

05knpela Argument

1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----x

2  
3 PELICAN EQUITY,

3  
4 Plaintiff, New York, N.Y.

4  
5 v. 09 Civ. 5927 (LAK)

5  
6 ROBERT V. BRAZELL, et al.,

6  
7 Defendants.

7  
8 -----x

8  
9 May 20, 2010  
9 10:35 a.m.

10  
10 Before:

11  
11 HON. NAOMI REICE BUCHWALD,  
12  
12 District Judge

13 APPEARANCES

14  
14 ALTMAN & COMPANY P.C.  
15 Attorneys for Plaintiffs  
15 BY: STEVEN ALTMAN  
16 ERIC P. ROSENBERG

17  
17 MEISLER SEELIG & FEIN, L.L.P.  
18 Attorneys for Talos Defendants  
18 BY: JAMES M. RINGER  
19 JEANETTE RENEE BLAIR

19  
20 PAUL WEISS RIFKIND WHARTON & GARRISON  
20 Attorneys for Defendant Bryan Cave  
21 BY: MOSES SILVERMAN  
21 SAMUEL BONDEROFF

22  
22 McBRIDE LAW P.C.  
23 Attorneys for Defendant D. McBride  
23 BY: KEVIN McBRIDE (via telephone)

24  
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1 (In open court)

2 (Case called)

3 THE COURT: If I may, let me begin with a question.

4 As I went through the materials here and also obtained  
5 the docket sheet from the bankruptcy proceeding involving AIP,  
6 it seemed to me that the assignment agreement to Pelican would  
7 properly be classified as a voidable preference. And it seemed  
8 that the only reason that that result was not reached in the  
9 bankruptcy court was because of the fact that Mr. Robbins had  
10 an outstanding arrest warrant for him and he couldn't appear in  
11 the bankruptcy court. And as a consequence, if I understand  
12 the docket sheet correctly, the bankruptcy court dismissed the  
13 bankruptcy petition and never adjudicated or gave relief to the  
14 bankrupt company, the filer.

15 If this analysis is correct, and I would certainly  
16 want to know from counsel if it is not, Pelican comes to court  
17 with unclean hands, or perhaps, looking at it another way,  
18 Pelican has no standing to bring this case.

19 So I invite comment, perhaps first from Pelican's  
20 counsel.

21 MR. ALTMAN: Sure, your Honor.

22 I guess to backtrack just one step to respond to the  
23 question that you presented in writing, was the assignment  
24 presented to the bankruptcy court, it was. It's clearly  
25 identified in the statement of financial affairs, which is

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1 docket No. 14 in the bankruptcy court under item 10. I am  
2 happy to provide a copy.

3 THE COURT: If you have it, that's not one of the  
4 pieces of paper that I managed to --

5 MR. ALTMAN: May I approach, your Honor?

6 THE COURT: Sure.

7 MR. ALTMAN: I do have two copies.

8 MR. SILVERMAN: Thanks.

9 MR. ALTMAN: I do understand from Mr. Ringer, although  
10 I was not a participant -- I'm sorry.

11 THE COURT: Just so I don't spend a lot of time.

12 MR. ALTMAN: Item 10 on page 4 of 9.

13 THE COURT: OK. Thank you. Yes.

14 MR. ALTMAN: As I understand it, from Mr. Rinnert, I  
15 was not a participant in the AIP bankruptcy proceeding in any  
16 way, but I understand that the trustee certainly inquired about  
17 it. There was discussion about it during the proceedings.  
18 Counsel can confirm that. I think they are aware of that.

19 As to the second part of it, yes, you are correct,  
20 your Honor, that an order of dismissal was entered on December  
21 8, 2009. That is a matter of fact. There is no bankruptcy.  
22 There is no bankruptcy proceeding. There is no forum in which  
23 the question of whether or not the assignment is a voidable  
24 preference can be heard.

25 As to unclean hands with respect to Pelican, I submit  
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1 absolutely not, your Honor. We submitted the assignment  
2 agreement.

3 THE COURT: The unclean hands is that this whole deal  
4 stank from the beginning.

5 MR. ALTMAN: Your Honor, with all due respect, there  
6 is no record with respect to that. It is absolutely not true.  
7 It is an arm's-length transaction that is embodied in the  
8 assignment agreement.

9 THE COURT: Excuse me. If this had gone to  
10 adjudication in a bankruptcy proceeding, it seems clear to  
11 me -- but again you can talk me down -- that this is a paradigm  
12 example of a voidable preference.

13 If that was the case, the assignment of this claim to  
14 Pelican would have been voided because this was a situation in  
15 which AIP was clearly bankrupt at the time. The amount of  
16 outstanding debt far exceeded its assets. It arranged to  
17 transfer what seems to be the guts of its assets to Pelican in  
18 a transaction which gave a preference to one creditor over  
19 another for an antecedent date within 90 days of the time that  
20 it filed the bankruptcy petition and that creditor got the  
21 entirety of the loan proceeds.

22 MR. ALTMAN: You are building castles on clouds, and  
23 I'm happy to address some of it. I think at the end of my  
24 presentation what I will ask for is opportunity to make a more  
25 fuller presentation with respect to that issue, which was not

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1 before the court on this motion.

2 THE COURT: Well, it was raised in Mr. Ringer's  
3 answer. I just mentioned it. The idea did not come from his  
4 answer frankly, it came from my own just --

5 MR. ALTMAN: I understand. I am not suggesting it is  
6 off the wall. It is a fair question to put to me and my client  
7 in the context of our being the plaintiff, so might be a claim  
8 of champerty or otherwise. That argument was made. I don't  
9 think there is any basis for it. I also think that we have an  
10 opportunity --

11 THE COURT: Absolutely.

12 MR. ALTMAN: I will do that.

13 But let me just suggest a couple of things. It may  
14 not necessarily have been bankrupt, and your assumption that  
15 this is the only asset is not accurate as I understand it, and  
16 I don't represent AIP.

17 At least as I heard you and took my notes, your  
18 assumption that the guts of the asset was this business, what  
19 we say is confidential proprietary information, a trade secret  
20 that they stole and used, that is not the only asset of it. I  
21 am happy to make a fuller presentation with respect to that.

22 THE COURT: Let me just ask you this: Is there any  
23 serious debate that at the time of this assignment AIP was  
24 insolvent?

25 MR. ALTMAN: It didn't have cash to pay its bills, but

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1 it depends on the value of the assets, and there's a great  
2 dispute with respect to that.

3 There is, as I understand it -- and I am not an active  
4 participant in this and that's why I am hesitating, because I  
5 want to get my facts straight so I don't mis-present them.  
6 There is a creditor of AIP who is hot on the tail of AIP in a  
7 variety of contexts and pursuing a variety of assets other than  
8 the assets that are subject to the assignment that is the  
9 subject of this lawsuit.

10 I think with respect to my client, Pelican, we  
11 certainly have had no involvement in AIP. So to suggest that  
12 Pelican had unclean hands is not fair, and the record will show  
13 it is inaccurate.

