UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PELICAN EQUITY, LLC,

Plaintiff,

09 Civ. 5927 (NRB)

-against-

ROBERT V. BRAZELL, STEPHEN L. NORRIS, TALOS PARTNERS, LLC, RAMA RAMACHANDRAN, DARL McBRIDE, and BRYAN CAVE LLP,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO BRYAN CAVE LLP'S MOTION TO DISMISS COMPLAINT

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INTRODUCTION

Plaintiff Pelican Equity, LLC ("Pelican") submits this memorandum in opposition to defendant Bryan Cave LLP's motion to dismiss the second, sixth, and ninth claims of Pelican's first amended complaint (the "Complaint") as against that firm.

Bryan Cave's motion should be denied because each of Pelican's claims against it easily meets Fed.R.Civ.Pro. 8's lenient requirements. Bryan Cave did not, as it argues, only innocently disclose the confidential information of Pelican's predecessor in interest, American Institutional Partners ("AIP"), to AIP's own officers. To the contrary, Pelican plainly alleges that Bryan Cave's misappropriations occurred after it learned that the faithless AIP personnel were stealing AIP's business in gross violation of their duties. Bryan Cave's misdeeds are also alleged to have continued even after AIP refused to sign the conflicts waiver that Bryan Cave tendered to AIP. Nor did the other defendants already possess the confidential information that Pelican

accuses Bryan Cave of using for and disclosing to them. Pelican implies that the information that Bryan Cave contributed to the defendants' illicit venture was different from the confidential information that the other defendants already possessed.

Pelican has also more than adequately alleged Bryan Cave's knowledge of the other defendants' wrongful scheme. It alleges that other of the defendants told Bryan Cave partner Bart Fisher of their scheme and implies that that was the basis for Bryan Cave's knowledge of that wrongdoing. Those allegations, which are sufficient in themselves, are supported by a quotation from an extraordinary electronic mail message that not only establishes Bart Fisher's knowledge of the defendants' wrongdoing on the date of the message but also implies his previous knowledge of it. Nor is it implausible, as Bryan Cave contends, that Bryan Cave performed its legal work for the other defendants with knowledge that it was part of a scheme to steal AIP's business. Certainly the patronage of the defendants and particularly of Stephen Norris, a founder of Carlyle Group, provided a motive for them to favor and assist the defendants. The circumstances, including Bryan Cave's very work as the defendants' counsel, its continuation of that work after AIP refused to execute a conflicts waiver, and the electronic mail message to Mr. Fisher, show Mr. Fisher's knowing involvement. Indeed, under the circumstances, the scenario that Bryan Cave suggests, of Bryan Cave's ignorance of the defendants' scheme while performing legal work in support of that scheme, is far less plausible than is its knowing connivance in it.

Pelican's ninth claim is not duplicative of itself, as Bryan Cave asserts, nor is it deficient for failure to allege that Bryan Cave's breaches caused damages to AIP. Pelican alleges misconduct by Bryan Cave that constitutes breaches of its fiduciary duties of good faith

and undivided loyalty. Pelican's reference to "malpractice," or violation of fiduciary duties of care, does not merely characterize the same misconduct as do its allegations regarding duties of loyalty. Rather it is a backstop to catch any misconduct that might ultimately be deemed to have resulted from mere negligence. The courts are divided on the issue whether claims for attorneys' breaches of their duties of loyalty and good faith (as opposed to malpractice claims) must be supported with allegations of "but-for" causation. The better rule is that it need not be alleged. However, Pelican in fact alleges it. It asserts that Bryan Cave's misconduct damaged AIP (and therefore Pelican) by inter alia enabling the other defendants to operate their illicit business and by preventing AIP from cutting off the defendants' access to confidential information and from corrupting other employees. Had Bryan Cave acted appropriately the other defendants would have been stopped in their tracks. More is not required to plead "but-for" causation.

The common thread in Bryan Cave's arguments is the perversion of the requirements of Fed.R.Civ.P. 8 and of federal standards for dismissal of claims. It mislabels inconvenient allegations as "conclusory," disregards other allegations, and draws inferences from Pelican's contentions in its favor rather than Pelican's. Bryan Cave effectively interprets the lenient federal "plausibility" standard to require the pleading of evidentiary details even where allegations are not incredible without those details. That, of course, is not the law.

BACKGROUND

Pelican alleges that it is the successor in interest to AIP, a company that, largely through its principal officer, Mark Robbins, developed a novel stock loan program. (Complaint ¶¶ 7, 17-19) The AIP stock loan program, the structure of the transactions effected in it, the model contracts and other documents created for it, and related agreements and discussions with financial institutions and others, allegedly constitute valuable trade secrets. (Id. ¶ 19) Each of the defendants came to work for AIP in 2007 and 2008. Defendant Darl McBride moved into AIP's Salt Lake City offices in the fall of 2007 and became a trusted confidante of Mr. Robbins. (Id. at ¶ 20) He had access to AIP's files, worked with and supervised AIP personnel who conducted AIP's stock loan business, and assumed responsibilities for AIP's finances. (Id.) Robert Brazell began to work at AIP in late 2008, acted as an officer of that company, obtained access to much of its confidential information, and held himself out as a partner and "co-chairman" of AIP. (Complaint at ¶¶ 8, 23-29) Stephen Norris, one of the founders of private equity giant Carlyle Group, worked on AIP's stock loan program and had a consulting agreement with the company before he began working with Mr. Brazell and AIP employee Rama Ramachandran full time on the stock loan program in November 2008. (Id. ¶¶ 9, 29-30) Both Mr. Brazell and Mr. Norris also came to have access to confidential AIP information. (Id. at ¶¶ 23, 25, 27, 29)

Pelican alleges that AIP retained Bryan Cave upon Mr. Norris's recommendation and that, according to Mr. Norris, he had enjoyed a twenty-year relationship with that firm through its partner Bart Fisher. (Complaint ¶ 21) Bryan Cave agreed to provide legal services to AIP pursuant to a written April 30, 2008 engagement agreement. In that agreement, "Bryan Cave acknowledged that it was creating an 'attorney-client relationship' with AIP and that the

relationship was to be 'one of mutual trust and confidence.' Bryan Cave's engagement agreement provided that AIP's consent to conflicting representation would be required 'where as a result of [its] representation of [AIP it has] obtained sensitive, proprietary or other confidential information of a non-public nature that, if known to such other client of [Bryan Cave's], could be used in any such other matter by such client to the disadvantage of [AIP].'" (Id.)

