The following constitutes the ruling of the court and has the force and effect therein described.

Signed November 18, 2013

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
HALLWOOD ENERGY, L.P., et al.,	§	CASE NO. 09-31253-SGJ-11
DEBTORS.	§	
	§	
RAY BALESTRI, TRUSTEE OF THE HALLWOOD ENERGY I CREDITORS' TRUST,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 10-03263
	§	
HUNTON & WILLIAMS, LLP, W. ALAN KAILER, ANDREW E. JILLSON, and MICHELLE A. MENDEZ,	§	
DEFENDANTS.	§	(Civ. Action #3:11-CV-3359-G)

BANKRUPTCY COURT'S REPORT AND RECOMMENDATION TO DISTRICT COURT THAT IT GRANT IN PART (AS TO COUNTS ONE AND THREE) BUT DENY IN PART (AS TO COUNT TWO) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR FOR JUDGMENT ON THE PLEADINGS [DE # 211]

I. INTRODUCTION

The above-referenced adversary proceeding is related to the Chapter 11 bankruptcy case of Hallwood Energy, L.P. (hereinafter,

the "Debtor" or "HELP").[1] The Chapter 11 bankruptcy case of HELP has, for a few years now, been in a post-confirmation phase. This adversary proceeding will henceforth be referred to as the "Lawyer-Defendant Adversary Proceeding"—since the sole remaining defendants in it are three lawyers and a law firm that previously provided legal representation to HELP and to HELP's majority equity owner (the latter of which never filed bankruptcy). As will be explained in detail below, the Lawyer-Defendant Adversary Proceeding is mostly now a legal malpractice action.[2]

II. JURISDICTIONAL STATEMENT AND PROCEDURAL POSTURE

By way of reminder, several months ago, the bankruptcy court, when presented with a Motion to Withdraw the Reference in this Lawyer-Defendant Adversary Proceeding [DE # 70],[3] determined that: (a) bankruptcy subject matter jurisdiction exists in this

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[1] There were actually six, affiliated Chapter 11 Debtors that filed their bankruptcy cases simultaneously; their cases were subsequently administratively consolidated under Bankruptcy Case No. 09-31253. HELP was the primary operating company.

[2] There were originally twelve defendants in this "Lawyer-Defendant Adversary Proceeding." Eight of the original defendants (who were not lawyers but, rather, were current or former officers or directors of HELP and/or HELP's majority equity owner) were subsequently dismissed by the Plaintiff and sued in a different adversary proceeding. The now-governing Complaint (which currently only includes three lawyers (*i.e.*, W. Alan Kailer, Andrew E. Jillson, and Michelle Mendez) and the law firm of Hunton & Williams, LLP (collectively, the "Defendants")) is the First Amended Complaint, DE # 191, filed January 21, 2013, in Adv. Pro. No. 10-03263.

[3] "DE # _" as used herein refers to the Docket Entry number at which a pleading is filed in the docket maintained by the Bankruptcy Clerk in Adversary Proceeding No. 10-03263.

adversary proceeding, pursuant to 28 U.S.C. § 1334(b);[4] (b) the adversary proceeding involves merely "related to," non-core matters in which the bankruptcy court cannot enter final orders, but may only submit proposed findings, conclusions, and orders to the District Court for *de novo* review, pursuant to 28 U.S.C. § 157(c)(1);[5] and (c) the Plaintiff timely demanded a jury trial and is entitled to a jury trial. Thus, the bankruptcy court made a report and recommendation [DE #99], on February 8, 2012, that the reference should be withdrawn by the District Court in this adversary proceeding, but only at such time as the bankruptcy judge certifies that the parties are trial-ready. The District Court accepted this report and recommendation in an Order entered June 25, 2012, in which the District Court also deferred to the bankruptcy court the authority to handle pre-trial matters in the meanwhile. *See* Order of the District Court that is Docket Entry 8, in Civil Action # 3:11-cv-03359-G.

Fast-forwarding to the present, now before the bankruptcy court is a pre-trial matter—specifically, "Defendants' Motion for Summary Judgment or for Judgment on the Pleadings" [DE #211] (the

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[4] Citing to *Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388 (5th Cir. 2001); *U.S. Brass Corp. v. Travelers Ins. Group (In re U.S. Brass Corp.),* 301 F.3d 296 (5th Cir. 2002); *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 535 F.3d 325 (5th Cir. 2008); *Kirschner v. Grant Thornton LLP (In re Refco, Inc. Sec. Litig.),* 628 F. Supp. 2d 432 (S.D.N.Y. 2008).

[5] The Plaintiff did not consent to the bankruptcy court entering final orders. *See* 28 U.S.C. § 157(c)(2).

