UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PELICAN EQUITY, LLC,

Plaintiff,

- against -

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

Defendants.

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09 CIV 5927 (NRB)
ECF Case

MEMORANDUM OF LAW OF TALOS DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS THE AMENDED COUNTERCLAIM

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Defendants Robert V. Brazell ("Brazell"), Stephen L. Norris ("Norris"), Talos Partners, LLC ("Talos"), and Rama Ramachandran ("Ramachandran") (collectively, "Talos Defendants") submit this Memorandum of Law in opposition to Plaintiff's motion to dismiss Talos Defendants' Amended Counterclaim in this action.

Preliminary Statement

Plaintiff is, in this action, knowingly and intentionally asserting as fact the fraudulent representations of American Institutional Partners, LLC ("AIP") and its principal, Mark H. Robbins ("Robbins"). By filing this action and adopting these misrepresentations as its own, Plaintiff, the self described "successor in interest" of AIP, has joined in and is acting in concert with and in furtherance of the fraudulent scheme begun by its assignors. The Talos Defendants submit that Plaintiff is therefore responsible for the fraudulent acts of its assignors and accountable for all of the damage caused by their conduct.

Facts

One week after its formation,[1] Plaintiff entered into an "Assignment Agreement" dated as of April 6, 2009 with assignors Robbins, AIP, AIP Funding, LLC, Equitap, LLC, Smarthedge, LLC and Seven Investments, LLC (collectively, "Assignors"). In exchange for a payment of $350,000 by DPR Management, LLC ("DPR") to Fairstar Resources Ltd. and Goldlaw Pty Ltd (collectively "Fairstar"), allegedly arranged by plaintiff to obtain a forbearance by Fairstar for at least 30 days in pursuing the judgment entered in November 2008 in Utah against Robbins, AIP and AIP Lending, the Assignors purported to assign to Plaintiff on an **"as is, where is"** basis:

> (a) all trade secrets, confidential and/or proprietary information, other intellectual property, licenses, contract rights and other intangibles relating to the stock lending business conceived of, developed, acquired, owned and/or operated by Robbins, AIP, AIP Lending, Equitap, SmartHedge and Seven (the "Stock Lending Business"), including without limitation all related trademarks, service marks, trade names, software, web sites, business plans, models, methodologies, analyses, data, information, business contacts and relationships;
>
> (b) all rights and/or claims against Talos Partners, LLC and/or its principals, members, employees, agents and associates, and all those who conspired and/or acted in concert with any of them (including without limitation Rob Brazell, Steve Norris, Darl McBride and Rama Ramachandran), for theft, misappropriation, fraud, breach of fiduciary duty and/or conversion (or similar or related claims) of or against the Stock Lending Business and/or certain components thereof, and against Bryan Cave LLP and/or its attorneys, for related and similar claims and for malpractice and/or breach of fiduciary duties to any Assignor (collectively the "Talos Claims");

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[1] According to the Delaware Department of Corporations website, Pelican Equity, LLC was formed March 27, 2009. *See* Ringer Decl, Exh. B. The Court may take judicial notice of the Exhibits annexed to the Ringer Declaration. In deciding an F.R.C.P. 12(b)(6) motion, the Court can look to documents that were not incorporated to the complaint by reference but were integral to the complaint. *See Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 48 (2d Cir.1991), *cert. denied,* 503 U.S. 960, 112 S.Ct. 1561, 118 L.Ed.2d 208 (1992) (considering documents that were attached to the motion to dismiss because plaintiff had actual notice of the facts contained within the documents). By referencing the exhibits, defendants do not acknowledge their validity or otherwise suggest that any of the facts recited therein are true.

(c) all confidential and proprietary information, all work product and all related information, documents and/or materials associated with any of the foregoing items prepared to date by Robbins, AIP, AIP Lending, Equitap, SmartHedge and/or Seven and/or any of their respective associates, legal counsel and/or financial or industry professionals; and

(d) all books, accounts, records and other documentation relating to any of the above.[2]

On June 29, 2009, Plaintiff filed this action asserting claims purportedly obtained by the above assignment. The complaint alleges at great length facts that it claims to have obtained from AIP and Mark Robbins, that it is AIP's "successor in interest" and has thereby expressly adopted the knowledge of AIP and its principal, Mark Robbins, in relation to the allegations made in the complaint. Indeed, Plaintiff repeats as allegations of fact the very misrepresentations that AIP and Mark Robbins made to the Talos Defendants and which form the core of the counterclaim.

