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 IN OPPOSITION TO DEFENDANTS' CLAIM OF CHAMPERTY AND ALLEGED VIOLATION OF A UTAH COURT ORDER

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PRE,IMINARY STATEMENT

Plaintiff Pelican Equity, LLC ("Pelican") submits this reply memorandum in response to the instructions from the Court in its July 30, 2010 letter to counsel to address the issues of champerty, and alleged violation of a Utah state court order raised by defendants Robert Brazell, Stephen Norris, Rama Ramachandran, and Talos Partners, LLC (collectively, the "Talos Defendants") and the Bryan Cave law firm ("Bryan Cave") in their respective July 1, 2010 submissions to the Court (Docket No. 53-54 and 55-56). Pelican does so with pleasure.[1]

Both the Talos Defendants and Bryan Cave mis-state New York law on champerty, omitting completely from their papers any reference to the leading cases and controlling precedent in this Circuit of Trust for the Certificate Holders of the Merrill Lynch

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[1] This memorandum is supported by the August 4, 2010 affidavit of Doug Roberts and the exhibits to it. References to that affidavit are "(Roberts Aff. ¶ _)".

Mort. Investors v. Love Funding Corp., 591 F.3d 116 (2d Cir. 2010) and Elliot Assoc., L.P. v. Banco de la Nacion, 194 F.3d 363 (2d Cir. 1999). Those precedents make clear that New York's champerty statute, N.Y. Jud. Ct. Acts Law § 489(1), "does not apply when [and where as here] the purpose of an assignment is the collection of a legitimate claim." Trust v. Love Funding, 591 F.2d at 121, quoting Trust v. Love Funding, 13 N.Y.3d 190, 201 (2009) (decision of the New York Court of Appeals answering certified questions posed by the Second Circuit). That New York Judiciary Law § 489(1) is inapplicable here is apparent from the face of the Assignment Agreement. The "very purpose" of the Assignment Agreement was not the pursuit of the claims in this action. That matter is ancillary to the broader commercial transactions between and among the parties to it and others. (Point I)

Bryan Cave and the Talos Defendants fare no better with their arguments concerning the alleged violation of an order in a Utah state court proceeding in which none of them were parties or participated in any way. Pelican is not in this action seeking to enforce a contractual duty of the defendants against which illegality could be argued as Pelican has done no wrong for which it should be penalized and for which the Talos Defendants and Bryan Cave should receive a windfall. (Point II)

FACTS

The April 6, 2009 Assignment Agreement

Pelican is party to a written Assignment Agreement made as of April 6, 2009 (the "Assignment Agreement"), which was signed by Doug Roberts as Manager of Pelican. (Roberts Aff. ¶ 2 and Exh. A) The counter parties to the Assignment Agreement are Mark H. Robbins, American Institutional Partners, LLC, AIP Funding, LLC, Equitap, LLC, Smarthedge, LLC and

Seven Investments, LLC (collectively, the "Assignors"). (Roberts Aff. ¶ 4)

The principal purpose of the Assignment Agreement was to provide funding so that the Assignors could continue good faith negotiations with two third-parties – Fairstar Resources Ltd. and Goldlaw Pty Ltd. (collectively, "Fairstar") – who had obtained a judgment in November 2008 against several of them. (Roberts Aff. ¶ 4) Mr. Roberts' company, DPR Management, LLC ("DPR"), provided that funding. (Roberts Aff. ¶ 5) DPR is now current with its Utah business filing fees, having recently paid the $25 filing fee that it had neglected to make, and is Pelican in good standing in Delaware. (Roberts Aff. ¶ 5 and Exhs. B and C)

A secondary purpose of the Assignment Agreement was to permit Pelican to pursue the "Stock Lending Business" in which the Assignors had previously been engaged. (Roberts Aff. ¶ 6) The assignment of "rights and/or claims against Talos Partners, LLC and/or its principals" and others described in paragraphs 1.(b) and 3 of the Assignment Agreement was an ancillary matter to it and part of a larger commercial transaction then being contemplated between Pelican and one or more of the Assignors. That transaction involved the possible settlement of completely unrelated claims between and among Mark Robbins and another individual, Marc Jenson. (Roberts Aff. ¶ 7)

