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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS TALOS DEFENDANTS' COUNTERCLAIM

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INTRODUCTION

Plaintiff Pelican Equity, LLC ("Pelican") submits this reply memorandum in further support of its motion to dismiss the amended counterclaim (the "Counterclaim") that defendants Robert Brazell, Stephen Norris, Rama Ramachandran, and Talos Partners, LLC (collectively, the "Talos Defendants") have asserted against Pelican. This memorandum is supported by the initial November 16, 2009 declaration of Eric Rosenberg and the exhibits to it.

In their opposition papers, the Talos Defendants do not even argue that they have alleged their reliance on any purported misstatements by Pelican or that Pelican made any such statements for the purpose of inducing their reliance, as required to support their ersatz fraud claim. Instead they contend that (1) American Institutional Partners LLC ("AIP") and Mark Robbins defrauded them, (2) Pelican is liable for AIP's and Robbins' purported fraud because

Pelican acquired assets from them, and (3) Pelican somehow conspired with AIP and Mr. Robbins by "adopting" and "repeating" purported misrepresentations that those nonparties allegedly made to the Talos Defendants. The Talos Defendants have wholly failed to allege facts necessary to support any of those theories. They still do not show that their allegations of fraud against AIP and Mr. Robbins meet the requirements of Fed.R.Civ.Pro. 9(b). Nor have they alleged facts necessary to impose liability on Pelican under the "de facto merger" doctrine that they have belatedly adopted. Some of their arguments and theories, such as their unsupported contention that Pelican has "adopted" AIP's and Mark Robbins' acts and alleged misrepresentations, are just weird. In sum, the Talos Defendants have abjectly failed to show that they have stated a claim or that the Court should indulge them yet again by granting them license for further floundering.

ARGUMENT

I. RULE 8 PLEADING STANDARDS

The Talos Defendants fittingly start the Argument section of their memorandum with a misstatement of law. Quoting Societe Anonyme Dauphitex v. Schoenfelder Corp., 2007 WL 3253592 at * 2 (S.D.N.Y. 2007), they contend that "[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 would entitle him to relief." That, of course, is exactly the standard that the Supreme Court rejected in Bell Atlantic v. Twombly, 550 U.S. 544, 560-63, 127 S. Ct. 1955, 1968-69 (2007). From that point the Talos Defendants continue to speed headlong

downhill[1].

II. THE TALOS DEFENDANTS HAVE NOT SHOWN THAT THEY HAVE ADEQUATELY ALLEGED FRAUD AGAINST PELICAN OR ANYBODY ELSE.

The Talos Defendants have not shown that they have adequately alleged a claim for fraud against Pelican. As shown in Pelican's opening brief, that claim is deficient because those defendants fail to allege adequately (1) that they relied, or even could have relied, on any of

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[1] Presumably the Talos Defendants and their co-defendant Bryan Cave LLP will resist the temptation to liken the Talos Defendants' quotation of Societe Anonyme Dauphitex to Pelican's citation of another post-Twombly case, Selmanovic v. NYSE Group, Inc., 2007 WL 4563431 (S.D.N.Y. 2007), for some (still valid) statements regarding pleading and dismissal standards, in Pelican's brief in opposition to Bryan Cave's motion to dismiss. Bryan Cave inaccurately referred to Selmanovic as Pelican's "main case," apparently on the basis that it quoted two passages from that case (regarding neither of which Bryan Cave finds fault). (Bryan Cave November 18, 2009 reply brief at p. 1) Bryan Cave then pointed out that in Selmanovic the Court made the statement, **not quoted or relied on by Pelican**, 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 [emphasis supplied]." (Id. at p. 2) Bryan Cave proceeded to argue that that was "precisely the standard that the Supreme Court dislodged in Ashcroft v. Iqbal, 1927 S. Ct. 1937, 1949 (2009)." (Id.) Adopting a straw man argument, Bryan Cave then pretended that Pelican relied on that principle in its opposition papers. By contrast, the Talos Defendants actually relied on (indeed, quoted) the above-quoted statement from Societe Anonyme Dauphitex.