Plaintiff has taken the rights asserted in this complaint "as is" and has adopted as its own the knowledge and acts of AIP and Robbins. As alleged in the counterclaim, virtually every factual statement made by AIP and Robbins, and now adopted by Plaintiff, concerning the alleged stock loan business of AIP is false and was known to be false when made. By asserting these claims and allegations in this action Plaintiff has joined in, continued and become an integral part of the fraudulent conduct begun by its alter egos AIP and Robbins.

Argument

A motion to dismiss pursuant to Rule 12(b)(6) must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which

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2 *See* Assignment Agreement produced by Plaintiff and attached to the Ringer Declaration as Exhibit A.

would entitle him to relief. *Societe Anonyme Dauphitex v. Schoenfelder Corp.,* 2007 WL 3253592 at *2 (S.D.N.Y. 2007). For the purposes of a motion to dismiss, all factual allegations are accepted as true, and all inferences are drawn in favor of the pleader. *Id.* At issue is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Id.* If under any reasonable reading, the counterclaim states a claim upon which relief can be granted, the Court must deny the motion to dismiss. *Id.*

I. The Counterclaim is Sufficiently Particular.

Common law fraud, under New York law, requires a plaintiff to allege: (1) the defendant knowingly or recklessly misrepresented a material fact; (2) intending to induce the plaintiff's reliance; (3) that the plaintiff relied on the misrepresentation; and (4) suffered damages as a result. *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 181 (2d Cir. 2007); *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 119, 302 N.Y.S.2d 799, 250 N.E.2d 214 (1969).

Federal Rule of Civil Procedure 9(b) states "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The particularity requirement of Rule 9(b) is designed to further three goals: (1) to provide a defendant with fair notice of the plaintiff's claim, (2) to protect a defendant from harm to his or her reputation or goodwill, and (3) to reduce the number of strike suits. *Cosmas v. Hassett*, 886 F.2d 8, 11 (2nd Cir. 1989).

To satisfy the particularity requirement of Rule 9(b), a complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect

in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements. *Id.* On a motion to dismiss, a court must read the complaint generously, and draw all inferences in favor of the pleader. *Id.*

The Talos Defendants have met their burden of pleading fraud with particularity. The Talos Defendants' counterclaim clearly specifies the statements they contend were false and misleading; it adequately details when and where the allegedly fraudulent statements were made; and it adequately identifies Mark Robbins, AIP and Pelican as those responsible for the misrepresentations.

Fraudulent misrepresentations: The counterclaim alleges the following misrepresentations made by Robbins, AIP and, by repeating the misrepresentations in its complaint as truth, Pelican:[3]

- They misrepresented that they had expertise in the stock loan business – when in fact they had none.
- They misrepresented that they had concluded numerous stock loan transactions – when in fact they had not.
- They misrepresented that they had substantial assets and financial backing, including ownership of a mountain ski resort and an island in the Bahamas – when they in fact had no assets, no financial backing and mountains of debts and liabilities.
- They misrepresented that they had developed proprietary business plans, models and other intellectual property for a stock loan business – when they in fact had nothing of substance.

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[3] Talos Defendants Answer and Amended Counterclaim ("Counterclaim") ¶¶ 7, 34, 97-98, 100-01. For examples of these misrepresentations, see Exhibits C and D to the Ringer Declaration which are a financial statement provided to the Talos Defendants by Robbins purporting to show the financial strength of AIP and a promotional piece provided by Robbins purporting to show AIP's expertise and experience in the Stock loan business.

- They sent an e-mail falsely reporting a "successful" business meeting posing as a third party – when in fact the whole thing was a fabrication created and sent by Robbins.

- They concealed that the one purported stock loan that AIP had in fact placed resulted in a lawsuit in Utah, brought by the borrower based on, among other things, fraud and misrepresentation, which resulted in the entry of a final judgment of $2,296,651.38, that the judgment remains outstanding, and that there is a bench warrant in Utah for the arrest of Robbins for contempt of court.