Pelican did vigorously pursue the Stock Lending business beginning in April 2009. (Roberts Aff. ¶ 7) Hundreds of meetings were held internally and with prospective stock lending clients and their representatives and with individuals and companies who were considered as potential executives, employees and strategic partners. (Roberts Aff. ¶ 8) An office was secured and business conducted, numerous proposed stock loans were considered, loan documents were drafted and term sheets prepared and executed by prospective borrowers,

and substantial amounts of money were committed and spent in furtherance of those business efforts. Id.

ARGUMENT

I. DEFENDANTS CLAIM OF CHAMPERTY IS SPECIOUS

Courts in this Circuit recognize that the Second Circuit's decision in Elliot Assoc., L.P. v. Banco de la Nacion, 194 F.3d 363 (2d Cir. 1999), "contains a comprehensive examination of *N.Y. Judiciary Law § 489* and the New York cases construing it." LNC Investments, Inc. v. First Fidelity Bank, 2000 U.S. Dist. LEXIS 4617 (S.D.N.Y. 2000) (Haight, J.) The Second Circuit more recently addressed the issue of alleged champerty under N.Y. Judiciary Law § 489 in great detail in Trust v. Love Funding, initially certifying questions concerning the scope of that statute to the New York Court of Appeals (Love Funding, 556 F.3d 100 (2d Cir. 2009)), receiving detailed answers, analysis and direction from New York's highest court on the subject (13 N.Y.3d 190 (2009)), and then earlier this year ruling as a matter of law in that case that the trial record did not support a finding of champerty (Love Funding, 591 F.3d 116 (2d Cir. 2010)).

Yet nowhere in the papers submitted by the estimable law firm representing Bryan Cave or in the papers presented by the Talos Defendants is there any mention of either of those cases. Other lawyers might be sanctioned or certainly reprimanded for such omissions.

> New York cases agree that if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation. [extensive case and historic analysis omitted]
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> * * *
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> Many other New York cases can be cited for the same

> principle (*see e.g. Red Tulip, LLC v Neiva, 44 AD3d 204, 213-214, 842 N.Y.S.2d 1 [1st Dept 2007]*); *Hill Int'l, Inc. v. Town of Orangetown, 290 AD2d 416, 417, 736 N.Y.S.2d 77 [2d Dept 2002]; G.G.F. Dev. Corp. v Andreadis, 251 A.D.2d 624, 676 N.Y.S.2d 488 [2d Dept 1998]; Small Business Admin. v Mills, 203 AD2d 654, 655, 610 N.Y.S.2d 371 [3d Dept 1994]; Am. Bag & Metal Co. v. Alcan Aluminum Corp., 115 AD2d 958, 959-960, 497 N.Y.S.2d 787 [4th Dept 1985]; Limpar Realty Corp. v Uswiss Realty Holding, Inc., 112 AD2d 834, 836-837, 492 N.Y.S.2d 754 [1st Dept 1985]; 1015 Gerard Realty Corp. v A & S Improvements Corp., 91 A.D.2d 927, 928, 457 N.Y.S.2d 821 [1st Dept 1983]; Prudential Oil Corp. v Phillips Petroleum Co., 69 AD2d 763, 415 N.Y.S.2d 217 [1st Dept 1979]; American Express Co. v Control Data Corp., 50 AD2d 749, 750, 376 N.Y.S.2d 153 [1st Dept 1975]; Concord Landscapers, Inc. v Pincus, 41 AD2d 759, 341 N.Y.S.2d 538 [2d Dept 1973]*). In short, the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim. What the statute prohibits, as the Appellate Division stated over a century ago, "is the purchase of claims with the 'intent and for the purpose of bringing an action' that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up . . . in [an] effort to secure costs" (*Wightman v Catlin, 113 AD 24, 27, 28, 98 N.Y.S. 1071, 37 Civ. Proc. R. 105 [2d Dept 1906]*).