14 We come to this Court presenting this claim.

15 THE COURT: Unclean hands only in the sense that if  
16 you got your right to sue in a questionable transaction and you  
17 are now relying on that right to sue to make you the plaintiff  
18 in this case, because you certainly were not, and that is part  
19 of the argument, an active sort of victim and because you  
20 weren't involved, that's the unclean hands. It is not before  
21 that. It is how did you manage to get here.

22 MR. ALTMAN: We got here by an arm's-length  
23 transaction. My client was a creditor of various entities in  
24 and around Robbins.

25 THE COURT: That makes it worse, doesn't it?

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1 MR. ALTMAN: No. Not worse at all. It is a question  
2 of -- I understand the Court's concern. You want to resolve an  
3 issue where really the Court's concern, as I see it, is the  
4 other creditors of AIP are out there, and you are arguing in  
5 advance on behalf of those people.

6 Maybe the result is if there were a forum in which the  
7 question of whether or not our assignment is a voidable  
8 preference, if there is a forum in which that can be decided,  
9 if there were a bankruptcy proceeding still in effect, I might  
10 imagine a scenario that would have some reasonability would be  
11 a stay of this action and determine that issue there. Fair. I  
12 don't know what my response to that would be, but we don't have  
13 those facts. That's not the way that the world is today.

14 Today I have a claim and what the Court is raising, as  
15 we see it, are issues of prospective parties that are not here.

16 THE COURT: No, I'm looking retrospectively.

17 Did you get your right to sue here in a proper way?  
18 Because if this assignment void as a matter of law you have no  
19 standing. We have found cases in which assignments were done  
20 of certain types of actions contrary to state law, and the  
21 courts have then found no standing.

22 MR. ALTMAN: Here's my initial response to that.

23 Whatever Fairstar or any other creditor of AIP has is  
24 at most under Delaware law a charging lien against AIP. That  
25 would not in any way -- that is one of the legal arguments that

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1 I am anticipating -- would not in any way defeat our  
2 prosecution of this claim.

3 Fairstar then or any other creditor of AIP has a  
4 charging lien on our claim. That doesn't defeat the  
5 prosecution of the claim.

6 THE COURT: But it would as a practical matter  
7 certainly discourage it, wouldn't it?

8 MR. ALTMAN: It may or may not.

9 But the sort of absurdity in the result of that would  
10 be, what we believe are very viable claims against these  
11 defendants, they sort of get let off the hook because of now --

12 THE COURT: Excuse me. Would that be the most awful  
13 result? Because, if my assumption is correct that, at the time  
14 of this deal with Pelican, AIP was insolvent and they had  
15 Fairstar breathing down their neck about to insist on a sale,  
16 the fact is that, if AIP did everything in a proper fashion,  
17 they would have immediately filed for bankruptcy if that had  
18 occurred.

19 Then whatever the value of this claim is and whatever  
20 the value of the intellectual property of AIP might be would  
21 have remained in the bankrupt's estate for distribution to all  
22 creditors. If the trustee had no interest in this particular  
23 lawsuit, they could have abandoned it and let you pursue it.

24 There is another approach to all of this.

25 MR. ALTMAN: There are several other approaches.

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1 THE COURT: Therefore, one wonders why was not that  
2 absolutely logical approach, an easy approach, just file for  
3 bankruptcy then and there. That's the end of a problem with  
4 Fairstar.

5 MR. ALTMAN: The bankruptcy was filed. The business  
6 decisions that counseled AIP to file for bankruptcy when they  
7 did and not proceed with the bankruptcy are AIP's issues.  
8 Various scenarios exist. AIP I suppose could hire me tomorrow  
9 and intervene as a plaintiff with Fairstar out there. Maybe we  
10 work something out with Fairstar, if this is the valuable asset  
11 that we believe it is, the lawsuit, the claim the intellectual  
12 property. Those are potential next steps in the, as I see it,  
13 the chess match of pursuing these claims, because they are my  
14 client.

15 As I understand it, as a result of the transaction,  
16 which I wasn't involved in also, AIP also, and I even believe  
17 Fairstar, they all believed that there's value in A, the  
18 intellectual property and, B, the lawsuit that we have  
19 asserted.

20 THE COURT: So then the whole point is that goes back  
21 to, had this transaction not occurred, those assets would have  
22 been in the bankrupt's estate for potential distribution to all  
23 creditors.

24 MR. ALTMAN: True, if there was a bankruptcy  
25 proceeding. But today there is no bankruptcy.

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1 THE COURT: That is right. But there was a filing  
2 within 90 days of the date of this transfer.

3 So it looks to me as if what AIP did here was to  
4 structure this transaction to avoid proceeding directly in  
5 bankruptcy court. Frankly, it makes very little sense to pay  
6 Fairstar \$350,000 to only file a bankruptcy within, I think it  
7 was like 30 or 40 days thereafter if they are going to do it  
8 anyway.

9 MR. ALTMAN: There is a much larger piece, and I  
10 understand the Court was not generally aware. On some of it  
11 there are little bits and pieces in Mr. Ringer's submission.  
12 As I understand what happened, Fairstar was a creditor  
13 breathing down AIP's back, and Fairstar was paid a significant  
14 chunk of money, several hundred thousand dollars, in order to  
15 buy some time.

16 THE COURT: Right.

17 MR. ALTMAN: Then Fairstar, which was owed, whatever  
18 it was, another \$1 million or so, just played hardball and  
19 refused to cut a deal. In the context of being a business  
20 lawyer and not just a litigator, I understand why AIP would  
21 file for bankruptcy to stop it at that time. That was long  
22 after the transaction, the assignment to my client.

23 THE COURT: None of this was long after.

24 MR. ALTMAN: Well, that is an overstatement. Let me  
25 retract that Judge. Certainly not long. The bankruptcy filing

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1 was after the assignment, when, as I understand the facts  
2 secondhand, Fairstar had already been paid a substantial  
3 amount. But then this is standing it on its head.

4 I think the law will show, if you will be kind enough  
5 to give us an opportunity to fully brief this subject, that for  
6 these purposes today, without a bankruptcy proceeding, without  
7 Fairstar here, there is no basis for this court to find that  
8 there is any voidable preference of anything, I think  
9 principally because there is no bankruptcy.

10 THE COURT: Because there are facts out there.

11 MR. ALTMAN: There are facts out there. And if  
12 Fairstar or some party comes in and says, "This is the wrong  
13 plaintiff, it really should be us because we were an aggrieved  
14 creditor of AIP," then the issue is crystallized. But right  
15 now, before this Court, I don't think it is an issue. I  
16 understand the Court's inquiry into standing and sua sponte,  
17 fair.

18 THE COURT: Here are the historic facts. Pelican was  
19 formed on March 27, the assignment occurs on April 6, and the  
20 bankruptcy filing is on May 27. Those are not attractive  
21 facts.

