

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

ACE AMERICAN INSURANCE COMPANY	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-4724
	:	
ONEBEACON U.S. HOLDINGS, INC.	:	
	:	
Defendant.	:	
	:	

**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

Plaintiff ACE American Insurance Co. (“ACE”) hereby files this Memorandum in Opposition to Defendant OneBeacon U.S. Holdings, Inc.’s (“OneBeacon”) Motion to Dismiss. For the reasons set forth below, the Motion to Dismiss should be denied.

**I. Legal Standard**

Federal Rule of Civil Procedure 8 states that a pleading states a claim for relief when it includes, in part, a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for the relief sought. This straightforward rule became complex with the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Indeed, this Court has noted that there is a “decided national debate” over whether *Twombly* and *Iqbal* create a “more rigorous federal pleading standard.” *Greenberg v. Macy’s*, 2011 WL 4336674 (E.D. Pa. 2011) (Diamond, J.). Despite such a debate, this Court has acknowledged that these decisions merely require that a party “set forth sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Macy’s*, 2011 WL 4336674, at \*6 (*quoting Iqbal*, 556 U.S. at 663) (internal citation omitted); *see also Twombly*, 550 U.S. at 556, 570.

Consistent therewith, the U.S. Court of Appeals for the Third Circuit in *Fowler v. PMC Shadyside*, which was decided after both *Twombly* and *Iqbal*, held that the plausibility test requires that the plaintiff set forth the “how, when, and where” of his, her, or its claim. 578 F.3d 203, 212 (3d Cir. 2009).

This Court has further acknowledged that *Twombly* does not require the pleader to prove the allegations before taking discovery. *In re OSB Antitrust Litigation*, 2007 WL 2253419, at \*5 (E.D. Pa. 2007).

In *Macy’s*, the defendants moved for summary judgment, accusing the plaintiff of fraudulently joining individual defendants in order to defeat diversity jurisdiction and claiming that the plaintiff had failed to meet the pleading requirements of *Twombly/Iqbal* necessary to join the parties. 2011 WL 4336674, at \*1. The plaintiff, who brought an action pursuant to her slip and fall in a department store, joined two store employees by alleging merely that the employees wrongfully created a hazardous condition at the place and on the date of her slip and fall. *Id.* at \*7. This Court held that while it was apparent that the plaintiff joined the two individual defendants in order to defeat diversity jurisdiction, there was a possibility that a court would find the plaintiff’s claim plausible. *Id.* at 7.

Here, ACE is able to meet the pleading standard of *Twombly/Iqbal* and has certainly pleaded claims that are more facially plausible than those of the plaintiff in *Macy’s*. Therefore, OneBeacon’s Motion to Dismiss should be denied.

## **II. Count I**

Count I seeks injunctive relief pursuant to the other counts and alleges the elements necessary for injunctive relief. If any of Counts II, III, IV, or V survive, Count I should survive.

### III. Count II

Count II seeks relief for misappropriation of trade secrets, including under the Pennsylvania Uniform Trade Secrets Act.

ACE has met the plausibility standard with respect to Count II alleging a misappropriation of trade secrets. In support of this claim, ACE has set forth the how, when, and where of the claim.

ACE pleaded that OneBeacon conspired with eight ACE employees to steal ACE trade secrets while they were still employed by ACE and deliver them to OneBeacon upon their coordinated resignations from ACE. Complaint at ¶¶ 10-11, 18. Knowing the wrongfulness of their conduct, the eight employees made extensive efforts to cover up their wrongdoing. Complaint at ¶¶ 12, 17. ACE has pleaded that at or about the time of their resignations, the Surety Employees took with them to OneBeacon information that fits the definition of trade secrets under the Pennsylvania Uniform Trade Secrets Act and other trade secrets laws. Complaint at ¶¶ 16, 26-28. In fact, ACE went so far as to include a list setting forth specific types of information which the Surety Employees misappropriated (information including, but not limited to, client information, strategic planning information, pricing information, underwriting information, rating information, and reinsurance information). Complaint at ¶ 25. ACE further alleges that OneBeacon has used and is using that trade secret information in the formation of OneBeacon's new surety department. Complaint at ¶ 29.<sup>1</sup>