Love Funding, 13 N.Y.3d at 200-201.

In the Second Circuit decision in Love Funding following the decision by the New York Court of Appeals answering its certified questions, the Court noted that:

> the [New York] Court of Appeals emphasized that New York's prohibition of champerty "has always been 'limited in scope and largely directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs.'" *Id.* at 199 (quoting *Bluebird Partners, L.P. v. First Fidelity Bank, N.A., 94 N.Y.2d 726, 734, 731 N.E.2d 581, 709 N.Y.S.2d 865, 870 (2000)*).

Love Funding, 591 F.3d at 120.[2]

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[2] Elliot Assoc. and Love Funding comport fully with the United States Supreme Couirt's most recent pronouncement on the issue of allegedly improper champerty. As (Pelican previously cited) Justice Breyer observed in Sprint Communications Co., L.P. v. APCC Servs.,

Bluebird Partners, quoted by the Second Circuit (above) in Love Funding, was one of the few cases Bryan Cave's counsel cited on the issue of champerty, though they ignore this quote. It is a baffling citation for Bryan Cave because in that case the New York Court of Appeals held that the trial court's dismissal of the complaint on grounds of champerty was improper. Bluebird Partners, L.P. v. First Fidelity Bank, N.A., 94 N.Y.2d 726, 739 (2000).

Both Bryan Cave and the Talos Defendants purport to rely on the district court decision in Semi-Tech Litig., LLC v. Bankers Trust Co., 12 F. Supp. 2d 319 (S.D.N.Y. 2003). Why they do so is beyond mystifying. In that case, in a subsequent decision defendants do not cite, the Second Circuit affirmed the district court's finding that the assignments in issue were not a violation of New York Judiciary Law § 489. Semi-Tech Litig., 450 F.3d 121, 123 (2d Cir. 2006).

Bryan Cave's other case citation on the issue of champerty, "Commercial Capital Co., LLC v. Becker Real Estate Servs., Inc., 24 Misc. 3d 912, 918 (N.Y. Sup. Ct. 2009)," is similarly curious, as was counsel's decision to leave off the first two words of the named plaintiff "National City." In National City Commercial Capital Co., LLC v. Becker, the trial court

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Inc.:

> The history and precedents that we have summarized make clear that courts have long found ways to allow assignees to bring suit; that where assignment is at issue, courts--both before and after the founding--have always permitted the party with legal title alone to bring suit; and that there is a strong tradition specifically of suits by assignees for collection.

554 U.S. 269, 128 S.Ct. 2531, 2541-2542, 171 L.Ed.2d 424, 437-438 (2008) (holding that the plaintiff/assignee – who held legal title to an injured party's (the assignor's) claim – had constitutional standing to pursue that claim, even where the assignee has agreed to remit all proceeds from the litigation to the assignor)

(Supreme Court, Suffolk County) rejected the defendant's defense of champerty. 24 Misc. 2d at 918.[3]

The controlling precedents in this Circuit, which as noted the Talos Defendnats and Bryan Cave do not cite, make clear that a finding of champerty under New York Judiciary Law § 489(1) can only be made where the purchase of the claim is made *"'for the very purpose of bringing such suit and this implies the exclusion of any other purpose. *** To constitute the offense the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring the suit must not merely be incidental or contingent.'"* Elliot Assoc., 194 F.3d at 374 quoting the seminal New York Court of Appeals case of Moses v. McDivitt, 88 N.Y. 62, 65 (1882) (emphasis in original).

