IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

ONEBEACON U.S. HOLDINGS, INC.'S
REPLY IN FURTHER SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pursuant to Local Rule 7.1(c), Defendant OneBeacon U.S. Holdings, Inc. ("OneBeacon Holdings") respectfully submits this reply memorandum in further support of its Motion to Dismiss Plaintiff's Complaint and supporting Memorandum of Law (Doc. No. 18) (the "Motion"), and to address new arguments raised in plaintiff's "Memorandum in Opposition to Motion to Dismiss" (Doc. No. 19) (the "Response"). For the reasons set forth herein and in OneBeacon Holdings' Motion, plaintiff's Complaint should be dismissed.

REPLY

I. PLAINTIFF CANNOT AVOID BASIC FEDERAL PLEADING REQUIREMENTS WHICH ARE NOT SATISFIED BY THE SPECULATIVE ALLEGATIONS IN THE COMPLAINT

Contrary to plaintiff's Response, the pleading standards set forth by the U.S. Supreme Court in *Twombly* and *Iqbal* are controlling and binding in this case. *See, e.g., Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-212 (3d Cir. 2009) (applying *Twombly* and *Iqbal*, and suggesting a two part analysis of first separating well-pleaded facts from legal conclusions, and then determining whether the facts alleged show a plausible claim for relief rather than a mere

possibility of misconduct). These pleading standards apply despite any debate about whether, or to what extent, *Twombly* and *Iqbal* altered the standards that already existed in the Third Circuit.[1]

A Complaint does not meet the pleading standards of Federal Rule of Civil Procedure 8, and is subject to dismissal pursuant to Rule 12(b)(6) where "it tenders 'naked assertions[s]' devoid of 'further factual enhancement," and fails to plead sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). It is not sufficient for a pleading to rest on a "formulaic recitation of the elements of a cause of action," but rather, to survive a 12(b)(6) standard, a plaintiff must allege enough well-pleaded facts to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. As plaintiff correctly notes, this requires it to allege facts establishing the "how, when, and where" of each claim. *Fowler*, 578 F.3d at 212. This Court has not hesitated to dismiss claims that fail to meet these standards. *See Chechele v. Hayne*, 2011 WL 2519522, at *4 (E.D. Pa. June 20, 2011) (dismissing claim which failed to include sufficient factual allegations to satisfy *Twombly*).[2] In *Chechele*, this Court found insufficient a plaintiff's

[1] There is no conflict between the opinions of this Circuit and the holdings of *Twombly* and *Iqbal* cited in OneBeacon Holdings' Memorandum of Law (hereinafter "Mem."). Of course, in the case of any conflict between the Third Circuit and the U.S. Supreme Court, the Supreme Court's opinions control. *See, e.g., U.S. v. Farrow*, 2007 WL 707362, at * 3 (E.D. Pa. Mar. 1, 2007) (recognizing that Supreme Court decisions control over conflicting decisions of the Third Circuit).

[2] Plaintiff's reliance on *Greenberg v. Macy's*, 2011 WL 4336674 (E.D. Pa. Sept. 15, 2011) is misplaced. *See* Response at 2. The *Greenberg* case involved a motion to remand, not a motion to dismiss, and applied the legal standard for analyzing "fraudulent joinder." *Greenberg*, 2011 WL 4336674, at *1. In *Greenberg*, the plaintiff alleged not only the legal elements of a claim (that Macy's management employees "created or directed the creation of a hazardous condition"), but also the well-pleaded facts to support the claim (that an "'unmarked empty platform'" was "placed in front of the Women's Department elevator in Macy's Ardmore store" which caused the plaintiff to fall). *Greenberg*, 2011 WL 4336674, at *7. Plaintiff's Complaint

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allegations that were based on a hope that "she might discover" supporting facts during the litigation:

> Plaintiff apparently brings Count II to preserve her right to recover on Urban Outfitters' behalf the profits from any "additional short-swing trades" that she might discover "during the course of this action." Plaintiff thus fails to allege facts sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *see also DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."). In these circumstances, I will dismiss Count II.

Id. As established in OneBeacon Holdings' Motion, plaintiff's Complaint rests almost exclusively on speculation about OneBeacon Holdings, is devoid of any well-pleaded factual allegations regarding conduct by anyone at OneBeacon Holdings, and does not satisfy minimum federal pleading standards. It should be dismissed.