22 MR. ALTMAN: I hear you.

23 That alone does not a voidable preference make when  
24 you have a bankruptcy that is nonexistent. And all you have is  
25 maybe an aggrieved nonparty creditor out there. That doesn't

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1 invalidate -- a claim yet unasserted by a nonparty is not a  
2 basis to defeat our bona fide assignment.

3 THE COURT: I don't know if your assignment is bona  
4 fide. Listen, this only works if, maybe someone doesn't think  
5 I am out of my mind and is prepared to -- actually, I probably  
6 haven't heard any lawyer s to declare that I am out of my mind.  
7 I got a laugh.

8 MR. McBRIDE: Your Honor, I'm sorry.

9 THE COURT: Just remember we hear you.

10 MR. McBRIDE: If it is appropriate, your Honor, I  
11 would like to make one initial point to this particular  
12 discussion if this is a good time.

13 THE COURT: Sure. Go ahead.

14 MR. McBRIDE: Two of the defendants in this case, at  
15 least two, certainly my client, but I believe Mr. Ramachandran  
16 are creditors of the AIP bankruptcy. So we have the added  
17 problem, which I believe also falls in the category of unclean  
18 hands where Pelican is attempting to collecting against my  
19 client in New York --

20 THE COURT: Let me see, for the benefit of the court  
21 reporter to make a record, let me sort of at least translate  
22 what I understand to be the argument.

23 The argument that Mr. McBride is advancing is that the  
24 defendants in this action, two of the defendants in the action,  
25 Mr. McBride and Mr. Ramachandran are creditors of AIP. In

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1 fact, I just might add that in reading over the hearing  
2 conducted by the trustee when the bankruptcy proceeding was  
3 under Chapter 11 it was actually Mr. McBride, the defendant  
4 here, who got closest in his comments to this issue that I am  
5 raising.

6 So I think the argument is being made by Mr. McBride  
7 as counsel that there are actually creditors in this proceeding  
8 who are affected by the assignment because they have claims  
9 against AIP.

10 MR. ALTMAN: If I may, your Honor, I mean, that's  
11 really, again, twisting it around. There are claims of AIP.  
12 They have their employment claims of a very modest amount  
13 against AIP.

14 AIP's claim that, if this weren't bankruptcy, which  
15 it's not, and if there were a trustee here, which there isn't,  
16 and if the trustee agreed with me that these are viable claims,  
17 that the trustee would make a decision to sue these people, it  
18 does not defeat that claim, the fact that against these  
19 individuals, these former employees, that they happen to be  
20 creditors of the estate. I can't imagine for a minute that the  
21 law suggests that in any way. I am sure it does not, and we  
22 will provide authority for that.

23 I guess the topic sentence is I can't imagine that the  
24 fact that, as Mr. McBride now argues, that two individuals are  
25 creditors of AIP in this amount would in any way interfere with

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1 the proper prosecution of the claim.

2 The question that I understand the Court to be asking  
3 is who is the proper plaintiff. Is the entity that you are  
4 representing Altman the right one, or ought it be, must it be  
5 somebody else.

6 We will happily prepare, if the Court would like I can  
7 go on for longer but probably not say much more than what  
8 occurs to me now, but briefing the issue with respect to the  
9 law as to why we have proper --

10 THE COURT: I would want you to. But at this time if  
11 I could just hear from the defense side, because obviously I  
12 raised the issue. It is in a sense the defendant's issue, I  
13 don't know if in the first instance, at least in the second  
14 instance.

15 Mr. Ringer.

16 MR. RINGER: Thank you, your Honor. First, it is  
17 correct that Mr. Ramachandran, our client, did file a claim in  
18 the bankruptcy. He also was at the hearing I believe your  
19 Honor alluded to.

20 THE COURT: Right.

21 MR. RINGER: He along with some of the other creditors  
22 objected to the dismissal. I was not involved in it. The  
23 simple fact is that it was clear to us at least that AIP had no  
24 assets. And we believe obviously the claims that were assigned  
25 were also worthless. But the simple fact was that there was no

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1 one to finance proceedings in the bankruptcy. More  
2 importantly, the debtor, AIP, never actively participated. One  
3 thing I think is a little troubling to me, and I think it is  
4 important to bring to the Court's attention, is Mr. Altman said  
5 that he had nothing to do with it. We have reason to doubt  
6 that.

7 At the very hearing your Honor referred to, on July 2,  
8 2009, Mr. Robbins, who you would have expected would have  
9 appeared, he did not. Instead, the creditor showed up with  
10 Mr. Paul Benson as a witness to come to the creditor's meeting  
11 and answer questions, who testified varyingly that he was  
12 either an employee or a consultant or something or other, but  
13 he was not a member of AIP. He didn't have any ownership  
14 interest. And ultimately was asked --

15 THE COURT: They pulled him off the golf course that  
16 morning, which I thought was a wonderful little fact.

17 MR. RINGER: They pulled him off the golf course.  
18 Well, who pulled him off the golf course? His answer was,  
19 well, that was Steve Altman. He also said that Mark, meaning  
20 Mark Robbins, was pretty much a one-man company. We believe  
21 that also to be true.

22 Other salient facts, unfortunately the record is very  
23 murky here, which is why we haven't been able to do much more,  
24 but on the same schedules filed in the bankruptcy, the part  
25 that your Honor looked at, under Pelican Equity it's listed as

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1 being limited common ownership and management. That means  
2 common with AIP. We don't know what the relationship is, but  
3 we have been led to believe there is one.

4 Also, on the same schedule on page 2 I thought was  
5 interesting, again, don't know what it means, but when the  
6 debtor was listing payments made to creditors in the 12 months  
7 prior to the filing, listed a payment to Allison Robbins, which  
8 is Mark Robbins' wife, and the payment was made care of Steven  
9 Altman, and his address in New York is given, which again  
10 suggests a bit more of a relationship than Mr. Altman has  
11 suggested here this morning.

12 THE COURT: It is also actually on the docket sheet,  
13 my law clerk points out, of the bankruptcy proceeding, Allison  
14 Robbins, care of Altman & Company, 260 Madison.

15 MR. RINGER: Yes. As to what was revealed in those  
16 proceedings, not having participated, I don't know.  
17 Mr. Ramachandran has given me some information. It is clear to  
18 me that the creditors were aware of the assignment. I can't  
19 imagine that the trustee didn't have some awareness of it,  
20 since it was raised at the hearing.

21 But the simple fact is that AIP never participated,  
22 never did anything, and the bankrupt is allowed to be  
23 dismissed, although there were objections made by some of the  
24 creditors. I don't know what happened. I'm not privy to that.

25 But I think the question of standing is a very real

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1 one. We also believe based on limited information we have that  
2 the entire assignment is a sham. It was entirely a construct  
3 to escape the Fairstar judgment, which, by the way, is not just  
4 a lien they have a judgment for \$2.3 million I believe.

5 THE COURT: I think that's right.

6 MR. RINGER: Another fact that I can't attest to, but  
7 I was informed by my client, that, I think it was two days ago,  
8 an auction was held through the state court in Utah, at which  
9 essentially everything that Mr. Robbins owned, including, I'm  
10 told, whatever rights AIP had to this lawsuit, was sold at the  
11 auction to the creditor.