Though it is of little moment because Pelican did not rely on the contested quotation from Selmanovic, Bryan Cave's assertion that Ashcroft v. Iqbal rejected the quoted principle is also misleading for other reasons. First, as Bryan Cave neglected to note, Selmanovic quoted that purportedly false statement of law not only from a recent Second Circuit case but also from Bell Atlantic v. Twombly, 127 S. Ct. at 1969, which Selmanovic cited for that proposition. That same case (Twombly) is also the source of the principle on which Bryan Cave relies to refute that first quotation from Twombly (that pleading facts merely consistent with a claim is not sufficient). Iqbal merely quoted and paraphrased that language from Twombly. Iqbal, 129 S. Ct. at 1949, quoting Twombly, 550 U.S. at 557. Therefore Bell Atlantic v. Twombly was the source of both the quotation on which Bryan Cave relied and of the quotation that Bryan Cave claims that that quotation negated. Second, it is far from clear that the Supreme Court rejected that contested principle. Rather, it rejected the famous "no set of facts" standard as an "incomplete, negative gloss" on that "accepted pleading standard." Twombly, 550 U.S. at 563, 127 S. Ct. at 1969.

Pelican's statements or (2) that Pelican made any statements with the intention of inducing their reliance. Further, (3) the Talos Defendants' misrepresentation allegations against Mark Robbins and AIP are insufficiently specific to comply with Rule 9. The Talos Defendants have not even addressed the first two of those deficiencies. Their argument, that they have alleged AIP's and Mark Robbins' misrepresentations with sufficient particularity, is meritless. The Talos Defendants cite no cases holding that they need not identify which of them received which allegedly false communications. In fact they must allege those facts but did not do so. See Bankok Crafts Corp. v. Capitolo Di San Pietro in Vaticano, 331 F. Supp.2d 247, 253 (S.D.N.Y. 2004). Contrary to their unsupported contention, their allegation that all of AIP's and Mr. Robbins' misrepresentations took place during a three-month period is insufficient to allege the times of those statements. Doehla v. Wathne Limited, Inc., 1999 WL 566311 at * 17 (S.D.N.Y. 1999) (four-month window too vague).

The Talos Defendants also do not adequately identify in their Counterclaim the persons who made the purported misrepresentations on behalf of AIP. Their assertion (Talos Defendants' brief at p. 6) that Mark Robbins was the person who made all of AIP's alleged misrepresentations is found nowhere in the Counterclaim. For at least two reasons, Pelican's allegations also do not supply that detail for the Talos Defendants' Counterclaim. First, and contrary to the Talos Defendants' argument (id. at fn. 4), Pelican's allegation that Mr. Robbins was AIP's founder and manager obviously does not imply that he made all of the statements that the Talos Defendants have attributed to AIP. Second, even if Pelican's allegation did somehow show that Mr. Robbins made all of those statements, it would be of no help to the Talos Defendants because Pelican's allegations were not incorporated into the Counterclaim as the

Talos Defendants imply. (Talos Defendants' brief at p. 6, fn. 4) As shown in Pelican's opening brief, the failure to identify the person who made each statement is itself fatal. See also Int'l Telecom Inc. v. Generadora Electrica Del Oriente, 2002 WL 465291 at * 7 (S.D.N.Y. 2002); Doehla v. Wathne Limited, Inc., 1999 WL 566311 at * 17. And the Talos Defendants' allegation that all of the AIP and Robbins misrepresentations "took place in numerous meetings, conversations in person and by telephone, in e-mails . . . [etc.]" (Talos Defendants' brief p. 7) manifestly does not suffice to identify the place of each misrepresentation or indeed of any of them.

III. THE TALOS DEFENDANTS HAVE NOT ALLEGED THAT PELICAN IS LIABLE FOR AIP'S AND MARK ROBBINS' PURPORTED FRAUD BY VIRTUE OF THE DE FACTO MERGER DOCTRINE.

