter to Mark Robbins "promptly" after receiving the January 19 email, a letter that told Robbins exactly what Talos was going to do and advised Robbins to consult with counsel. (Main Br. 13-19) Thus, Bryan Cave's "failure to inform" can hardly be the but-for cause of Plaintiff's damages because Plaintiff's own allegations are that Bryan Cave *did not fail to inform*.[4]

Plaintiff also argues that Bryan Cave is the but-for cause of its damages because "the refusal of Bryan Cave to help them would have undermined their scheme" and "the defendants would presumably have had a difficult time hiring other sophisticated lawyers for their crooked operation on short notice if Bryan Cave had refused to represent them and instead unmasked them as the crooks they were and are." (P. Br. 22) Plaintiff's melodramatic descriptions aside, these assertions – which, citing nothing in the amended complaint, are really just lawyer argument – do not stand up to the facts as plaintiff has alleged them. The pleading acknowledges that Bryan Cave did disclose the "scheme" to Robbins in the conflict-waiver letter, and there remains no allegation of *any* specific legal work done by Bryan Cave for Brazell or Talos after the conflict-waiver letter was sent. (Cplt. ¶¶ 41-43) No "but-for" causation exists.

IV.

Plaintiff Should Not Be Permitted To Amend Its Complaint for a Second Time

As the Court stated during the September 19, 2009 pre-motion teleconference, the purpose of the conference was so that plaintiff would have the opportunity to correct any defects

[4] *See Weil, Gotshal & Manges, LLP* v. *Fashion Boutique of Short Hills, Inc*., 10 A.D.3d 267, 272 (1st Dep't 2004); *Nordwind* v. *Rowland*, 2007 WL 2962350, *5 (S.D.N.Y. Oct. 10, 2007); *Kirk* v. *Heppt*, 2009 WL 2870167, *12 (S.D.N.Y. Sept. 3, 2009); *Morelli & Gold, LLP* v. *Altman*, 24 Misc.3d 1221(A), 2009 WL 2152138, *16 (N.Y. Sup. Ct. June 12, 2009); *Kyle* v. *Heiberger & Assocs.*, P.C., 25 Misc.3d 1218(A), 2009 WL 3417851, * 6-7 (N.Y. Sup. Ct. Oct. 16, 2009).

in its pleading before briefing and a decision on a motion to dismiss occurred. Plaintiff did correct some deficiencies in its pleading (dropping, for example, its baseless fraud claim against Bryan Cave). But plaintiff has now had its chance; it should not get yet another bite at the apple. Moreover, plaintiff has not articulated what would change about its complaint if leave to amend were granted. *See Lynch* v. *Suffolk County Police Dept., Inc.*, 2009 WL 3287565, * 3 (2d Cir. Oct. 14, 2009) (upholding ruling where "the District Court denied leave to amend because it found that amendment would have been futile and because, in any event, plaintiff had offered 'no indication of what a second amended complaint would contain'"). For both of these reasons, further leave to amend should not be granted.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Bryan Cave's moving brief, Bryan Cave's motion to dismiss should be granted and the Complaint dismissed against it in its entirety, with prejudice.

Dated: November 18, 2009
New York, NY

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: /s/ Gerard E. Harper

Moses Silverman
Gerard E. Harper
Samuel E. Bonderoff

1285 Avenue of the Americas
New York, NY 10019-6064
Tel. (212) 373-3000
Fax (212) 757-3990
gharper@paulweiss.com

Attorneys for Defendant Bryan Cave LLP