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<sup>1</sup> The Motion to Dismiss would have one believe that the entire trade secrets claim is based upon emails that were deleted by the Surety Employees. It is not. For example, ACE alleges "The commercial surety business is increasingly competitive. Success or failure of an organization is based on its use of information—about clients, underwriting, reinsurance, rating, and pricing. ACE took reasonable steps under the circumstances to safeguard the secrecy of the information about strategic planning, clients, underwriting, reinsurance, rating, and pricing. Yet, OneBeacon, through the Surety Employees, coordinated an employee raid to obtain and use

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Indeed, OneBeacon has undertaken a course of conduct by recruiting the entirety of ACE's East Coast Surety Department and using such recruits in order to form its own, brand new surety department within days. Complaint at ¶¶ 9-11, 15. The Court may infer from this, and from the paying of above-market compensation to the Surety Employees, that OneBeacon is seeking ACE's trade secrets.

Based on these facts, it is plausible that ACE is entitled to relief under Count II of the Complaint. Therefore, Count II should not be dismissed.

#### **IV. Count III**

In regard to Count III alleging interference with contractual relations, ACE has again met the plausibility standard.

ACE has specifically stated that OneBeacon knew of ACE's contractual relations with its clients and has used the Surety Employees and ACE's proprietary information in order to harm these relationships. Complaint at ¶¶ 35-36. These allegations are supported by ACE's recruitment of the Surety Employees, formation of its own surety department, and the use of ACE's trade secrets. Complaint at ¶¶ 9-11, 15. Furthermore, one of the Surety Employees, Chad Anderson ("Mr. Anderson"), had previously commented that taking the entire East Coast Surety Department away from ACE would be the best way to leave ACE unable to retain clients and this is exactly what has happened. Complaint at ¶¶ 13-14. That ACE has not publicly disclosed the identity of the trade secret clients does not mean there is no claim.

These facts make it plausible that ACE is entitled to relief for OneBeacon's intentional interference with contractual relations. Therefore, Count III should not be dismissed.

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ACE's trade secrets. OneBeacon and the Surety Employees are now using ACE's trade secrets to, among other things, solicit ACE clients (including broker-referral sources)." Complaint at ¶ 16.

**V. Count IV**

Count IV states a claim for Aiding and Abetting a Duty of Loyalty Violation. ACE has again met the plausibility pleading standard with respect to Count IV.

Aiding and abetting a breach of a duty of loyalty is a viable claim, as set forth in the rulings of the U.S. District Court for the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit. The U.S. District Court for the Eastern District of Pennsylvania has ruled in numerous instances that a claim for aiding and abetting a breach of duty of loyalty or fiduciary duty is available. *Reis v. Barley, Snyder, Senft & Cohen, LLC*, 484 F. Supp. 2d 337, 350-51 (E.D. Pa. 2007), (citing and discussing *Pierce v. Rossetta Corp.*, 1992 WL 165817, \*2 (E.D. Pa. June 15, 1992); *Koken v. Steinberg*, 825 A.2d 723 (Pa. Commw. 2003); *Baker v. Family Credit Counseling Corp.*, 440 F. Supp. 2d 392 (E.D. Pa. 2006)); *Adena, Inc. v. Cohn*, 162 F. Supp. 2d 351 (E.D. Pa. 2001); *Stone Street Serv., Inc. v. Daniels*, 2000 WL 1909373 (E.D. Pa. 2000); *Kaiser v. Stewart*, 1997 WL 476455 (E.D. Pa. 1997); *Schuylkill Skyport Inn, Inc. v. Rich*, 1996 WL 502280 (E.D. Pa. 1996)). The U.S. Court of Appeals for the Third Circuit adopted this holding as recently as January 2011 when it affirmed the decision in *Reis* that aiding and abetting a breach of fiduciary duty claim was available, although concluding that the sufficient factual showing had not been made in that case. *Reis v. Barley, Snyder, Senft & Cohen, LLC*, 426 F. App'x 79, 84 (3d Cir. 2011).