Bryan Cave is alleged to have worked on AIP's stock loan program beginning in the Spring of 2008. (Complaint ¶ 21) According to Pelican:

> As a consequence of its engagement, Bryan Cave came to possess confidences and secrets of AIP and AIP Confidential Business Information. Lawyers at Bryan Cave, and most prominently its partners Bartley Fisher and Alan Pearce, 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. Through their work for AIP, attorneys from that firm became privy to virtually every aspect of the Confidential Business Information, including the structure of the program, the contracts and other documents necessary to effect it, and the financial institutions that were and might become involved in it.

(Id. at ¶ 22) Additionally, Bryan Cave allowed Mr. Brazell and other of the defendants to use its office space before they established defendant Talos's offices on Madison Avenue. (Id. at ¶ 36)

Pelican alleges that in December 2008 or early January 2009, while still working for AIP, defendants Brazell, Norris, McBride, and Ramachandran agreed to steal AIP's business, destroy AIP, and move forward with its stock loan product but without Robbins or AIP. (Complaint ¶ 37) They stole confidential AIP information from its computer and sabotaged its computer and electronic mail systems. They usurped AIP business opportunities, took over its New York offices, and hired prospective and actual AIP employees and consultants. (Id. at ¶¶ 44-48) They also conducted an internet smear campaign against AIP and Mark Robbins to

ensure further that AIP could not compete effectively with them. (Id. at ¶¶ 49-50)

Robert Brazell allegedly told Bryan Cave partner Bart Fisher that he and his confederates were moving forward with a new, separate business to exploit the stock loan program. (Id. ¶ 38) Pelican also specifically alleges that "[t]he Bryan Cave attorneys knew that . . . Brazell and his co-conspirators were misappropriating" AIP's confidential information "in their own virtually identical competing stock loan business." (Complaint ¶ 39) Those attorneys not only formed that competing business, Talos, but also prepared agreements for it at Mr. Brazell's direction, including employment agreements between Talos and existing and prospective AIP employees. (Id. and also at ¶¶ 3, 83) Bryan Cave's ongoing knowledge of the defendants' scheme, and of its assistance in it, was allegedly reflected in a January 19, 2009 electronic mail message in which Mr. Brazell told Bart Fisher that Messrs. Norris and Brazell would be Talos managers and co-chairmen. (Id. ¶ 38) In that message, "Brazell told Fisher: 'Please let me know what I need to do to facilitate this. I don't know how long Mark [Robbins] will remain friendly.'" (Id.)

Pelican alleges that Bryan Cave lawyers Fisher and Pearce "concealed the defendants' breaches of trust from Robbins and AIP." (Complaint at ¶¶ 40, 83-85) Instead of disclosing the individual defendants' preparations, their formation of a competing business, and thefts of confidential information, those lawyers actively assisted the other defendants by performing legal work for them. (Id) Only in late January 2009[1] did Bryan Cave present to AIP

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[1] As Bryan Cave points out at page 18, fn. 2 of its memorandum, Pelican alleged at ¶ 87 of its original complaint that Bryan Cave had sent the waiver letter on January 21, 2009. On the basis of that fact, Bryan Cave argues that the change to "late January" is an attempt to "blur the time line" and make it appear as if it waited too long to notify AIP. (Id.) However, Bryan Cave omits from that argument the fact that Pelican also alleged at ¶42 of that document that

a proposed waiver of conflicts in which it indicated that Mr. Brazell intended to pursue a lending business, though it did not advise AIP or Robbins regarding the import and consequences of the waiver. (Complaint ¶¶ 40-41) Shocked, Robbins and AIP never signed that document. (¶ 40)

According to Pelican, Bryan Cave continued to represent Brazell, Talos, and related entities notwithstanding AIP's refusal to sign the conflicts waiver. (Complaint ¶ 42) On information and belief Bryan Cave formed other entities, in addition to Talos, through which the defendants operated their competing business. Bryan Cave attorneys also, inter alia, used confidential documents that its attorneys had drafted for AIP as models for Talos transactions and otherwise used AIP confidential information in the representation of Talos in its virtually identical pirated business. (Id.) In order to hide the scope of its work for the other defendants, Bryan Cave failed to provide to AIP copies of many documents when AIP requested production of its client file. (Id. at ¶ 43)

On the basis of that misconduct, Pelican alleges three causes of action against Bryan Cave: the second, for misappropriation of trade secrets; the sixth, for aiding and abetting the other defendants' misconduct; and the ninth, for malpractice and breach of fiduciary duties.