12 I have not been able to get papers on that. It only  
13 happened -- and I can't even swear that it did, because I'm  
14 dealing with lay people trying to explain what they heard went  
15 on.

16 But we do have some real issues here. I am not sure  
17 how you resolve these without discovery into the subject,  
18 because the facts just aren't known, at least not known to me.  
19 If they had been known to me, believe me, I would have brought  
20 them forward.

21 Quite frankly, as you saw in our answer, we raised the  
22 issue of standing. We think the whole thing stinks. I think  
23 with discovery we will be able to show that the entire thing is  
24 a sham and a fraud on this court and all the parties.

25 THE COURT: One of the things maybe I could be

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1 enlightened on, maybe, Mr. Altman, you know, or maybe some one  
2 on the defense side knows, who is DPR Management LLC?

3 MR. ALTMAN: Doug Roberts, principal.

4 THE COURT: Some Connecticut --

5 MR. ALTMAN: I believe that's the -- I want to make  
6 sure I'm not misspeaking.

7 THE COURT: The same Doug Robbins that signed this as  
8 assignee for Pelican Equities.

9 MR. ALTMAN: Doug Roberts.

10 THE COURT: Roberts.

11 MR. ALTMAN: Roberts. No Robbins, completely  
12 unrelated to Robbins.

13 THE COURT: I'm sorry.

14 MR. ALTMAN: I have to check.

15 THE COURT: I'm just confused. The DPR you think  
16 refers to a Doug Roberts?

17 MR. ALTMAN: Roberts, unrelated to Mark Robbins, also  
18 not related to AIP in any way.

19 THE COURT: Doug Roberts signed the assignment  
20 agreement on behalf of Pelican so Pelican and DPR are really  
21 the same.

22 MR. ALTMAN: Not the same, Doug Roberts' entity has an  
23 interest in Pelican.

24 THE COURT: Well, he signed as manager of Pelican.

25 MR. ALTMAN: Yes. I'm representing to the court that

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1 he owns through that entity, I believe, a membership interest.  
2 The precise corporate structure, I have it in my notes. I am  
3 not in the position right now to present it to you.

4 If I can just respond to the personal stuff, because  
5 it is very significant to me?

6 THE COURT: Yes.

7 MR. ALTMAN: I take it very seriously. I met  
8 Mr. Benson once. What possible basis he had for that statement  
9 I have no idea. I claim no participation whatsoever. I  
10 represent to the Court as a matter of Rule 11 and otherwise as  
11 an officer of the Court --

12 THE COURT: You were not the person to took him off  
13 the golf course?

14 MR. ALTMAN: Absolutely not.

15 THE COURT: Have you ever been on a golf course with  
16 Mr. Benson?

17 MR. ALTMAN: No.

18 THE COURT: Do you play golf at all?

19 MR. ALTMAN: Yes.

20 THE COURT: OK. I would have had a complete defense.  
21 I don't play golf.

22 MR. ALTMAN: That Allison Robbins is listed on behalf  
23 of my law firm, A, we certainly never received any funds, and  
24 the implication that the transfer was made through my law firm,  
25 that there was a transfer and it was made through my law firm,

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1 absolutely not true.

2 In fact, the record will show, and I will provide the  
3 Court with it, I have no idea why my name is listed on behalf  
4 of Allison Robbins in those pleadings. There are numerous  
5 letters that I sent to AIP, its counsel, to the Court, saying  
6 Why are you sending me this stuff? I don't represent Allison  
7 Robbins in connection with this proceeding at all.

8 So, again, I didn't file this schedule. These are a  
9 public record. It is filed by some other lawyer. Why this  
10 other lawyer filed that and said that, I don't know what their  
11 basis was.

12 I know the facts with respect to me. So certainly my  
13 purported participation to -- I am not saying it is necessarily  
14 an unfair inference that they are drawing, but it is just not  
15 true, your Honor. It didn't happen. That's it.

16 Now, the one additional response to Mr. Ringer's  
17 comments is the transaction being a sham.

18 I submit, when all this is said and done, the Court  
19 will find that it is not a sham with respect to the underlying  
20 claims.

21 The claims that Brazell was at AIP with Robbins and  
22 said, You know what, Screw you, we're leaving; that Brian Cave  
23 was an active participant in that process, they identified the  
24 conflict in mid-January of 2009; that they nevertheless  
25 continued to represent the new splintering-off entity, formed

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1 it, created employment agreements for it.

2 THE COURT: That's not even what you have alleged in  
3 the complaint. You've really, I think, expanded verbally what  
4 you actually put in the complaint if I remember.

5 MR. ALTMAN: That is true, your Honor. Here's the way  
6 I -- I can preview issues with respect to that potential motion  
7 to dismiss because it is on the Court's mind.

8 THE COURT: Shouldn't we first deal with the issue of  
9 standing and whether you can be here at all?

10 MR. ALTMAN: I'm happy to do it. Your Honor, the  
11 complaint as pled with respect to Brian Cave, the facts that I  
12 just described to you are, and I'm happy to make an offer of  
13 proof with respect to it, it is Brian Cave's bill to AIP for  
14 the period in January 2009.

15 Forgive me my error, mea culpa, in the seven and a  
16 half years that I studied under Stephen Rackow Kaye and Michael  
17 Cardozo in Proskauer, in the 16 years that I have practiced  
18 since then, that kind of minute detail with respect to what  
19 seemed to me on the face of the conflict letter, the unsigned  
20 conflict letter and what clearly happened based on the facts,  
21 that level of really atrocious conduct and detail was not  
22 necessary for us to allege in that specified detail in the  
23 complaint.

24 It can be done based on occasional documents, the  
25 limited documents that I have now. So I suppose we will leave

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1 that for another day.

2 But I didn't think for a minute, a minute that the  
3 case law would require that degree of specificity with respect  
4 to the actual -- from the time entries by Brian Cave  
5 identifying the conflict issue, having meetings about it,  
6 forming Talos, filing the employee identification number,  
7 preparing employment agreements with respect to it, all in  
8 January 2009 during that time period.

9 It is, frankly, stuff I would have expected, at some  
10 point I imagine what happened, Brian Cave realized, Oh, my God,  
11 what did we do. We have to get out. It just wasn't right  
12 away.

13 THE COURT: Actually I am a little surprised at this  
14 sort of approach, which is on the one hand you are saying to me  
15 I didn't think when I was suing a law firm that it was  
16 necessary for me to trash them in detail in my pleading, but  
17 you would rather do it here during oral argument when it is not  
18 in your pleading?

19 MR. ALTMAN: No.

20 THE COURT: I don't understand why at this point,  
21 since we haven't even turned to the Brian Cave motion, I am not  
22 sure we are going to, that you want to expand your complaint  
23 verbally.

24 MR. ALTMAN: I don't need to, your Honor. There is a  
25 point in which I have learned to shut up and sit down with

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1 respect to a subject, and I get it.