The standard for bringing an aiding and abetting claim was set forth in *Pierce*, 1992 WL 165817, at \*7-8. There, this Court stated that the elements of the claim were as follows: “(1) the breach of a fiduciary duty owed to another; (2) knowledge of the breach by the aider and abettor; and (3) substantial assistance or encouragement by the aider or abettor in effecting that breach.” 1992 WL 165817, at \*8 (citations omitted). Interestingly, OneBeacon failed to mention in citing

*Pierce* that the third element is “substantial assistance **or encouragement.**” *Id.* (emphasis added). *See also Koken v. Steinberg*, 825 A.2d 723, 732 (Pa. Commw. Ct. 2003).

ACE has pleaded that Mr. Anderson supervised the Surety Employees, that he had a duty of loyalty to ACE, and that he concealed the planned departure of the Surety Employees to OneBeacon, when in fact he had an obligation to disclose those plans. Complaint at ¶¶ 13, 17. ACE has pleaded that OneBeacon knew that Mr. Anderson was the supervisor of the Surety Employees and that he breached his duty of loyalty to ACE by concealing the planned departure and elimination of information. Complaint at ¶ 17. OneBeacon knew of these actions and aided and abetted and/or encouraged them, in part, by recruiting the Surety Employees, facilitating that they all begin with OneBeacon on the same day, and agreeing to pay them compensation well above market rates for comparable employees and comparable positions. Complaint at ¶¶ 10-11, 18. Mr. Anderson could not and would not have been able to violate his duty of loyalty to ACE in this manner unless OneBeacon made employment offers to all eight Surety Employees to start at the same time.

Because these facts make it plausible that ACE is entitled to relief for OneBeacon’s aiding and abetting the breach of the duty of loyalty, Count IV should not be dismissed.

## **VI. Count V**

Count V likewise meets the elements of a claim for tortious interference. ACE has set forth facts that support the inference that OneBeacon targeted ACE’s customers with the intent to harm ACE.

While simply offering employment to an at-will employee is not actionable,

[t]he systematic inducing of employes to leave their present employment and take work with another is unlawful when the purpose of such enticement is to cripple and destroy an integral part of a competitive business organization rather than to obtain the services of particularly gifted or skilled employes. So also, when the

inducement is made for the purpose of having the employes commit wrongs, such as disclosing their former employer's trade secrets or enticing away his customers, the injured employer is entitled to protection.

*Morgan's Home Equipment Corp. v. Martucci*, 136 A.2d 838, 847 (Pa. 1957).

The conduct that ACE alleges in its Complaint is of the exact type held by Pennsylvania courts to be actionable. For example, ACE has alleged that OneBeacon's recruitment of the entirety of ACE's East Coast Surety Department was an attempt to cripple ACE's East Coast Surety business. Complaint at ¶¶ 11, 16. Mr. Anderson, who was in charge of the ACE East Coast Surety Department, and thereby directly or indirectly supervised the other seven Surety Employees, once commented that if he were going to leave ACE, he would take the entire East Coast Surety Department with him, because it would be the best way to leave ACE unable to retain clients. Complaint at ¶¶ 13, 14. OneBeacon's compensation of the Surety Employees well over market value for the same services further evidences OneBeacon's incentivizing **all** the Surety Employees to leave employment with ACE—to cripple or destroy ACE's East Coast Surety Department. Complaint ¶ 18.

Note that Pennsylvania law does not require that the entire plaintiff-employer be crippled or destroyed to state such a claim—as Defendant seems to imply in talking about the worldwide operations of ACE—only “an integral part of a competitive business organization.” *Morgan's Home Equipment Corp.*, 136 A.2d at 847. The East Coast Surety Department of ACE is such an integral part of a competitive business organization.

Because ACE has pleaded facts sufficient to make it plausible that it is entitled to relief for tortious interference/intent to harm, Count V should not be dismissed.

**VI. Conclusion**

For the reasons set forth above, OneBeacon's Motion to Dismiss should be denied.

Respectfully submitted,

Date: September 4, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of September, I caused a copy of the forgoing document to be served upon the following electronically and via e-mail:

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