Who responsible: As alleged in the counterclaim, the misrepresentations were made by Robbins, AIP and, by its repetition in this action, Plaintiff. Plaintiff, as it alleges itself, is the "successor in interest" of and obtained all of its rights and claims by assignment from Robbins and AIP. As such, it stands in their shoes and is charged with and responsible for the knowledge, acts and misrepresentations of Robbins and AIP.[4]

When made: The counterclaim expressly alleges that misrepresentations were first made during a period of three (3) months—the same three months at issue in Pelican's complaint—from November 2008 through early January 2009, that by repetition the misrepresentations continued thereafter and that, by virtue of Plaintiff's repetition of the misrepresentations in its complaint, continue to this date.[5]

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[4] There should be no reason for confusion as to the allegations of "who" is responsible for the misrepresentations. As alleged in the First Amended Complaint (¶ 1), Robbins is AIP's founder and "Manager" (Ringer Decl., Exh. A). The misrepresentations were made by Robbins and on behalf of himself and AIP. By virtue of the assignment and the filing of this lawsuit Plaintiff has adopted as its own and repeated the same misrepresentations. The Counterclaim does not allege misrepresentations to any other individual so there can be no confusion as to who made them and who is alleged to be responsible for them.

[5] Id. at ¶¶ 99, 103. The misrepresentations were made on a continuous basis through various channels of communications. The time frames alleged are sufficiently particular because it is clear that Plaintiff has access to the relevant e-mail and text message data and can easily identify the specific messages wherein Robbins and/or AIP make the statements identified by Talos Defendants in their counterclaim and in this Point I of the Memorandum of Law. Upon being

Where made: The misrepresentations took place in numerous meetings, conversations in person and by telephone, in e-mails and in Plaintiff's complaints.[6]

Intent, which may be plead generally, is more than adequately plead in the counterclaim.

> Plaintiff, Robbins and AIP knew these representations to be false and made these misrepresentations and concealed these facts for the purpose of inducing the Talos Defendants, as well as other prospective investors and customers, to rely upon the representations, to create a false belief that the AIP stock loan business was real, lawful and legitimate, and to induce them to invest time and money in Robbins's and AIP's fraudulent scheme when, in fact, AIP, Robbins and their alleged stock loan business was nothing more than an elaborate con job.[7]

Again, as the "successor in interest" to AIP and its principal, Robbins, Plaintiff is possessed of and responsible for all of the knowledge and intent of its assignors. When plaintiff chose to repeat and assert these misrepresentations in its complaint it did so in the full knowledge of their falsity and with the intent to deceive.

Talos Defendants have plead their counterclaim with sufficient particularity to move forward with the claim and be given the opportunity to prove the claim after discovery,[8] and the goals of Rule 9(b) are satisfied: (1) Plaintiff is on fair notice as to the

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given the opportunity for discovery, the Talos Defendants will be able to provide specific dates of e-mails and other communications that are currently in possession of the opposing party.

6 Id. at ¶¶ 97, 99, 103.

7 Id. at ¶101.

8 Further, if this Court believes that additional facts must be included in the counterclaim to support any of the claims, Talos Defendants request that they be granted leave to file a Second Amended Answer. Pursuant to Fed. R. Civ. P. 15(a)(2) leave to file such an amended pleading should be liberally granted. *See Forman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962) (If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared

allegations being made; (2) Plaintiff — which does not allege to have any business operations and likely was created for the express purpose of taking the assignment and bringing this lawsuit — is not suffering harm to its reputation or goodwill; and (3) a counterclaim can hardly be considered a strike suit brought for the sole purpose of extracting a settlement. *See Cosmas* 886 F.2d at 11.

Plaintiff obtained the rights and claims it asserts in its complaint "as is" and is therefore possessed of all of the knowledge of and, by filing this action, has adopted as its own, all of the acts of AIP and Robbins. Plaintiff repeats and alleges as true facts the very misrepresentations that AIP and Mark Robbins made to the Talos Defendants, indicating a close, if not personal, knowledge of the representations made. Pelican has adopted the facts surrounding the claims and has stated them as truths, adopting the fraud. Indeed, Plaintiff's complaint is entirely based on the fraud of AIP and Robbins and it cannot seek to further that fraud while at the same time disavowing responsibility for it.