2 THE COURT: Sir.

3 MR. SILVERMAN: I think, with respect to Mr. Altman,  
4 he was trying to change the subject. If I could respond to  
5 what your Honor asked originally of defense counsel.

6 THE COURT: Sure.

7 MR. SILVERMAN: We were, as your Honor will recall,  
8 the first party who raised the question of the assignment.

9 THE COURT: Right.

10 MR. SILVERMAN: Because the original complaint did not  
11 say there was a claim against Brian Cave and Edmund Stein, and  
12 as we mentioned in our premotion letter, we would like to see  
13 the assignment.

14 Mr. Altman said that we were improperly seeking early  
15 discovery and refused. But as a result of that telephone  
16 conference, you encouraged them to produce the assignment, and  
17 they did produce the assignment. We got the assignment. We  
18 saw that it was an assignment. We read what your Honor read,  
19 and we're perplexed by it as well. Obviously, it smelled to  
20 us. It didn't make any sense. I frankly don't understand it.

21 My best assumption is that certainly the claim against  
22 Brian Cave was worthless. I assume that the same is true with  
23 the other defendants, but I have no personal opinion on that.

24 So it may not have been a very significant thing.  
25 They weren't releasing valuable assets. Whether or not the

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1 confidential information, the secrets that he claims were worth  
2 \$100 million but somehow got transferred for not even dollars,  
3 but some bankruptcy maneuver, what they were worth, I really  
4 can't say. But it really did smell to us.

5 But what our response was, they have a basis to plead  
6 that there was an assignment. We accept that.

7 They haven't pleaded a claim against us, and we  
8 therefore thought the best and simplest thing from the law  
9 firm's point of view was to make the appropriate motion to be  
10 dismissed, which we hope your Honor will consider and grant.

11 Your Honor raises real issues which were very much on  
12 our mind, but we did not think that they could be resolved on a  
13 motion to dismiss short of discovery.

14 Given the total deficiency and lack of allegations of  
15 fact as are required to plead a claim, we thought that what  
16 we -- a lot of interesting questions here. We hope not to have  
17 to be part of them, but we feel he simply hasn't pleaded a  
18 claim that should go forward, at least against the law firm.

19 We came here prepared to argue. That's if your Honor  
20 wants to hear argument. We recognize these issues, but your  
21 Honor might at the appropriate time ask them to make an  
22 evidentiary showing and have limited discovery.

23 We don't understand who Pelican is. We don't  
24 understand why Pelican was formed. We don't know who the  
25 individuals are behind all of these entities.

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1 My guess is that when we get all into it, it isn't  
2 going to smell any better. But we thought since these guys  
3 know nothing -- as your Honor pointed out, they are not AIP.  
4 So what they have had to do in a pleading is make things up,  
5 and the best way to do it is with simple generalizations saying  
6 everything happened in January.

7 I don't want to go into my motion unless and until  
8 your Honor wants to hear it. But they do not have facts, and  
9 therefore they haven't pleaded them and we thought our best  
10 move was to ask them to be dismissed.

11 THE COURT: To be perfectly candid, I am not sure I  
12 would be prepared in the abstract to grant your motion. I am  
13 not sure that we have the facts sufficient.

14 That doesn't mean that there aren't clear scenarios in  
15 which there would be no question about Brian Cave's conduct.  
16 To me, the mere fact that one of the principals of AIP asked  
17 Brian Cave to form a company called Talos doesn't set off alarm  
18 bells that there is some conflict. It is a nice name, and we  
19 need a corporate name. Form this for us.

20 But it is just not clear from the submissions what did  
21 sort of Brian Cave learn and when did they learn it and what is  
22 the relationship between Brian Cave's state of knowledge and  
23 the time they sent the conflict letter. Those dates just  
24 really aren't in the record now, and obviously the dates could  
25 work out in a way that makes it very, very simple.

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1 So, for example, if the facts turn out to be that an  
2 e-mail about we don't know how long Mark will still be  
3 friendly, if there is a very short space in time between that  
4 e-mail and the sending of the conflict letter, there is no  
5 issue, no substantive issue.

6 MR. SILVERMAN: That is what they pleaded, your Honor.

7 THE COURT: But then he changed his pleading.

8 MR. SILVERMAN: Can I address that?

9 THE COURT: Sure.

10 MR. SILVERMAN: The complaint is intentionally vague,  
11 with everything happening in January and no chronology. He's  
12 told you he has the diary, so he could give you a chronology,  
13 but he's chosen not to do that.

14 The complaint says that the plot by the other  
15 defendants was formed in December or early January, no date.  
16 No date on when they did the first pass, no date on when they  
17 asked us to form Talos, which, as your Honor points out, for  
18 the cochair of the company to say please form the company, it  
19 could be anything.

20 They have two specific facts pleaded in the complaint.  
21 One, in paragraph 38, they have the January 19 e-mail which  
22 your Honor refers to. That e-mail says something about Mark  
23 still remaining friendly.

24 That e-mail itself doesn't say we're about to do  
25 something improper. It doesn't say we are stealing the

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1 company. It says nothing like that.

2 At most that January 19 e-mail says that there may be  
3 a conflict between the two cochairs of the company. If your  
4 Honor looks at the original complaint, I think it's paragraph  
5 87 or 89 -- my colleague will test my memory here, it says that  
6 the --

7 THE COURT: We all need colleagues.

8 MR. SILVERMAN: The conflict letter -- I have it all  
9 in my notes, your Honor, but I'm totally away from my notes  
10 now, I apologize. Paragraph 87 of the original complaint says  
11 it was January 21, January 21. That is two days later, and is  
12 really only one business day later --

13 MR. ALTMAN: That is a typographical error.

14 MR. SILVERMAN: -- because January 19 is Martin Luther  
15 King Day. So we pointed that out. That is about as prompt as  
16 you can be. That conflict waiver letter says everything. It  
17 says we have doing this for AIP, Brazell wants to do this for a  
18 different company.

19 It asks for consent to Brian Cave's continuing to do  
20 that, and it asks that he get his own counsel to review it. I  
21 don't know that it was necessary, but it certainly was prudent,  
22 and they allege it's two days afterwards. We made a point of  
23 that. We said that was prompt.

24 So what did they do in the amended complaint? They  
25 took out the date altogether and said late January, for the

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1 purpose I believe of obfuscation.

2 What they say in a footnote, I think it's footnote 1  
3 in their brief, they said, well, they actually gave two  
4 different dates in the complaint. In one place they said  
5 January 31, I believe in paragraph 40. In another place they  
6 said January 21, footnote 1, on page 6 of their brief.

7 So, instead of correcting it, because they have the  
8 document, they quoted it in full text, instead of correcting  
9 it, they obfuscated it.

10 So, yes, it is true they said January 31 in one place,  
11 January 21 in the another place. But when we pointed out that  
12 they said January 21, in order to get away from it, they didn't  
13 say no, that was wrong. The correct date is January 31. They  
14 just changed it to late January to try to create the  
15 possibility of a bigger period of time between the January 19  
16 e-mail and the consent request that goes out.