II. THE RESPONSE DOES NOT IDENTIFY WELL-PLEADED FACTS ESTABLISHING THE "HOW, WHEN, AND WHERE" OF ANY CONDUCT BY ONEBEACON HOLDINGS SUFFICIENT TO STATE A PLAUSIBLE CLAIM FOR RELIEF

A. The Response Ignores Controlling Case Law Demonstrating That Plaintiff's Tortious Interference Claims Are Inadequately Alleged And Must Be Dismissed

Plaintiff effectively concedes in the Response that Count III of the Complaint fails to identify any existing or prospective client contracts with which OneBeacon Holdings has interfered, and plaintiff cites no law to support its position that it need not do so in order to state a claim. Plaintiff's failure to identify the relationships subject to interference is fatal to plaintiff's tortious interference claim. *See, e.g., Meissner Chevrolet Geo-Oldsmobile v. Rothrock*

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here alleges legal claims whose elements are more complex than the elements of a garden-variety negligence case, yet the Complaint fails to plead anything close to these detailed factual allegations in *Greenberg*. The *Greenberg* opinion is inapposite and does not help plaintiff here.

Chevrolet, 2007 WL 3103114, at *3 (E.D. Pa. Oct. 23, 2007) (complaint fails to state a tortious interference claim where it fails to allege the contractual or prospective contractual relationship at issue between "complainant and a third party"); *Eagle v. Morgan*, 2011 WL 6739448, *15 (E.D. Pa. Dec. 22, 2011) (dismissing tortious interference counterclaim which did not identify "any individual or corporation with whom [counterclaim plaintiff] had a reasonable likelihood of a contract" that was "disrupted"). Plaintiff's Response likewise points to no well-pleaded factual allegations that would establish an intent by OneBeacon Holdings' to target any customers of ACE for the purpose of harming the company, and the Response does not even address OneBeacon Holdings' financial interest privilege in competing against ACE. *See* Mem. at 6-7 (collecting cases dismissing tortious interference claims in similar circumstances).

Plaintiff's Response also fails to meaningfully respond to One Beacon Holdings' arguments for dismissal of Count V, tortious interference/intent to harm. Instead, plaintiff attempts to seek shelter in the Complaint's allegation that OneBeacon Holdings wanted "to cripple" ACE. This is not a well-pleaded factual allegation, but merely a bare recitation of an element of the claim. *See Brubaker Kitchens, Inc. v. Brown*, 2006 WL 2381767, at *5 (E.D. Pa. Aug. 15, 2006) (elements of claim for tortious interference based on hiring away of employees include "systematic inducement" of employee departures, for the "sole purpose," of "crippling" the employer); *Cf. Twombly*, 550 U.S. at 557 ("formulaic recitation of the elements of a cause of action" is insufficient to state a claim). In the absence of supporting factual allegations sufficient to infer that OneBeacon Holdings' purpose in hiring the Surety employees was, indeed, to "cripple" ACE, the allegation that OneBeacon Holdings hired eight ACE employees and paid them well, is legally insignificant. Even if true, it merely establishes that OneBeacon Holdings engaged in the commonplace, lawful practice of hiring an executive search firm to locate and

recruit well-qualified and gifted individuals to staff its new Surety department. Accordingly, Counts III and V should be dismissed.

B. The Response Does Not Cure Plaintiff's Failure To Allege Well-Pleaded Facts Sufficient To State A Claim For Relief For Misappropriation of Trade Secrets

In attempting to address the lack of factual detail in plaintiff's Count II claim for "misappropriation of trade secrets," the Response merely highlights the conclusory nature of plaintiff's allegations. The elements of plaintiff's misappropriation claim are set forth in OneBeacon Holdings' Motion and include the existence of trade secrets as defined pursuant to a six factor test, and the wrongful acquisition or disclosure of those secrets by OneBeacon Holdings. *See* Mem. at 3-4. As the Third Circuit explained in *Fowler*, this court may analyze plaintiff's claim by separating the well-pleaded factual allegations from the Complaint's labels and legal conclusions, to determine whether the Complaint sets out "sufficient factual matter to show that the claim is facially plausible." 578 F.3d at 210-11 (internal citation and quotations omitted). Plaintiff's Response contends that its misappropriation claim is valid because it alleges OneBeacon Holdings "conspired" with ACE's employees to "steal," certain "trade secrets," and that the Court can "infer" that "OneBeacon is ***seeking*** ACE's trade secrets. *See* Response at 3-4 (emphasis added). These contentions are precisely the type of "conclusory or 'bare bones' allegations [that] will no longer survive a motion to dismiss." *Fowler*, 578 F.3d at 210 (citing *Iqbal*, 556 U.S. at 678).[3]

[3] Plaintiff's allegation that OneBeacon Holdings is paying the eight former Surety employees "above-market compensation" is a factual allegation, but not one that is relevant to any element of the misappropriation of trade secrets claim. Regardless of what ACE's former employees are being paid to work at OneBeacon, plaintiff was required to plead facts sufficient to establish the existence of "trade secrets" that were wrongfully "acquired" or "disclosed."