II. Plaintiff Expressly Claims To Be The "Successor In Interest" Of AIP And Robbins And, As Such, Is By Definition Their Alter Ego

"Under the liberal federal pleading standards, if the allegations in a complaint do not support the particular legal theory advanced, a district court has broad latitude in determining whether another theory of relief with respect to those same allegations is available." *Societe Anonyme Dauphitex*, 2007 WL 3253592 at *2 (noting that party did

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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 by virtue of allowance of the amendment, etc. – the leave sought [*i.e.* to amend the complaint] should, as the rules require, be 'freely given.'").

not explicate a de facto merger theory, but did assert a general claim of successor liability).[9]

A. Successor Liability

Like allegations of alter ego, allegations of successor liability are subject to the lenient pleading requirements of Rule 8(a). *See Old Republic Ins. Co. v. Hansa World Cargo Service, Inc.,* 170 F.R.D. 361, 375-76 (S.D.N.Y. 1997).

In general, successor liability will lie when: (1) there is an express or implied agreement to assume the other company's debts and obligations; (2) the transaction [conveying the assets of one company to the other] was fraudulent; (3) there was a *de facto* merger or consolidation of the companies; or (4) the purchasing company was a mere continuation of the selling company. *Id.* at 376 (internal quotations omitted). Courts have acknowledged a lack of clarity between the mere continuation and de-facto merger exceptions, with some courts observing that the two doctrines are so similar that they may be considered a single exception. *Societe Anonyme Dauphitex,* 2007 WL 3253592 at *3 (collecting cases).

"A de facto merger occurs when one corporation is absorbed by another absent compliance with the statutory requirements for a merger.... The hallmarks of a *de facto* merger include: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) a continuity of management, personnel,

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[9] Should the Court grant Plaintiff's motion to dismiss—which it should not—the court should grant Talos Defendants leave to replead their successor liability theory with respect to their fraud claim. Where a court grants a motion to dismiss for failure to state a claim upon which relief can be granted, a court should grant plaintiff leave to replead. *See Old Republic Ins. Co. v. Hansa World Cargo Service, Inc.,* 170 F.R.D. 361, 376 (S.D.N.Y. 1997).

physical location, assets, and general business operation." *Id.* (internal citations omitted). Not all these elements are necessary to find a *de facto* merger. *Id.* (noting that the Second Circuit has yet to resolve the question, but citing significant support for notion that not all elements are required). "The de facto merger analysis requires taking into consideration the totality of the relevant allegations." The purpose of the doctrine of de facto merger is

> to avoid the patent injustice which might befall a party simply because a merger has been called something else.... Therefore, courts are to analyze the facts in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor.... Courts may impose successor liability in cases where the form of the transaction does not accurately portray its substance"

which is the case here. *Id.* at *5.

Here, as Plaintiff repeatedly alleges, it is the successor in interest to AIP, an entity that is now defunct. The facts alleged by both parties indicate a *de facto* merger. Plaintiff itself asserts — repeatedly — that it is the "successor in interest" to AIP and asserts its claims solely on that basis. The assignment transaction itself is suspicious and indicates a transfer of the entire business from one entity to another followed by the prompt dissolution of the first entity (a *de facto* merger).

First, the very purpose of the Assignment Agreement was to transfer assets to avoid a judgment collection on them. The transfer constituted more than a mere asset purchase agreement. According to the Delaware Division of Corporations, Pelican was created on March 27, 2009.[10] The Assignment Agreement sets forth that the purpose of the assignment was for Pelican to arrange for payment to one of Robbins and AIP's

[10] *See* Ringer Decl., Exh. B.

creditors, Fairstar, in exchange for the assignment by Robbins and AIP of their business to forestall a judgment sale scheduled for April 6th and 8th, 2009.[11]

Second, Plaintiff did not just acquire some assets, but rather acquired all of Robbins's and AIP's business, and the intangible assets, such as trade secrets, web sites, business plans, models, methodologies, data, information, business contacts and relationships, work product, books, accounts, records and other documentation relating to any of the above that purportedly are the subject of this action.[12] This is indicative of more than a mere asset purchase. *See, eg. Ryan, Beck & Co., LLC v. Fakih*, 268 F.Supp.2d 210, 230 (E.D.N.Y. 2003) (noting that entity acquired "more than just fixed assets" when it also acquired "intangible assets, such as good will, customer accounts, personnel, and the right to use the [successor entity's] name, internet address, phone numbers, trademarks, as well as most of its office space.").