17 I believe that is a nonanswer answer. Frankly, even  
18 if it was late January, I mean even if it was not the 21st, it  
19 was a couple of days later, it is extremely prompt, given the  
20 fact that the 19th e-mail says nothing on its face that shows a  
21 conspiracy to steal a business, to compete unfairly, etc. etc.  
22 It just says that there is a problem or there might be a  
23 problem with Mark, the other cochair and the founder.

24 There is a prompt disclosure of all of it. It is an  
25 amazing complaint. Because while I have almost no facts that

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1 establish or tend to show that we knowingly participated in  
2 wrongdoing, they have the facts that show the exculpation.

3 It's like, your Honor pointed this out in the  
4 Weinstein case, where you said you should look at what facts  
5 are pleaded to see, in your Honor's words, if they belie the  
6 allegations in the complaint. And to allege that two days  
7 after this, this delphic e-mail that says "while Mark is still  
8 friendly," we send this out, that certainly belies it.

9 In fact, the e-mail is very much like the e-mail in  
10 another one of your Honor's opinions in Astor Media v. Clear  
11 Channel Taxi.

12 THE COURT: That's hers. You've complimented two law  
13 clerks now.

14 MR. SILVERMAN: I may get it wrong, but there was an  
15 e-mail.

16 THE COURT: She'll remember.

17 MR. SILVERMAN: She can correct me.

18 the plaintiff was trying to show a conspiracy between  
19 Clear Channel and the Taxi and Limousine Commission. It said  
20 here's an e-mail that has Clear Channel telling its clients  
21 what the TLC is going to do before they do it.

22 Well, you know, maybe that suggests some improper  
23 collusion. However, it is also consistent with the fact that  
24 the TLC talked to people and told people what they were doing.  
25 To use the language of Iqbal and Twombly, it doesn't nudge

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1 across the line from conceivable to plausible.

2 My friend put in a brief in which on page 10 he says  
3 you generally do not need to allege specific facts, the top  
4 line of page 7. That's what he thought the pleading standard  
5 was, and that's the pleading standard he tried.

6 There are at least ten opinions of your Honor's since  
7 Iqbal and Twombly which have synthesized what the pleading  
8 standards are. Some came before the brief was submitted, and  
9 I'm embarrassed we didn't cite them, and some came out  
10 afterwards, like the Astor case.

11 But he is pleading against the standard of you don't  
12 need to plead facts. You can just plead conclusions. The  
13 conclusions he pleads actually are remarkably like Iqbal. I am  
14 not suggesting that there was a tortured prisoner here. There  
15 is a difference. But the essence of it is the same.

16 The essence of it is the same because in Iqbal there  
17 was a clear pleading that the prison officials had abused Iqbal  
18 because he was a Muslim and an Arab, and the allegation against  
19 the moving defendants, the Attorney General, Ashcroft, and the  
20 FBI director Mueller were that they knew about it and they  
21 condoned it and they were responsible for the policy and they  
22 were the architect and so forth and so on.

23 That the Supreme Court said was conclusory, and in the  
24 two-part Iqbal test you throw out the conclusions and you just  
25 look at the facts. That is what you throw out.

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1 So if you throw out the conclusory language "like  
2 Brian Cave came to know that they were all doing wrong" and you  
3 look at what they actually plead, what do they actually plead?

4 They plead that we were asked to form a company by the  
5 cochair of the company. They plead we did some things for that  
6 company. They are very vague as to when. Their brief, by the  
7 way, expands on their amended complaint, and in court my friend  
8 has now expanded on even his brief.

9 What the amended complaint does not say when any of  
10 this was done except in January, intentionally vague. The  
11 amended complaint even makes things vaguer.

12 By the way, another way the amended complaint makes it  
13 vaguer, in the original complaint they alleged that Brazell was  
14 cochair. In the amended complaint they said "he presented  
15 himself as." They are trying to get back a little bit from  
16 whether or not he was really the cochair.

17 The amended complaint, rather than adding facts, which  
18 they were given the opportunity to do by your Honor when you  
19 said I am not going to go through this twice. If you have more  
20 to give me give it to me now.

21 Instead of adding facts, they subtracted facts. And  
22 they were left with a pleading that said we were asked to do  
23 routine things. We got wind of a conflict between the  
24 principals. We sent a detailed request, that they quote, that  
25 says that Brazell has asked us to these things for him.

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1           Then the next remarkable thing is the complaint does  
2 not allege that this there was any response from Robbins.  
3 Paragraph 40 of the complaint right after the quote says  
4 something like, Robbins was horrified, and of course he didn't  
5 sign it.

6           But what the complaint doesn't say is Robbins picked  
7 up the phone or sent an e-mail and said, My God, you can't do  
8 that. That's terrible. There's not a single allegation that  
9 he asked us not to when he was given full disclosure.

10          Those are the facts. How can you allege that a law  
11 firm -- my friend referred to my former adversary Stephen  
12 Rackow Kaye and his former distinguished law firm, I represent  
13 a distinguished law firm. How you can allege that a law firm,  
14 when it promptly tells the other partner what one partner is  
15 doing and asks for consent, how that makes it part of a  
16 conspiracy to, or aiding and abetting wrongdoing or malpractice  
17 or breach of duty is beyond me.

18          THE COURT: All right. If I may interrupt you.

19          MR. SILVERMAN: I'm sorry. I've gone beyond where I  
20 should.

21          THE COURT: That is OK. I know that I've read,  
22 because it is in the complaint, the substance of the letter  
23 sent by Brian Cave to Mr. Robbins. But the quote in the  
24 complaint doesn't have a date on which the letter was sent.

25          MR. SILVERMAN: That's what paragraph 87 of the

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1 original complaint says, January 21.

2 THE COURT: But it is fair game on the motion to  
3 dismiss to look at any document incorporated into the  
4 complaint. So can somebody give me a copy of the letter.

5 Mr. Altman.

6 MR. ALTMAN: For some reason I don't have it in my bag  
7 today. That is shocking to me. Certainly Mr. Silverman must  
8 know what the date of their letter is to us, which was  
9 unsigned, never --

10 THE COURT: Your client didn't agree. We understand.

11 MR. ALTMAN: Not my client. Mr. Robbins didn't.

12 THE COURT: OK.

13 Mr. Robbins didn't sign it. But when you say  
14 unsigned, normally that refers to the person who sent it, not  
15 the person who received it.

16 MR. ALTMAN: Your Honor, Brian Cave recognized a  
17 conflict. It is not a minor matter that a prestigious law  
18 firm, with sophisticated, bright lawyers identified a conflict,  
19 saw that there was a need to identify in writing very severe  
20 conflicts, and provided that conflict waiver in writing, as  
21 they were obliged to do under the disciplinary rules, because  
22 they could not, they perceived, proceed without that.