Plaintiff contends in its Response that OneBeacon Holdings' Motion is overly focused on ACE's factual allegation about the deletion of e-mail messages. Response at 3, n.1. The Response ignores, however, that ACE's allegation regarding e-mail messages is the sole, non-conclusory factual allegation in the Complaint linking the conduct of ACE's former Surety employees to any of ACE's property. The Complaint alleges only this deletion of e-mail, and does not plead any non-conclusory facts regarding the "stealing" or "misappropriation" of any document or other information by anyone. Similarly, the Complaint fails to adequately allege facts which, if true, would establish that any such information fits the six-factor test for defining a trade secret. Because plaintiff's misappropriation claim is based on legal conclusions, speculation and conjecture, it should be dismissed.[4]

C. The Response Does Not Cure Plaintiff's Failure To Allege Well-Pleaded Facts Sufficient To State A Claim For Relief For Aiding And Abetting A Breach Of The Duty Of Loyalty

Plaintiff does not dispute that the Pennsylvania Supreme Court has not recognized a claim for aiding and abetting the breach of a duty of loyalty.[5] On this basis alone, Count IV

[4] Plaintiff's reference in the Response to a shotgun style, laundry list of common insurance terms is insufficient to make the misappropriation claim facially plausible. *See* Response at 3 (contending that the Complaint included "a list" of the "types of information" allegedly misappropriated, and listing general insurance industry terms). Even if this list were not conclusory, ACE's Complaint fails to specifically allege that any particular item on this list was misappropriated by any particular person. *Compare* Complaint ¶ 16 (alleging that ACE took steps to protect the categories of information identified in this list, but not alleging that any particular type or category was taken), *with* Mem. at 5 (collecting cases dismissing claims based on generic references to a collection of various individuals) .

[5] OneBeacon Holdings recognizes that the authorities are divided about whether the Pennsylvania Supreme Court would recognize a claim for aiding and abetting a breach of the fiduciary duty of loyalty. *See* Mem. at 7-8. Given, however, that the court has still not recognized the claim more than twenty years since the debate commenced, OneBeacon Holdings submits that the claim does not exist and that the federal courts, in making an *Erie*-guess, should not expand the law of the Commonwealth. *See Daniel Boone Area Sch. Dist. v. Lehman Bros.,*

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should be dismissed. Even if such a claim had been recognized by Pennsylvania's high court, however, plaintiff's Response does not establish that the Complaint states such a claim. Plaintiff fails to sufficiently allege an underlying breach and, tellingly, asserts no claim against any of the former Surety employees for a breach of the duty of loyalty. None of the cases cited in plaintiff's Response which recognize the claim hold that a third party can be held liable for aiding and abetting where claims against the alleged principal tortfeasor have not also been brought or previously resolved.

Plaintiff's Response also fails to address the authorities cited in OneBeacon Holdings' Motion which establish that the aiding and abetting claim should be dismissed because it fails to adequately allege facts that would establish knowledge and substantial assistance. Plaintiff's Response identifies Paragraphs 10, 11, at 18 of the Complaint as relevant to its claim, but these paragraphs include ***no*** facts regarding OneBeacon Holdings' "knowledge" of an alleged breach of a duty of loyalty, and no facts sufficient to support the "substantial assistance or encouragement" element of the claim.[6] Although plaintiff argues that OneBeacon Holdings "substantially assisted or encouraged" a breach by recruiting the Surety employees at the same time (Response at 6), this allegation does not support the claim. The substantial assistance or encouragement element requires allegations of specific action on the part of the alleged abettor in assisting or inducing the tortfeasor to commit the alleged wrong. *See* Mem. at 10-11 (collecting authority dismissing aiding and abetting claims for failure to allege facts sufficient to establish

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Inc., 187 F. Supp. 2d 400, 413 (W.D. Pa. 2002) ("[I]t is not for me to say whether the common law of Pennsylvania should include [such] an action.").

[6] Plaintiff falsely states in the Response that OneBeacon "failed to mention" substantial encouragement in its Motion. *See* Mem. at 8-9 (reciting legal elements of claim, including "substantial assistance or encouragement").

substantial assistance element of the claim). Accordingly, plaintiff's Count IV claim for aiding and abetting an alleged breach of the duty of loyalty should also be dismissed.

CONCLUSION

For the foregoing reasons and those set forth in the Motion, plaintiff's Complaint should be dismissed.

Dated: September 5, 2012

Respectfully submitted,

/s/ Michael Lieberman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 5, 2012 I caused a true and correct copy of the foregoing OneBeacon U.S. Holdings, Inc.'s Reply in Support of its Motion to Dismiss the Complaint to be served on the following via electronic filing and via e-mail:

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