"Under both New York law and traditional common law, a corporation that purchases the assets of another corporation is generally not liable for the seller's liabilities. [citation omitted] Both New York law and traditional common law, however, recognize certain exceptions to this rule." State of New York v. National Service Inds., 460 F.3d 201, 209 (2d Cir. 2006). One of those exceptions, the de facto merger doctrine, is applicable when "a transaction, although not in form a merger, is in substance a 'consolidation or merger of seller and purchaser.'" Id. As the court recited in Desclafani v. Pave-Mark Corp., 2008 WL 3914881 at * 4 (S.D.N.Y. 2008):

> Courts consider the following factors in determining whether a *de facto* merger has occurred: "(1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the purchaser of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets, and general business operation." State of

New York v. National Service Inds., 460 F.3d 201, 209 (2d Cir. 2006).

See also State of New York v. National Service Industries, 380 F. Supp.2d 122, 129-31 (E.D.N.Y. 2005), aff'd 460 F.3d 201, 209 (2d Cir. 2006) (all four factors must be present); Peralta v. WHM Tool Group, Inc., 2005 WL 2002454 at * 3 (E.D.N.Y. 2005).

Even if the Talos Defendants had stated a viable fraud claim against AIP and Mark Robbins, they still would not have stated a claim to impose liability for that fraud on Pelican under the de facto merger doctrine because they have not alleged facts necessary to establish a single one of the four necessary factors. The reader of the Counterclaim will search it in vain for those factors. Indeed, the very predicate for application of the doctrine, the sale of one corporation's assets to another, is itself absent from the Counterclaim. Nor has Pelican alleged that it purchased or acquired all of the assets of AIP and Mr. Robbins, as the Talos Defendants now contend. (Talos Defendants' brief at p. 11) Pelican alleges that it is the assignee of all assets and rights of AIP and Mr. Robbins relating to their stock loan business, not of all of their assets and rights.[2] On the basis of that allegation, Pelican alleges that it is AIP's successor in interest, obviously only to the extent of the assignment of the stock loan assets and related rights. (Complaint at ¶¶ 58-61, 65-66, 69, 71-72, 75, and 89) Although the Talos Defendants now purport to adopt the "successor in interest" allegation (as distorted by them), they in fact deny every single paragraph containing it in their current answer and counterclaim! (Rosenberg Dec. Exh. E) The assignment agreement annexed as Exhibit A to the Talos Defendants' papers adds nothing to their argument. It is consistent with Pelican's allegations and does not buttress the

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[2] Rosenberg Dec. Exh. C: Pelican's First Amended Complaint ("Complaint") at ¶¶ 1, 7.

Talos Defendants' new "merger" theory.

IV. THE TALOS DEFENDANTS HAVE NOT ADEQUATELY ALLEGED THAT PELICAN CONSPIRED TO DEFRAUD THEM.

The Talos Defendants have not alleged a claim for conspiracy to defraud them because they have not adequately stated an underlying fraud claim. See Gladstone Business Loan, Inc. v. Randa Corp., 2009 WL 2524608 at * 5-6 (S.D.N.Y. 2009); Fezzani v. Bear, Stearns & Co., 592 F. Supp.2d 410, 428-29 (S.D.N.Y. 2008). They also have not specifically alleged an agreement to defraud them or the other elements of a conspiracy claim. Their observation that "the First Amended Complaint itself alleges that Plaintiff entered into an agreement with AIP . . ." (opposition brief p. 12) is irrelevant because neither Pelican nor the Talos Defendants nor anybody else has alleged that that agreement - to assign assets and rights to Pelican - required anybody to defraud any of the Talos Defendants. (Talos Defendants' brief at pp. 12-13) And of course, the repetition of AIP's and Mark Robbins' purported "false representations" in Pelican's Complaint also could not be the basis for a claim because the Talos Defendants could not have relied on any such representations. (See Pelican's initial brief at pp. 9-10) In sum, the Talos Defendants' conspiracy theory amounts to nothing.

CONCLUSION

For the foregoing reasons, and those set forth in Pelican's initial memorandum of law, the Talos Defendants' counterclaim against Pelican should be dismissed.

New York, New York
November 30, 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 30, 2009, I served the attached reply memorandum of law by filing it through the ECF system and by sending copies of it by first class U.S. mail to the following persons:

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