Bryan Cave sent that waiver on January 31. The change in the amended complaint was made to correct that inconsistency, not to "blur" any "time line." Further, because Bryan Cave has no basis for its assertion that it first learned of the scheme on January 19 - certainly none is found in the Complaint - and because the January 19 message in fact implies Bryan Cave's pre-existing knowledge of the scheme, Bryan Cave's argument regarding that matter is not only misleading but also illogical. Additionally, since Bryan Cave continued its misconduct after transmission of the waiver letter, its misconduct would still be prolonged and outrageous even had it learned of the scheme on January 19. That is, sadly, not the only place in which Bryan Cave argues without basis or logic that Pelican has changed the Complaint in order to avoid its dismissal motion. At page 5, fn. 1 it makes the same argument regarding Pelican's replacement of an allegation that Mr. Brazell was an AIP "partner" and co-chairman with the more precise allegation that he held himself out as having those titles. The argument is particularly weak in that case because AIP, as a limited liability company, technically did not have "partners."

In consequence of Bryan Cave's breaches of its duties, Pelican alleges that:

> Bryan Cave's foregoing breaches of its duties damaged AIP and through it Pelican. Bryan Cave's failures to inform AIP promptly of the preparations to compete with AIP and the conspiracy to steal its secrets prevented AIP from immediately terminating the access of Brazell and any existing confederates to its computer system and Confidential Business Information, preventing Brazell from enticing other of the Individual Defendants to breach their duties to AIP and join him in his illicit activities, preventing any others who had at the time joined him from stealing information and undermining its business, and from taking other measures to limit the damages it suffered as a result of those activities. The assistance Bryan Cave provided to Brazell and the other defendants in the commencement and operation of their competing business, which they were in a uniquely good position to provide due to their access to and creation (at AIP's expense) of much of the Confidential Business Information, also allowed the other defendants more effectively to establish and operate their competing business to AIP's detriment and to destroy AIP's business than they would otherwise have been able to do. But for Bryan Cave's misconduct, AIP would, on information and belief, have been able to stop, and would in fact have stopped, the defendants' conspiracy from coming to fruition.

(Complaint at ¶ 85) Pelican also alleges that Bryan Cave's actions damaged it at ¶¶ 60 and 75 of the Complaint.

ARGUMENT

I. PELICAN ADEQUATELY ALLEGES A CLAIM FOR MISAPPROPRIATION AGAINST BRYAN CAVE.

> The purpose of a motion to dismiss pursuant to Red.R.Civ.P. 12(b)(6) is to "test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits. [citation omitted] On such a motion,the court "assesses the legal feasibility of the complaint, but does not weigh the evidence that might be offered to support it." [citations omitted] The court therefore "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001) . . .

Selmanovic v. NYSE Group, Inc., 2007 WL 4563431 at * 2 (S.D.N.Y. 2007).[2]

Claims for misappropriation and breach of fiduciary duties require only compliance with Fed.R.Civ.Pro. 8.[3] As Judge Batts recited in Selmanovic:

> Federal Rule of Civil Procedure 8(a)(2) provides that civil complaints "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The Supreme Court has explained that Rule 8(a)(2) requires that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true . . ." Bell Atlantic v. Twombly, 127 S. Ct. 1955, 1965, (2007). However, under Rule 8(a)(2), "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007).

Id. "[A] plaintiff must allege "'only enough facts to state a claim to relief that is plausible on its face.'" Barkley v. Olympia Mortgage Co., 2007 WL 2437810 at * 9 (E.D.N.Y. 2007), quoting Bell Atlantic v. Twombly, 127 S. Ct. 1955 (2007). See also 1st Rochdale Cooperative Group v. Geltzer, 2008 WL 170410 at * 2 (S.D.N.Y. 2008).

The requirement of pleading a plausible claim is "minimal" in most cases.[4]

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[2] See also Selevan v. New York Thruway Authority, __ F.3d __, 2009 WL 3296659 at * 2 (2d Cir. 2009); Bikur Cholim, Inc. v. Village of Suffern, 2009 WL 1810136 at * 4 (S.D.N.Y. 2009); Picture Patents, LLC v. Aeropostale, Inc., 2009 WL 2569121 at * 1 (S.D.N.Y. 2009).

[3] KnowledgePlex, Inc. v. Placebase, Inc., 2008 WL 5245484 at * 7-8 (N.D. Cal. 2008) (misappropriation); American Int'l Refinery, 402 B.R. 728, 752 (W.D. La. 2008) (same); Schupack v. Florescue, 1993 WL 256572 at * 3 (S.D.N.Y. 1993) (fiduciary duties); Picinich v. UPS, 321 F. Supp.2d 485, 517 (N.D.N.Y. 2004) (aiding and abetting claims); Allou Distributors, Inc. v. KPMG LLP, 395 B.R. 246, 269 (Brpcy. E.D.N.Y. 2008) (professional malpractice).

[4] Xstrata Canada Corp. v. Advanced Recycling Technology, Inc., 2009 WL 2163475 at * 3 (N.D.N.Y. 2009).

Specific facts still generally need not be alleged.[5] Pursuant to the "flexible" plausibility requirement,[6] a plaintiff is obligated to amplify a claim with more specific allegations only, and to the degree necessary, "in those contexts where such amplification is needed to render the claim plausible." Bikur Cholim, Inc. v. Village of Suffern, 2009 WL 1810136 at * 4.[7] Therefore, for example, plaintiffs asserting claims against high government officials they never met involving those officials' purported participation in torts against them, as in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), must assert some specific facts to make their claims plausible. By the same token, allegations of facially improbable conduct must be supported by more than allegations that on their face are "more likely explained by" lawful conduct than misconduct. Id. at 1950, analyzing the holding in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955. On the other hand, it will generally not be necessary for a party asserting claims of garden variety misconduct against persons with whom it has had a direct relationship to allege very specific facts to render its claim plausible. For example, a common claim for breach of contract may be sustained even where the plaintiff fails to allege explicitly that a contract existed[8] or where it alleges its own performance

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[5] R.M. Development & Constr. Co. v. Principle IX Associates, LLC, 2009 WL 1813880 at * 2 (E.D.N.Y. 2009); Ogindo v. DeFleur, 2008 WL 5105153 at * 3 (S.D.N.Y. 2008); Selmanovic v. NYSE Group, Inc., 2007 WL 4563431 at * 2.