No such showing could possibly be made here. The very language of the Assignment Agreement demonstrates that the sole purpose of the Assignment Agreement was not the assignment of claims against the Talos Defendants or any other party, surely not Bryan Cave who is nowhere mentioned in the document. The principal purpose of the Assignment Agreement was to secure funding to enable the Assignors to continue to negotiate with two of its creditors and forestall a foreclosure sale. (See Roberts Aff. ¶ 5 and Exh. A: DPR Loan of $350,000 to Assignors "in order for such parties to obtain the forebearance of Fairstar in conducting the Scheduled Fairstar Sale" of assets of one or more of the Assignors). A secondary objective was the assignment of intellectual property in the "Stock Lending Business" in which one or more of the Assignors had been engaged, enabling Pelican to seek entry into that business,

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[3] Bryan Cave's final cite, to Refac Int'l, Ltd. V. Lotus Dev. Corp., 131 F.R.D. 56 (S.D.N.Y. 1990), involved the much different situation in which the transfer (in that case by way of a license) was for the sole purpose of permitting the plaintiff to act as "surrogate plaintiff."

which it did. (See Roberts Aff. ¶¶ 6, 8)

The assignment of claims on which this action is based was merely an ancillary right conveyed to Pelican in the Assignment Agreement. (Roberts Aff. ¶ 7)

That Mr. Roberts' company, DPR, stands to recover more than the $350,000 it loaned to the Assignors if Pelican prevails is no bar to this action. As the Second Circuit stated earlier this year in Love Funding affirming the instructions received from the New York Court of Appeals, "it is not champerty 'to settle a dispute by accepting a transfer of rights that has the potential for a larger recovery than one had demanded as a cash settlement.'" 591 F.3d at 123, quoting 13 N.Y.3d at 202-03.

Pelican believes that there is ample basis to show that the Assignment Agreement does not violate New York Judiciary Law § 489(1) as a matter of law, as was the narrow holding in Love Funding. It recognizes though that "[t]he applicability of §489 to a given case is fact-specific." LNC Investments, Inc. V. Charter Nat'l Life Ins. Co., 2000 U.S.Dist. LEXIS 4617 (S.D.N.Y. 2000). Pelican is not cross moving at this time, but expressly reserves it right to move to dismiss the purported defense if and when interposed by any or all of the defendants in this action.[4]

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[4] The remaining cases cited by Bryan Cave also do not support dismissal of Pelican's claims. In Kontrick v. Ryan, 540 U.S. 443 (2004), the Court held that the bankruptcy creditor had forfeited its claim against the debtor by failing to object in a timely fashion. In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Court held that the plaintiff (organizations dedicated to wildlife conservation and other environmental causes) did not have standing to challenge a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered Species Act of 1973.

II. THE ASSIGNMENT AGREEMENT IS NOT VOID DUE TO ALLEGED ILLEGALITY

Addressing "the basic policy supporting the New York cases" on the subject of the defense of illegality, the Second Circuit has observed that:

> [W]hen a plaintiff sues to recover on an illegal bargain, courts deny relief because the Plaintiff is a wrongdoer, not because they favor the defendant. Courts will not aid a person "who founds his cause of action upon his own immoral or illegal act". Restatement of Contracts § 598, Comment (a) (1932); See also Restatement (Second) of Contracts, Tent.Dr.No.23, Introductory Note to Ch. 14, p. 46 (1977); 14 Williston on Contracts § 1630A (3d ed. 1972). This rationale is precisely the policy articulated in the New York decisions. In McConnell the court said that the court's concern is not with the position of the defendant; instead, the question is whether the plaintiff should be denied a recovery for the sake of public interests. 7 N.Y.2d at 469, 166 N.E.2d at 496, 199 N.Y.S.2d at 485. The well-known maxim that no one shall be permitted to profit by his own fraud summarizes the policy. See *Riggs v. Palmer, 115 N.Y. 506, 511-12, 22 N.E. 188, 190 (1889)*. See also *Reiner v. North American Newspaper Alliance, 259 N.Y. 250, 256, 181 N.E. 561, 563 (1932); Sturm v. Truby, supra, 245 App.Div. at 360, 282 N.Y.S. at 437; Sirkin v. Fourteenth Street Store, supra, 124 App.Div. at 389-90, 394, 108 N.Y.S. at 834, 837.*
>
> Where an innocent third party, such as a holder in due course, is suing upon an illegal contract, the policy argument is inapplicable because the plaintiff has done no wrong for which it should be penalized. [citing 14 Williston on Contracts § 1631 (3d ed. 1972)] Moreover, insofar as it is enforcing the rights of an innocent party, the court does not blacken its name or participate in a wrong when it enforces an illegal contract. See Havighurst, Book Review, 61 Yale L.J. 1138, 1145 (1952).
>
> <u>One New York court has enforced the rights of a holder in due course of a note in the face of the defense that the note had been given as an unlawful preference by a bankrupt to one of his creditors</u>. *New Howard Mfg. Co. v. Cohen, 207 App.Div. 588, 202 N.Y.S. 449 (1st Dept. 1924).*