23 THE COURT: Is the date on Brian Cave's letter the  
24 21st?

25 MR. SILVERMAN: Your Honor, I am embarrassed to say we  
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1 do not have that, because we turned all of our files over to  
2 AIP, to people who represented themselves as AIP's lawyers  
3 before all this started, and did not keep a copy. But he has a  
4 copy, and he is in a position to tell your Honor.

5 THE COURT: I want an answer.

6 MR. ALTMAN: I think it is a the 31st.

7 THE COURT: The 21st or 31st?

8 MR. ALTMAN: I think it's the 31st. If I'm mistaken,  
9 I don't have it with me. And because there was typo the first  
10 time -- my colleague's father passed away two days ago, and my  
11 apologize for it. If he were here, this would be a nonissue,  
12 and that is on me.

13 MR. SILVERMAN: I apologize for raising this under  
14 those circumstances.

15 THE COURT: We need an answer to that. Obviously, if  
16 the facts are that on day one --

17 MR. ROSENBERG: I believe it's the 21st. I didn't  
18 prepare for this because my father did pass away two days ago.

19 THE COURT: You don't need to be here.

20 MR. ROSENBERG: Yes. I understand.

21 THE COURT: It is a court with a heart.

22 MR. ROSENBERG: I know.

23 THE COURT: It has a head, too, but it has a heart.

24 MR. ROSENBERG: I came here not because I thought my  
25 presence was required, but to see the oral argument here.

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1 THE COURT: OK.

2 MR. ROSENBERG: I would have remained silent, except I  
3 didn't want Mr. Altman's statement out there to be  
4 contradicted.

5 THE COURT: Here's the point. If the facts --

6 MR. ALTMAN: Can I anticipate your question and  
7 respond?

8 THE COURT: If on day one a lawyer learns about a  
9 conflict or a potential conflict or a real conflict and by day  
10 three, which is probably not actually 72 hours later, but less  
11 than that, sends out a conflict letter, what's wrong with that?

12 MR. ALTMAN: When the lawyer does not get the signed  
13 conflict and proceeds in any event as is, and I'm happy to hand  
14 up to the Court --

15 THE COURT: That would be great.

16 MR. ALTMAN: I'm handing up to the Court a letter  
17 dated February 23, 2009, sent, according to it, by e-mail to  
18 Mark Robbins, American Institutional Partners, from Bartlett F.  
19 Fisher, and it purports to be an invoice for services rendered  
20 by Brian Cave to AIP for the period through January 31, 2009.

21 THE COURT: OK.

22 MR. SILVERMAN: Your Honor, may I just a comment on  
23 this date thing before we get off the subject?

24 THE COURT: Sure.

25 MR. SILVERMAN: Your Honor, I suggested that when we

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1 pointed out that they said January 21, they intentionally  
2 obfuscated, because January 21 was too close.

3 So what did they do? Instead of acknowledging that  
4 the date was January 21, they said late January. Because they  
5 didn't want to acknowledge the date was January 21.

6 Mr. Altman didn't want to acknowledge it in Court. I  
7 appreciate that his partner has done that. So it is  
8 established that it was January 21. These are the diaries of  
9 Brian Cave, which they have had all along and have chosen not  
10 to use in their amended complaint. I believe if you look at  
11 these diaries you will see that the --

12 MR. ALTMAN: Your Honor, January 22, after the  
13 conflict is disclosed and a waiver sought, but not obtained, is  
14 when they prepared Talos certificate of formation.

15 January 23 the certificate of formation is filed  
16 after, with the competing company, after the conflict is  
17 disclosed and waiver not obtained.

18 January 26, employment agreements for Talos prepared  
19 by Brian Cave after the conflict waiver is sought but not  
20 obtained.

21 The entries continue throughout the end of January.

22 We haven't had discovery of Brian Cave, so we don't  
23 know. We know that Talos was working out of Brian Cave's  
24 office in February of 2009. That I had a good faith basis to  
25 allege.

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1           We know there are additional entries on January 27,  
2 January 28, January 29, with respect to work that Brian Cave  
3 did for this competing entity. They were in the business that  
4 AIP was in. Better facts than that would be hard to imagine.  
5 We have the benefit of these. I haven't had discovery from  
6 Brian Cave to find out what work they have done in February for  
7 Talos, what bills they rendered to Talos, what those time  
8 sheets say with respect to --

9           THE COURT: I realize this observation is absolutely  
10 irrelevant to a motion to dismiss. But these time sheets to me  
11 raise a whole series of other questions, and I am going to just  
12 share one with you.

13           If Brian Cave had concluded that it was really in a  
14 conflict position and could not represent AIP as well as the  
15 Brazell parties, A, why would they be so dumb as to bill AIP  
16 for work for the conflicted Talos parties, particularly when  
17 AIP owed Brian Cave a ton of money, at least a ton of money  
18 from my perspective, maybe not from the firm's perspective,  
19 when AIP had owed a ton of money, and the Talos principals, as  
20 I have been informed through these briefs, are very successful,  
21 high-powered individuals who themselves would have been better  
22 people to bill for services rendered because they might  
23 actually pay them?

24           MR. SILVERMAN: May I respond to that, your Honor?

25           THE COURT: Sure.

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1 MR. SILVERMAN: Two things. First of all, we're  
2 talking about what is in the pleading and what is outside of  
3 the pleading. None of that is in the pleading.

4 THE COURT: As I said, it is just a reaction.

5 MR. SILVERMAN: So that I will respond with stuff was  
6 not in the pleading, too. If you see on the January 21 entry  
7 of Fisher there is a telephone call with Jones.

8 THE COURT: Right.

9 MR. SILVERMAN: Jones is Robbins' lawyer.

10 It is my understanding from speaking with my clients  
11 that we were told we were getting this consent and waiver. It  
12 was not an issue. In fact, we were even told it was in the  
13 mail at one point. Then it never came and we stopped work.

14 I'm not making an evidentiary record, but I'm  
15 representing to the Court that these are the end of the  
16 diaries, except I believe there's one on the first or second  
17 day of February when an associate sent a file, sent her  
18 documents to the file and diaried a couple of tenths of an hour  
19 for that.

20 We did not represent Talos when we did not get the  
21 consent. If your Honor goes to Talos website.

22 THE COURT: You are not their lawyers.

23 MR. SILVERMAN: You will see that their lawyers are  
24 Simpson Thacher and Kramer Levin.

25 None of this is in the pleading, so I feel comfortable

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1 saying it without caveat, we didn't realize what the problem  
2 was. We didn't know that we had to have -- we didn't know that  
3 we had to have a waiver, but we thought it would be a good  
4 idea.

5 We thought we got one. We didn't get one. We stopped  
6 working for them. That's the fact. That's the true story.

7 But if you look at the complaint, the complaint  
8 doesn't even allege that we did anything after the conflict  
9 waiver was sent, and it doesn't say there was any response to  
10 the conflict waiver letter.

11 I mean, it not as though Robbins called us up and said  
12 don't do it. The fact is -- but I'm hoping not to get to  
13 discovery and the facts and put my client through that  
14 expense -- the fact is we did nothing after it was clear we  
15 weren't getting the waiver.