[6] R.M. Development & Constr. Co. v. Principle IX Associates, LLC, 2009 WL 1813880 at * 2.

[7] See also Tokio Marine and Nichido Fire Ins. Co. v. Canter, 2009 WL 2461048 at * 3 (S.D.N.Y. 2009) ("a claim not plausible on its face must be 'supported by an allegation of some subsidiary facts to survive a motion to dismiss").

[8] R.M. Development & Constr. Co. v. Principle IX Associates, LLC, 2009 WL 1813880 at * 3.

of the contract - a necessary element of the claim - in conclusory terms.[9]

Pelican's claim for misappropriation of trade secrets more than satisfies the requirements of Rule 8. The elements of a misappropriation claim are (1) a party's possession of a trade secret and (2) the defendants' use or disclosure of the trade secret in breach of an agreement, confidential relationship or duty . . ." North Atlantic Instruments, Inc. v. Haber, 188 F.3d 38, 43-44 (2d Cir. 1999). Pelican clearly alleges both. It alleges that Bryan Cave became privy to its confidential information, including not only the structure of AIP's loan program and draft agreements relating to that program but also other documents necessary to implement it, the names of relevant persons and institutions, and "virtually every aspect" of AIP's confidential information (Complaint ¶¶ 19, 22). Pelican also implies that, through its work for AIP, Bryan Cave became familiar with the regulatory considerations affecting the program (¶ 22). And Bryan Cave is alleged to have disclosed and used that confidential information while providing legal services to assist the other defendants in their stolen competing business. (Complaint ¶¶ 39, 40, 42, 83-85)

Pelican does not allege, as Bryan Cave argues, that Bryan Cave only disclosed AIP's confidential information to AIP's own officers and that Robert Brazell already possessed

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[9] Intellectual Capital Partner v. Institutional Credit Partners LLC, 2009 WL 1974392 * 4 (S.D.N.Y. 2009) (very general statements of plaintiff's performance accepted by court); Carb v. Lincoln Benefit Life Co., 2009 WL 3049785 at * 4 (S.D.N.Y. 2009) (plaintiff simply alleged that he had "performed all of [his] obligations necessary under and pursuant to" certain insurance policies). In the latter case, Judge Berman upheld a contract claim in part pursuant to his understanding of the contention the plaintiff "appear[ed]" to assert in his complaint. Id. See also Pisano v. Mancone, 2009 WL 2337131 at * 4 (S.D.N.Y. 2009) (court accepts plaintiff's apparently unadorned allegation that defendants' stated reasons for dismissing him, hiring him, and dismissing him again were pretextual); Spilkevitz v. Chase Investment Services Corp., 2009 WL 2762451 at * 4 (E.D.N.Y. 2009).

that information. Pelican 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. (Complaint ¶¶ 38-42 and 83-85) It also alleges and implies that Bryan Cave used and provided to the other defendants confidential documents and information other than the "Master Loan Agreement" that Mr. Brazell had already obtained, including "loan agreements" and other documents used in the loan program. (Id. at ¶¶ 39, 42) (documents they used "includ[ed] loan agreements"). Additionally, Pelican implies that Bryan Cave used its knowledge of the program's structure and the legal expertise, which included knowledge of the regulatory considerations, that it had gained through working with AIP on the loan program, which knowledge put it in a "uniquely good position" to assist the defendants in their wrongdoing. (Id. and also ¶¶ 21, 85) Indeed, Bryan Cave's arguments can only be accepted by disregarding those well-pleaded allegations and making all inferences in Bryan Cave's, and not Pelican's, favor.

II. PELICAN HAS ADEQUATELY ALLEGED A CLAIM FOR AIDING AND ABETTING THE OTHER DEFENDANTS' MISCONDUCT.

The elements of a claim for aiding and abetting a breach of fiduciary duties are (1) a person's breach of fiduciary duties, (2) a defendant's knowing participation in the first person's breach, and (3) plaintiff's suffering of damages from the breach.[10] Other aiding and abetting

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[10] S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 847-48 (2d Cir. 1987); Berman v. Sugo LLC, 580 F. Supp.2d 191, 205 (S.D.N.Y. 2008); 4987 Corp. v. Garment Capital Assocs., 1999 WL 608783 at * 7 (S.D.N.Y. 1999); Banco de Desarrollo Agropecuario v. Gibbs, 709 F. Supp. 1302, 1307 (S.D.N.Y. 1989); Volt Viewtech, Inc. v. D'Aprice, 2006 WL 3159205 at * 7 (S. Ct. N.Y. Co. 2006).

claims require similar allegations.[11] As the Second Circuit stated in S & K Sales, 816 F.2d at 847-48: "[o]ur recognition of this claim in Whitney and prior cases . . . is based upon the New York courts' longstanding acceptance of the principle that '[a]ny one who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby to the cestui que trust'" Wechsler v. Bowman, 285 N.Y. 284, 291 (1941) . . ." Bryan Cave does not contend that Pelican has failed to allege the first or third elements of that claim: the other defendants' breaches of their fiduciary duties and the damages caused by them. It does argue that Pelican has not sufficiently alleged the second element: Bryan Cave's knowledge of the wrongful scheme that it assisted.