Bankers Trust Co. v. Litton Systems, Inc., 599 F.2d 488, 492-493 (2d Cir. 1979) (emphasis added)

Pelican does not concede in any way that the Assignment Agreement was an illegal agreement, certainly its participation in it was not. No illegality can or should be imputed to Pelican. Pelican knew not about the February 17, 2009 Supplemental Order of the Utah Third Judicial District Court prior to the current motion practice. (Roberts Aff. ¶ 9) And, defendants' accusations and unseemly innuendo aside, it cannot be disputed that counsel for Pelican is not and has never been counsel for AIP and never represented Mark Robbins or his wife, Allison Robbins, in the AIP bankruptcy. (See Docket # 51: June 10, 2010 Letter to Hon. Naoimi Reice Buchwald at n.2 and Exh. C and Docket # 61: Altman Dec. ¶ 4) See Bunge Corp. v. Manufacterers Hanover Trust Co., 65 Misc. 2d 829, 842 (Sup. Ct., N.Y. County 1971) (defense of illegality not proved where there was no proof that plaintiff had knowledge of the alleged unlawful actions).

None of the cases cited by Bryan Cave and the Talos Defendants support their claim that the Assignment Agreement is void as a matter of law due to alleged illegality. Those cases certainly do not stand for the proposition that the defendants may avoid Pelican's prosecution of their claims. Bernstein v. The Greater New York Mutual Ins. Co., 706 F. Supp. 287 (S.D.N.Y. 1989) and McCormack v. Bloomfield Steamship Co., 399 F. Supp. 488 (S.D.N.Y. 1974) involved the assignment to the plaintiff of a personal injury action which under New York Law is expressly not assignable.

Sardanis v. RST Resources, Inc., 282 A.D.2d 322 (1st Dep't 2001) is similarly inapposite. Plaintiff in Sardanis was an officer and director of a commodities trading firm.

Without obtaining approval of the company's board of directors or shareholder, plaintiff purported to assign all of the company's assets to himself individually and then sue certain former company employees. The Court (New York's Appellate Division, First Department) held that the assignment was void because the transfer of all or substantially all of the corporation's assets without board or shareholder approval clearly violated the Sections 713 and 909 of the New York Business Corporation Law. 282 A.D.2d at 324.

Stone v. Freeman, 298 N.Y. 268 (1948), involved a claim for a commission by a broker who participate in a criminal payment of a bribe to a purchasing agent. Szerdahelhi v. Harris, 67 N.Y.2d 42 (1986), involved a lender's attempt to recover monies from the borrower in connection with a loan it admitted was usurious. And, Walters v. Fullwood, 675 F.Supp. 155 (S.D.N.Y. 1987), involved the attempted enforcement of a post-dated agreement with a college athlete that unquestionably violated of the National Collegiate Athletic Association and the National Football League.