16 The fact that we billed AIP I view as something that  
17 showed we really thought we were doing something that was sort  
18 of, whether it was for AIP or not it was unclear, and that's  
19 why these guys just sent the bill to AIP.

20 I mean, again, this man is saying we tried to hide all  
21 of this stuff. That's obvious nonsense, when we disclose it  
22 two days later, and it took pulling some teeth to get the  
23 admission in this courtroom that it was two days later.

24 Now we're off on a different subject not in the  
25 pleadings. The pleadings are intentionally vague, although

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1 they had these documents, so I'm responding to what is not in  
2 the pleadings with what is not in the pleadings.

3 So what is it that we did? We formed a corporation.  
4 We wrote an employment agreement. I mean, so what?

5 The main part of their complaint, which makes  
6 absolutely no sense, is that we somehow gave all of the  
7 confidential information to this new company. For God sakes,  
8 this new company was the senior manager of the old company.  
9 They spent 8 paragraphs, starting at paragraph 23 or 25,  
10 explaining how they had all the information.

11 What is it that we did, even according to these  
12 diaries, that was inconsistent. There was a slightly ambiguous  
13 period which it didn't clarify. We did what a rational law  
14 firm should do and a prudent law firm should do. We got out.

15 It is not as though we were dealing with some new  
16 company and were providing some new company with some unrelated  
17 client with another client's data. These were the same people  
18 working out of the same office.

19 The bottom line, your Honor, is their pleading they  
20 were given a chance to plead. They chose to plead the way they  
21 pleaded. They chose to be purposefully unclear about the  
22 sequence of events and date, and as your Honor pointed out,  
23 without knowing that sequence of events and the dates, it's  
24 really hard to make sense of this.

25 They chose to do that, though. They chose to do that

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1 on notice of Iqbal and Twombly, on notice of your Honor's  
2 published opinions on that subject, and now they are just  
3 trying to get around it by raising more.

4 With respect, this says nothing, your Honor, the fact  
5 that we that we did one of two things, waiting for the conflict  
6 waiver, which we were told we would get.

7 MR. ALTMAN: Very briefly, just one or two things,  
8 your Honor.

9 We don't know when Mr. Brazell first concocted this  
10 scheme to steal AIP's business for himself. That's why I don't  
11 have a date. That's not surprising in the context of this kind  
12 of theft of corporate opportunity.

13 We weren't inside the smoke-filled room where they  
14 said this is what we are going to do. That's why we have  
15 alleged in the complaint in the manner in which we did as to  
16 when the conspiracy was formed.

17 It is not surprising at all in the context of this  
18 complaint. Certainly, it ought not, we submit, be something we  
19 should be criticized for or to make the complaint not a  
20 plausible and valid one. We do know this principal formed a  
21 competing business.

22 THE COURT: That's fine. But it is another level of  
23 allegation, when you say that a law firm --

24 MR. ALTMAN: Absolutely, your Honor.

25 THE COURT: -- entered into a conspiracy with those  
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1 principals to accomplish that.

2 MR. ALTMAN: Absolutely.

3 From our perspective, given the existence of a  
4 conflict waiver, the detailed conflict waiver that was sought  
5 and written consent sought but not obtained, I don't accuse a  
6 significant law firm and lawyers who are no doubt excellent  
7 lawyers of wrongdoing willy nilly, not at all.

8 I would not for a minute have filed this complaint  
9 without believing that we had an absolute good-faith basis that  
10 a lawyer sitting in -- I have sat in those rooms with lawyers  
11 like Mr. Silverman discussing whether or not conflicts exist  
12 and where a conflict waiver is required to be sought by the  
13 client.

14 In this context, providing to Mr. Brazell and the  
15 Talos group all of the work product from Brian Cave which was  
16 an essential part of this business -- and we say, we do allege  
17 this, I forget what paragraph it is in the complaint -- an  
18 essential part of the business in addition to the --

19 THE COURT: This is probably again a little off topic,  
20 but what is it that Brian Cave would have had access to that  
21 Mr. Brazell wouldn't have had access to that is in any way  
22 reflected in this type of corporate activity that followed the  
23 sending of the conflict waiver?

24 MR. ALTMAN: For one thing, as we allege in the  
25 complaint very clearly I think, the master loan agreement,

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1 which was AIP's property and was the linchpin.

2 THE COURT: You are saying that Mr. Brazell didn't  
3 have that before.

4 MR. ALTMAN: He may or may not have had access to it.  
5 But this was the law firm's work product that the client had,  
6 AIP --

7 THE COURT: Wasn't Brazell the client?

8 MR. ALTMAN: No. Brazell was not. At the  
9 identification of that conflict, what I submit ought have  
10 happened, as I walked you down the hall to my friend Stephen  
11 Crane at that time, I imagine what he would have said to me is,  
12 you can't talk to Brazell anymore. He's starting a competing  
13 company. That is AIP's property. To the extent that he has  
14 any of that, your obligation is to AIP and its shareholders and  
15 he should be sent a cease and desist letter that all property  
16 of AIP should be returned. And any effort to use it in  
17 commercial business is against the interest of his client.

18 THE COURT: That's over--

19 MR. SILVERMAN: May I answer your Honor's question by  
20 riding the amended complaint.

21 THE COURT: Sure.

22 MR. SILVERMAN: Paragraph 23 of the amended complaint,  
23 Robbins sent certain documents to Brazell, including but not  
24 limited to, the master loan agreement. He got it from Robbins  
25 according to the complaint.

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1 Your Honor is exactly right. These are the senior  
2 managers. These were the people in New York. Robbins wasn't  
3 in New York. We were working with the people in New York.

4 There is not an allegation in the amended complaint  
5 that we had a single piece of paper that Brazell and others as  
6 senior management didn't have.

7 Another example, the brief says well, you could infer  
8 that maybe there was something else that we might have had.  
9 There is not even a suggestion of that in the amended  
10 complaint.

11 The amended complaint has paragraphs about how --  
12 because remember it is a complaint against these guys -- how  
13 Ramachandran and Norris and Brazell had all of this  
14 confidential information and stole it. There is no suggestion  
15 that he only had it because we gave it to them, which is  
16 obviously silly.

17 THE COURT: All right. I suspect we've gone about as  
18 far as we can go today.

19 I want to give Mr. Altman a chance to respond to the  
20 questions that I posed at the outset and then Mr. Ringer  
21 probably will want to respond to that. The response obviously  
22 may include the proposal that there needs to be discovery  
23 before this can be resolved. I will try to figure out whether  
24 there are any of the pending motions that can be resolved  
25 before the standing issue is resolved. Logically standing

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1 comes first.  
2 We'll look at all of them closely to see if there are  
3 any that could independently be granted in terms of a  
4 dismissal. If the answer is questionable, then we will figure  
5 out the standing problem first.  
6 Anything else that anybody wishes to say?  
7 Very good. Thank you.  
8 MR. ALTMAN: Thank you, your Honor.  
9 THE COURT: All right.  
10 (Discussion off the record)  
11 (Adjourned)  
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