Pelican has adequately alleged that Bryan Cave had actual knowledge of the other defendants' misconduct when it assisted those defendants and participated in the misconduct. Bryan Cave takes issue with Pelican's allegation that Bryan Cave "came to know" of the other defendants' misconduct. (Bryan Cave brief at pp. 12-13, referring to Complaint ¶ 74) However, Pelican specifically alleges that Robert Brazell told Bryan Cave partner Bart Fisher that Mr. Brazell and his confederates were moving forward with a new business to exploit the loan program and that the Bryan Cave partners knew that those defendants "were misappropriating [confidential information] in their own virtually identical stock loan business." (Complaint at ¶¶ 38-39) The clear implication of those allegations is that Bryan Cave "came to know" those facts because Mr. Brazell told them to its partner Bart Fisher. Those allegations, that one person told

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[11] The elements of other aiding and abetting claims are (1) a primary actor's wrongful act, causing injury, (2) the defendant's awareness of a role as part of overall tortious or unlawful activity, and (3) the defendant's knowing and substantial assistance in the principal violation. See e.g. Vistra Trust Co. v. Stoffel, 2008 WL 5454126 at * 9 (S.D.N.Y. 2008); Scollo v. Nunez, 2007 WL 2228771 at * 4 (S. Ct. Queens Co. 2007).

another something and the second one therefore knew it, do not constitute legal conclusions and cannot reasonably be characterized as "conclusory." Additionally, Pelican quotes from an electronic mail message in which Mr. Brazell tells Mr. Fisher that he and Mr. Norris would be managers of their new business, Talos, and that Mr. Norris would be co-chairman. In that message, Mr. Brazell also writes: "Please let me know what I need to do to facilitate this. I don't know how long Mark [Robbins] will remain friendly." (Id. at ¶ 38) That 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.

Mr. Brazell's January 19 message also implies that Mr. Brazell had previously disclosed that surreptitious matter to Mr. Fisher. 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. And Mr. Brazell would hardly have made that statement by electronic mail if he had not previously told Mr. Fisher about that matter and were therefore uncertain of Mr. Fisher's reaction to it. That Bryan Cave is able to concoct an alternate interpretation of that message does not eliminate its implication of Mr. Fisher's connivance in a wrongful scheme, particularly on a motion on which all inferences must be made in Pelican's favor. Later, Bryan Cave sent a conflicts waiver to AIP that indicated that Bryan Cave well knew the obvious: that the conflict pitted the defendants against AIP and was not merely an intramural AIP dispute. (Complaint ¶ 40) Of course, plaintiffs are not required to come forward with evidence at the pleading stage, and rarely does a plaintiff have access to defendants' internal communications before discovery. Even in the absence of the January 19 message, Pelican's allegations regarding

Bryan Cave's knowledge of the scheme are more than specific enough. However, the addition of that message makes the adequacy of Pelican's allegation of Bryan Caves' knowledge particularly clear.

Nothing is "implausible" in Pelican's allegations that two Bryan Cave partners sided with Mr. Brazell, the founder of Overstock.com, and Mr. Norris, the co-founder of Carlyle Group, in breach of its fiduciary duties, as Bryan Cave contends. The plausibility of Bryan Cave's knowledge of the scheme is bolstered by the circumstances, including not only Mr. Norris's prior relationship with Bryan Cave, his and the other defendants' obvious value as clients, and Bryan Cave's communications with the defendants but also Messrs. Brazell's and Norris's undisputed use of Bryan Cave to establish their illicit business and perform other legal work for it and them. Indeed, Bryan Cave's ignorance of the wrongful conduct of the clients whom they assisted in that very endeavor is, under the circumstances, less plausible than their knowledge of it. Further, misconduct more foolish than Bryan Cave's is all too common among partners in major firms.[12] Bryan Cave's proffered presumption, that a firm of Bryan Cave's

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[12] See, for a tiny smattering of examples, U.S. v. O'Hagan, 117 S. Ct. 2199 (1997) (Dorsey & Whitney partner convicted of insider trading); Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994) (firm promised client in writing not to represent adversary, then did just that in the same matter); In re Meridian Automotive Systems, 340 B.R. 740 (D. Del. 2006) (Milbank Tweed disqualified for conflicted representation); In Re Marc Dreier, _ N.Y.S.2d _, 2009 WL 3199741 (Head of Dreier LLC, a firm of several hundred lawyers, disbarred due to massive securities fraud involving inter alia sale of counterfeit securities); Matter of Melvyn Weiss, 58 A.D.3d, 870 N.Y.S.2d 255 (1st Dep't 2008) (name partner of Milberg Weiss disbarred after racketeering conviction) ; Matter of Samuel Fishman, 61 A.D.3d 159, 874 N.Y.S.2d 84 (1st Dep't 2009) (Latham & Watkins partner convicted of mail fraud and disbarred); Matter of Spinelli-Noseda, 55. A.D.3d 206, 863 N.Y.S.2d 597 (1st Dept. 2008) (Sullivan & Cromwell partner disbarred for fraudulent expense claims); Matter of Allan Blumstein, 22 A.D.3d 163, 801 N.Y.S.2d 299 (1st Dep't 2005) (Paul, Weiss partner disbarred for thefts of elderly aunt's trust funds); Beiny v. Wynyard, 132 A.D.2d 190, 522 N.Y.S.2d 511, 513 (1st Dep't 1987) (Sullivan & Cromwell disqualified for secretly obtaining privileged documents

reputation would not accept such a conflicted representation, if generally accepted, would be a great comfort to wealthy and powerful malefactors. It would not, however, be consistent with reality.

The cases that Bryan Cave cites in support of its argument that Pelican's allegations of its involvement in the defendants' scheme is implausible are easily distinguished. In U.S. v. Lloyds TSB Bank PLC, 2009 WL 2371562 (S.D.N.Y. 2009), the plaintiff claimed jurisdiction over claims resulting from a major bank's handling of proceeds in Cyprus from an alleged securities "pump and dump" scheme occurring in the United States on the basis that the bank knowingly assisted in the scheme when it handled those proceeds. Although the plaintiff added a conclusory allegation that the bank knew of the crooks' scheme, it alleged no facts suggesting that that might be the case. Id. at * 16-17.