Defendants in effect claim that in executing the Assignment Agreement Pelican participated with the Assignors in alleged wrongdoing, which mandates the dismissal of this action. Even so stated, they are wrong. See Schmidt v. Fleet Bank, 16 F. Supp. 2d 340, 345-346 (S.D.N.Y. 1998) (record did not show that plaintiffs participated in any scheme to defraud; cases relied on by defendants "involve[d] situations in which the plaintiff sought to enforce an illegal contract against its partner in crime"); Seagirt Realty Corp. v. Chazanof, 13 N.Y.2d 282, 286 (1963) (plaintiff not seeking to enforce a contractual duty of defendant against which illegality

could be argued).[5]

The only person that might reasonably raise an issue about the Assignment Agreement is AIP creditor, Fairstar. Fairstar undoubtedly has knowledge of the Assignment Agreement and this action. Presumably it knows its way to this courthouse and knows how to take whatever action it deems fit to secure its claim to any recovery Pelican may obtain. The possibility though that any judgment secured by Pelican may be subject to a claim by Fairstar is not a get out of jail free card for the defendants or grounds for them to be let off the hook for the serious charges made against them in the complaint in this action. See Southwestern Shipping Corp. v. National City Bank of New York, 6 N.Y.2d 454, 462 (1959) (refusing to permit defendant to maintain defense of illegality to avoid liability and secure a "windfall").

Finally, the Court made reference at the May 20, 2010 hearing of its concern that Pelican may be subject to a claim of unclean hands. None of the defendants addressed that issue as well they could not.

> The defense of unclean hands requires the party asserting the affirmative defense to prove that (1) the offending party is guilty of immoral, unconscionable conduct; (2) the conduct was relied upon by the asserting party; and (3) the asserting party was injured as a result. Kopsidas v. Krokos, 294 A.D.2d 406, 742 N.Y.S.2d 342, 344 (App. Div. 2002); see also In re Cohen, 418 B.R. 785, 2009 WL 1871054, at *16 (Bankr. E.D.N.Y. 2009). The party asserting the doctrine has the initial burden of demonstrating these elements. Fade v. Pugliani/Fade, 8 A.D.3d 612, 779 N.Y.S.2d 568, 570 (App. Div. 2004). The doctrine of unclean hands is "never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only 'when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct.'" Nat'l Distillers & Chem.

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[5] There is thus no reason or basis to hold an evidentiary hearing and otherwise delay Pelican's prosecution of its claims.

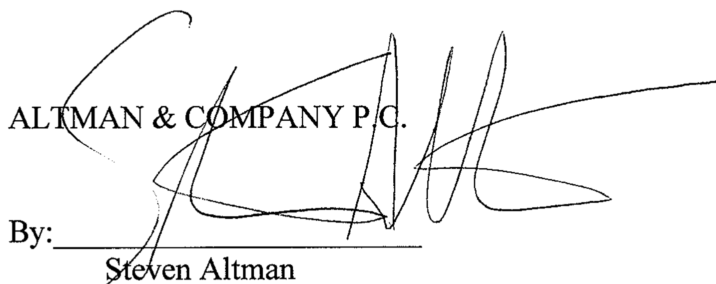
> Corp. v. Seyopp Corp., 17 N.Y.2d 12, 214 N.E.2d 361, 362, 267 N.Y.S.2d 193 (N.Y. 1966) (internal citations omitted); see also Markel v. Scovill Mfg. Co., 471 F. Supp. 1244, 1255 (W.D.N.Y. 1979) ("[C]ourts are reluctant to apply the unclean hands doctrine in all but the most egregious situations.").

Sheehy v. New Century Mortg. Corp., 690 F. Supp. 2d 51, 67 (E.D.N.Y. 2010).

CONCLUSION

For the foregoing reasons, and those set forth in Pelican's June 10 and July 30, 2010 submissions, Pelican should be permitted to continue its prosecution of all of the claims alleged in the First Amended Complaint.

New York, New York
August 4, 2010



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