Third, shortly after the transfer, the AIP entities either dissolved or became mere shell entities, further indicating a *de facto* merger. The Assignment Agreement was made "as of April 6, 2009" in anticipation of an involuntary sale of Robbins's and AIP's assets on April 6 and 8, 2009.[13] On May 27, 2009, mere weeks after the transfer of its business, AIP filed for Chapter 11 bankruptcy[14] and on September 1, 2009 it was converted to a Chapter 7 Liquidation.[15] Accordingly, even if AIP is not yet a dissolved entity, it is

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11 *See* Ringer Decl., Exh. A

12 Id.

13 Id.

14 *See* Ringer Decl. at ¶ 6; Answer and Amended Counterclaim at ¶ 91.

15 Although AIP initially appealed the conversion to Chapter 7, on November 20, 2009, AIP moved to dismiss its appeal. *See* Ringer Decl. at ¶ 6. In addition, although one of the assignors is allegedly "AIP Funding, LLC, a Delaware limited liability company formerly known as "AIP

rapidly on its way and clearly is a shell entity. "So long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of de facto merger will be made." *See Societe Anonyme Dauphitex,* 2007 WL 3253592 at *5 (where entity had no income after the transfer and transferred its assets and goodwill, it appears to have, in essence, become a shell); *see, eg., Ryan, Beck & Co.,* 268 F.Supp.2d at 230 (noting that fact that predecessor entity filed for bankruptcy within approximately six months of closing date was factor bearing on issue of fraudulent transfer in suggesting that a *de facto* merger occurred).

The determination of the issue of successor liability is fact-specific. *Ryan, Beck & Co.,* 268 F.Supp.2d at 229. Given the liberal pleading standards and the Court's ability to look at the pleading and motion papers as a whole in determining whether a claim exists, the Talos Defendants adequately plead successor liability and should be allowed to conduct discovery to determine whether the transaction constitutes a de facto merger or otherwise gives rise to successor liability. *See, Id.* at 229.

B. Conspiracy

Plaintiff's argument that the Talos Defendants have not sufficiently alleged facts supporting the claim of conspiracy is likewise without merit. The first Amended Complaint itself alleges that Plaintiff entered into an agreement with AIP, Robbins and the other Assignors, and the counterclaim alleges that by filing this action Plaintiff has joined with and is acting in furtherance of their fraudulent schemes. AIP and its principal, Robbins, knew that AIP never had any real or legitimate stock loan business, had no real assets and was nothing more than an elaborate con job. By filing this action,

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Lending, LLC," neither AIP Funding, LLC nor AIP Lending, LLC appear on the Delaware Department of Corporations as a Delaware entity.

Plaintiff has repeated these false representations as its own and seeks use this Court to further the con.

Plaintiff could have no good faith basis to allege its claims and it should not be permitted to escape the consequences of its actions by claiming that the fraud "had to have run its course before commencement of this lawsuit." By adopting the false claims of Robbins and AIP, Plaintiff has perpetuated the scheme to defraud the Talos Defendants and now this Court.

Conclusion

For the foregoing reasons, the Talos Defendants respectfully submit that Plaintiff's motion to dismiss should be denied.

Dated: New York, New York
November 23, 2009

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Defendants.

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DECLARATION OF SERVICE

JEANETTE BLAIR, hereby declares under penalty of puerjury:

I am an attorney licensed to practice law in the State of New York an am associated with Meister Seelig & Fein LLP, attorneys for DefendantsRobert V. Brazell, Stephen L. Norris, Talos Partners, LLC, and Rama Ramachandran. On this day, November 24, 2009, I served copies of the attached memorandum of law and Declaration of James M. Rinber by filing same through the ECF system and by first class U.S. mail on the following persons:

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I declare under the penalties of perjury that the foregoing is true and correct.

Executed: November 24, 2009

JEANETTE BLAIR