The Court rejected the plaintiff's allegation against Lloyds in part because the bank's knowing involvement in the scheme was implausible in two respects: first, because the securities crooks would be unlikely to disclose their fraud to a bank to which they did not need to disclose it in order to obtain the bank's services and second, because it was unlikely that a major international bank would enter into a conspiracy with two Cypriot crooks to obtain (relatively minor) fees. Id. By contrast, Messrs. Brazell and Norris would have much greater need to disclose their scheme to the lawyers who were helping them to implement it than would the Cypriots have to disclose their plot to a bank that was only holding deposits and processing money transfers for them. Additionally, the patronage of Messrs. Brazell and Norris was vastly

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"to which no law but only its own deceit entitled it"). Indeed, rarely does a week pass without the discovery of blatant wrongdoing by major law firm partners and corporate titans, much of it shockingly foolish and self-destructive.

more valuable to Messrs. Pearce and Fisher than was a big bank's depository relationship with some two-bit Cypriot crooks. And Pelican's allegations are hardly conclusory as were the plaintiff's in U.S. v. Lloyds.

Bryan Cave's other cases are equally inapposite. In Air Atlanta Aero Engineering v. SP Aircraft Owner I, LLC, 2009 WL 2191318 (S.D.N.Y. 2009), the plaintiff alleged that it had presented an "account" to the defendant through the defendant's "agent" and that the defendant had accepted it, also through that agent. The Court dismissed the plaintiff's account stated claim because the receipt and acceptance of accounts was outside the scope of the written agency contract between the defendant and the "agent!" Id. In light of the clear contractual language, the plaintiff's conclusory allegation of agency was inadequate in the absence of allegations regarding the purported source of that agency.

Kregler v. City of New York, 2009 WL 2524628 (S.D.N.Y. 2009), also involved outlandish allegations. There the plaintiff alleged that a certain defendant New York City Department of Inspection ("DOI") officer, Gill Hearn, rejected the plaintiff's application to be a city marshal upon request by defendant fire department officers because the plaintiff had endorsed Robert Morganthau for district attorney. As the Court recited:

> In essence, Kregler asks the Court to draw an inference that Gill Hearn, merely by reason of some alleged personal and social acquaintance with Garcia, knew of Kregler's support for Morganthau and improperly joined Garcia in a conspiracy to deprive Kregler of a public appointment in retaliation for his political activity.

Id at * 4. In the absence of factual allegations that Ms. Hearn had knowledge of his endorsement, the plaintiff did not plead facts sufficient to state a plausible claim.

And in Willey v. J.P. Morgan Chase, 2009 WL 1938987 (S.D.N.Y. 2009),

plaintiff credit card holder, upon learning that the defendant bank had disposed of documents containing his and others' personal information, sued under a statute and rules requiring proper disposal of such records so that the information in them is not compromised. Parroting the applicable regulatory language, the plaintiff alleged that the bank "deliberately and/or recklessly did not maintain reasonable procedures," though he did not identify the bank's procedures or describe how they were unreasonable. Id. at * 4. Rather, the plaintiff "appear[ed] to assert that a violation of the FCRA must have occurred simply because the data loss incident occurred." Id. That obvious lack of any basis for the plaintiff's claim, which consisted of bare allegations tracking the required elements, is a world away from Pelican's allegations regarding the relationship and communications between Bryan Cave and Messrs. Brazell and Norris and their work for those defendants' illicit venture.

III. PELICAN HAS PROPERLY ALLEGED A CLAIM FOR BREACH OF FIDUCIARY DUTIES AGAINST BRYAN CAVE.

The fiduciary duty allegations that Pelican has asserted in its ninth cause of action should not, as Bryan Cave contends, be dismissed as duplicative of the malpractice allegations in that same claim because Pelican has not alleged identical conduct to support separate claims. New York courts distinguish the fiduciary duties of good faith and loyalty from that of due care, with the latter often denominated "malpractice."[13] Pelican has clearly alleged misconduct by Bryan Cave that constitutes violations of its fiduciary duties of good faith and loyalty. (Complaint ¶ 83-84) That alleged conduct can hardly be characterized as mere malpractice or

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[13] See e.g. Schweizer v. Mulvehill, 93 F. Supp.2d 376, 400-01 at fn. 29 (S.D.N.Y. 2000) (also cited by Bryan Cave); Excelsior 57th Corp. v. Lerner, 160 A.D.2d 407, 553 N.Y.S.2d 763, 764-65 (1st Dep't 1990).

negligence. Pelican's inclusion of the words "malpractice" and "duty of care" in order to catch any of the alleged conduct that the factfinder might, for whatever reason, determine to have constituted mere negligence, does not render Pelican's ninth claim duplicative of itself.[14]

Pelican's ninth claim is not deficient for failure to allege that Bryan Cave's breaches caused damages to AIP because (1) Pelican need not allege "but-for" causation of damages and (2) Pelican has in any event adequately alleged it. Although a plaintiff must allege that attorney malpractice, or breaches of attorneys' duties of care, caused damages, it need not allege causation of damages arising from attorneys' breaches of their duties of loyalty. Schweizer v. Mulvehill, 93 F. Supp.2d at 401 & fn. 29. As the court recited in Excelsior 57th Corp. v. Lerner, 553 N.Y.S.2d at 764-65, quoting the landmark case of Diamond v. Oreamuno, 24 N.Y.2d 494, 498, 301 N.Y.S.2d 78, 81 (1969):

> It is true that the complaint before us does not contain any allegation of damages . . . but this has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty. [citations omitted] This is because the function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but, as this court declared many years ago . . . to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates.

Courts have found that that rule is especially applicable to attorneys who breach their duties of good faith and loyalty. "There is an even more compelling reason to apply a prophylactic rule to remove the incentive to breach when the fiduciary relationship is that of an

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[14] Requiring Pelican to separate its "good faith" and malpractice allegations to make even more clear the difference between them would be a pointless formalistic exercise. However, Pelican will do it, or will omit references to "malpractice" and the "duty of care," if the Court requires it.

attorney and former client because of the attorney's unique position of trust and confidence." Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d at 543. See also Estate of Joseph Re v. Kornstein Veisz & Wexler, 958 F. Supp. 907, 924 (S.D.N.Y. 1997); Ciocca v. Neff, 2005 WL 1473819 at * 6 (S.D.N.Y. 2005); Beltrone v. General Schuyler & Co., 252 A.D.2d 640, 641-42, 675 N.Y.S.2d 198, 200 (3d Dep't 1998).

To be sure, some courts have held that all fiduciary duty claims against attorneys must include allegations of "but-for" causation, thereby favoring lawyers (and disfavoring their betrayed clients) over other defalcating fiduciaries.[15] With the exception of Second Circuit precedent and directly applicable New York Court of Appeals cases, this Court need not follow those decisions.[16] Instead it must attempt to determine the way in which the Court of Appeals would rule on the relevant issue. Id. That court has held that plaintiffs need not plead damages causation in claims for breaches of fiduciary duties of good faith and loyalty. Diamond v. Oreamuno, 24 N.Y.2d at 498, 301 N.Y.S.2d at 81. The Second Circuit has held that that rule applies with particular force to such claims against attorneys. Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d at 543. In light of that pronouncement it would therefore hardly be

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[15] See e.g. Nordwind v. Rowland, 2007 WL 2962350 at * 5 (S.D.N.Y. 2007) (disapproving Ciocca but also distinguishing it on the ground that in Ciocca some of the fiduciary duty allegations against the attorney did not overlap with the malpractice allegations against that attorney); Ulico Casualty Co. v. Wilson, Elser, Moskowitz et al., 56 A.D.3d 1, 865 N.Y.S.2d 14 (1st Dep't 2008). If the distinction indicated in Nordwind is valid then Pelican need not allege but-for causation, as Pelican identifies Bryan Cave's duties as those of care and undivided loyalty, then describes misconduct that clearly constitutes breaches of the latter duty. (Complaint ¶ 83) The claim alleges malpractice only to the extent that the factfinder determines, for whatever reason, that Bryan Cave has in some instances breached the duty of due care rather than the duty of undivided loyalty.

[16] See e.g., Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 119 (2d Cir. 1994); Williams v. J.P. Morgan & Co., 199 F. Supp.2d 189, 191 (S.D.N.Y. 2002).

logical to apply stricter damages pleading standards to claims against attorneys. Therefore, if the factfinder determines that Pelican is ultimately unable to prove the damages it suffered from Bryan Cave's breaches of fiduciary duties, Pelican should still be allowed to recover disgorgement of the profits Bryan Cave obtained through them.

Bryan Cave's challenge to Pelican's fiduciary duty claim is also meritless because, even if "but-for" causation were required, Pelican has adequately alleged it. It is not a difficult requirement to meet. Neither the phrase "but-for" nor any other particular language is necessary to allege or imply that the defendant's conduct caused damages.[17] Specificity is not required.[18] An allegation that a defendant intentionally caused the deleterious effect suffices.[19] Indeed, causation allegations should be accepted where causation is not negated or undermined by the plaintiff's allegations or otherwise impossible or highly unlikely. See e.g. Antonios A. Alevizopoulos and Assocs. v. Comcast Int'l Holdings, 100 F. Supp.2d 178, 187 (S.D.N.Y. 2000).

Pelican's allegations meet those modest requirements. Putting aside its other contentions, it alleges that Bryan Cave's failure to inform AIP promptly of the defendants'

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[17] See Union Carbide Corp. v. Montell N.V., 944 F. Supp. 1119, 1137-38 (S.D.N.Y. 1996).

[18] See e.g. Emergent Capital Investment Mgt. v. Stonepath Group, Inc., 343 F.3d 189, 197-98 (2d Cir. 2003) (causation allegations sufficient where, interpreted most favorably, they "suggest" causation and court can "infer" it); Wells Fargo Bank Northwest v. Energy Ammonia Transp. Corp., 2002 WL 1343757 at * 2 (S.D.N.Y. 2002);Gallagher v. Savarese, 2001 WL 1382581 (S.D.N.Y. 2001) ; Edelman v. Marek 1992 WL 321715 at * 2-3 (S.D.N.Y. 1992) (rather conclusory allegations of causation in malpractice claim accepted); In Re Allou Distributors, 395 B.R. at 268-69.

[19] Czech Beer Importers, Inc. v. C. Haven Imports, LLC, 2005 WL 1490097 at * 7 (S.D.N.Y. 2005). As with Union Carbide and several other cases cited herein, the causation issue in that case arose in context of a tortious interference claim.

unlawful actions prevented AIP from immediately terminating their access to AIP's computer system and confidential information, stopping Mr. Brazell from enticing other of the defendants and others to breach their duties to AIP, and otherwise limiting AIP's damages. (Complaint ¶ 85) Pelican also alleges additional obvious facts in ¶ 85: that Bryan Cave's assistance, which is described elsewhere, enabled the other defendants more effectively to establish and operate their competing business to AIP's detriment. It specifically alleges that "but for" Bryan Cave's defalcations, AIP would have been able to stop, and would have stopped, the defendants' conspiracy from coming to fruition. (Id.) Those allegations are hardly implausible. Even apart from the actions that AIP would have taken to stop the defendants, the refusal of Bryan Cave to help them would have undermined their scheme. The defendants needed lawyers to start and operate their complex business. Not only were no other lawyers as well suited as Bryan Cave to assist them but 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.

The cases that Bryan Cave has cited on the issue of pleading causation are of little assistance to it. Most of the malpractice cases it cites involve alleged breaches of the duty of care, not the duty of good faith and undivided loyalty.[20] More to the point, in the cases it cites on

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[20] See discussion above for the critical distinction between the two duties with respect to damages causation. The only exceptions in Bryan Cave's partners are the Ulico Casualty Co. and Schweizer cases discussed above; the cursory and therefore in this respect cryptic decision in Reichenbaum v. Cilmi, 64 A.D.3d 693, 884 N.Y.S.2d 88 (2d Dep't 2009); Waggoner v. Caruso, 2009 WL 3079237 (1st Dep't 2009), which stands on the same basis as Ulico Casualty; and Romano v. Ficchi, 2009 WL 1460781 at * 3 (S. Ct. Kings Co. 2009). In Reichenbaum the dismissal had no practical effect (as one would expect from dismissal of a truly "duplicative" claim) because the court dismissed a claim for breach of fiduciary duties only after upholding the parallel malpractice claim. At worst, four of those cases reflect the disagreement

the adequacy of causation allegations, the courts found that the facts actually negated causation of the claimants' damages, made it unlikely, or in other procedural contexts that the claimants had not proven it, not that plausible allegations of causation were insufficient. For example, in Flutie Bros. LLC v. Hayes, 2006 WL 1379594 at * 6 (S.D.N.Y. 2006), the only federal court decision Bryan Cave cites on that subject, the court explained at length, by reference to the court proceedings in which the defendant attorneys had represented the plaintiff, why the defendant's alleged negligence would not have changed the result. In Hashmi v. Messiha, 2009 WL 3048417 (2d Dep't 2009), the plaintiff alleged that he was damaged by a New York Post article that was written, he said, because the defendant attorneys did not immediately move to dismiss the action on the basis of a specific fact. The court granted summary judgment dismissing the complaint because the plaintiff's failures to inform his lawyer of the basis for the omitted dismissal motion and to allege that the lawyer knew that the Post was writing an article rendered his causation allegations "speculative and conclusory."

In Ambase v. Davis Polk, 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007), the court dismissed a complaint, apparently on a summary judgment motion, where the defendant law firm did not commit malpractice in its successful defense of a tax case because it had not undertaken to advise the plaintiff of an alternative legal defense of which the firm allegedly failed to advise the plaintiff. With no discussion of the sufficiency of the allegations in the plaintiff's particular complaint, the court added that there was no reason to believe that the defendant would have behaved differently had it been advised of that alternative defense. Id., 8 N.Y.3d at 435-36, 834

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among the courts indicated above, though even that interpretation of Romano and Reichenbaum is unwarranted.

N.Y.S.2d at 1037. The same thing can hardly be said of AIP's likely conduct had it earlier been informed of the defendants' plot. Waggoner v. Caruso, 2009 WL 3079237, is distinguishable for a similar reason. There the plaintiff did not "demonstrate" that it would have prevailed in any underlying action had the defendant attorneys "timely and properly" investigated an adversary bank's location of attachable assets. The court did not explain why that was the case. And the decision of Reichenbaum v. Cilmi, 64 A.D.3d 693, 884 N.Y.S.2d 88, is so cursory and conclusory that the precise basis of its determination of lack of "but-for" causation is indeterminable. In none of those cases were allegations remotely resembling Pelican's found to be insufficient.

IV. IF THE COURT DEEMS PELICAN'S ALLEGATIONS INSUFFICIENT IN ANY WAY, THEN PELICAN SHOULD BE GIVEN LEAVE TO AMEND ITS COMPLAINT.

Fed.R.Civ.P. 15(a) provides, in pertinent part, that ". . . a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." "A liberal pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)." 3 Moore's Federal Practice at ¶ 15.14[1] (1997). As the Court of Appeals for the Second Circuit stated in Rachman Bag Co. v. Liberty Mutual Ins. Co., 46 F.3d 230, 234-35 (2nd Cir. 1995), in upholding leave to amend an answer more than four years after commencement of an action:

> . . . The Supreme Court has emphasized that amendment should normally be permitted, and has stated that refusal to grant leave without justification is "inconsistent with the spirit of the Federal Rules." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). Accordingly,
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> > [i]n the absence of any apparent or declared reason -- such as

> undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . ., etc. -- the leave sought should as the rules require, be "freely given."

See also Nerney v. Valente & Sons Repair Shop, 66 F.3d 25, 28-29 (2nd Cir. 1995); Spilkevitz v. Chase Investment Svces. Corp., 2009 WL 2762451 at * 5-6.

Although it should not be necessary, in the event that the Court deems Pelican's complaint insufficient in any way, then Pelican should be granted leave to submit a second amended complaint. Some of the purported deficiencies of which Bryan Cave complains can easily be remedied by small changes in the complaint. Indeed, as shown above, some depend on an unreasonably cramped reading of Pelican's allegations. Dismissal with prejudice is inappropriate under those circumstances.

CONCLUSION

For the foregoing reasons, Bryan Cave LLP's motion to dismiss the first amended complaint as against it should be denied.

New York, New York
November 9, 2009

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DECLARATION OF SERVICE

Eric Rosenberg hereby declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

I am an attorney licensed to practice law in the State of New York and am associated with Altman & Company PC, attorneys for plaintiff Pelican Equity. On this day, November 9, 2009, I served the attached memorandum of law by filing it through the ECF system and by sending copies of it by first class U.S. mail on the following persons:

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