"Dispositive Motion") which was filed on March 22, 2013, along with a Brief [DE #212] and Appendix [DE #213] in support thereof, arguing that the Defendants are entitled to judgment on all counts being asserted against them, as a matter of law. The Plaintiff thereafter filed a Response [DE #236] and Brief [DE #237] and Appendix [DE ## 238, 239 & 240], the Defendants thereafter filed a Reply [DE # 249], and the Plaintiff thereafter filed a Supplemental Brief [DE # 253]. The bankruptcy court heard oral argument on April 30, 2013. The bankruptcy court held a status conference on May 17, 2013, at which it announced orally (in bench ruling fashion) the type of written report and recommendation it anticipated making to the District Court with regard to the Dispositive Motion. At such status conference, the parties requested permission to submit certain additional briefing, which the bankruptcy court allowed [DE ## 265, 266, 267]. After consideration of voluminous briefing, appendices, and numerous motions to strike, this bankruptcy court now submits this report and recommendation, pursuant to 28 U.S.C. § 157(c)(1).

This report and recommendation proposes that the District Court grant in substantial part the Defendants' Dispositive Motion. As will be explained further below, the bankruptcy court has concluded that:

> **(a) of the three claims now pending in this Lawyer-Defendant Adversary Proceeding (*i.e.,* Count One,**

Negligence; Count Two, Breach of Fiduciary Duty; and Count Three, Aiding and Abetting Others' Breaches of Fiduciary Duties) the only claim that should survive the Dispositive Motion and go to a trial by jury in the District Court is the Count Two claim of Breach of Fiduciary Duty; and

(b) the only possible remedy that might be available on this Count Two claim is the equitable remedy of fee-forfeiture,[6] since no proximate causation or damages have been pleaded by the Plaintiff associated with this claim.

To be clear, the bankruptcy court is recommending partial summary judgment and/or judgment on the pleadings be **GRANTED** in favor of the Defendants on: Count One (Negligence) and Count Three (Aiding/Abetting in Breaches of Fiduciary Duties). The bankruptcy court is further recommending that summary judgment and/or judgment on the pleadings be **DENIED** as to Count Two (Breach of Fiduciary Duty), except that the remedy, in the event liability is found thereon, should be limited to possible fee forfeiture. Below is the bankruptcy court's reasoning.[7] The District Court is requested to consider this Report and Recommendation *de novo* and either adopt or reject it, pursuant to the process described in 28 U.S.C. § 157(c)(1).

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[6] Presumably, fee forfeiture would only be potentially available as a remedy against the law firm Defendant, not the individual Defendants, since presumably only the law firm was paid fees directly.

[7] *See* Fed. Rs. Civ. Proc. 12(c) and 56(a), as adopted in a bankruptcy adversary proceeding pursuant to Fed. Rs. Bankr. Proc. 7012(b) and 7056.

III. FACTUAL BACKGROUND

The Debtor HELP and its other Debtor-affiliates were based in Dallas, Texas, and were engaged in the energy business. The Debtors filed their voluntarily petitions under chapter 11 of the Bankruptcy Code on March 1, 2009, after many months of plummeting natural gas prices and due (at least in large part) to an inability to obtain necessary third-party financing. On October 19, 2009, the bankruptcy court confirmed a Chapter 11 plan for HELP (the "Plan"). The Plan contemplated, among other things, that three litigation trusts would be created to hold and pursue various claims and causes of action, post-confirmation, for the benefit of the HELP creditors. Ray Balestri, the Plaintiff in this Lawyer-Defendant Adversary Proceeding (the "Plaintiff"), is the post-confirmation representative for the Debtors' estates, pursuant to both section 1123(b)(3)(B) of the Bankruptcy Code and, also, pursuant to the terms of the Plan. The Plaintiff is sometimes described as the Trustee of the "Hallwood Energy I Creditors' Trust" (which is but one of the three aforementioned litigation trusts that were created pursuant to the Plan).

An extensive recitation of the facts regarding HELP's financial demise and underlying bankruptcy case is reported in the ***Proposed Findings of Fact, Conclusions of Law, and Judgment Awarding Various Monetary Damages***, issued by this bankruptcy court in another adversary proceeding that related to the HELP

bankruptcy case, Adv. Pro. No. 09-03082, on July 25, 2011, which were adopted in an ***Order and Final Judgment of the District Court*** (Judge David Godbey), on April 24, 2012, which was, in turn, affirmed entirely by the United States Court of Appeals for the Fifth Circuit on June 7, 2013 [*see* DE ## 424, 425, 472, 473, & 547, in the Docket maintained by the Bankruptcy Clerk in Adv. Pro. No. 09-03082]. Henceforth , the court will refer to the adversary proceeding in which those ***Proposed Findings of Fact, Conclusions of Law and Judgment Awarding Various Monetary Damages*** were issued as the "FEI Shale Adversary Proceeding." This court incorporates the factual recitations from the FEI Shale Adversary Proceeding by reference.[8] DE # 424 in Adv. Pro. No. 09-03082.

The Defendants, as mentioned earlier, are three individual lawyers and a law firm at which they practiced, that represented the Debtor-HELP ***and simultaneously*** HELP's majority equity owner (an entity known as Hallwood Group Incorporated). Such simultaneous legal representation occurred during many months of HELP's financial distress and prior to HELP's ultimate bankruptcy filing. This court will sometimes refer to HELP's majority equity owner, Hallwood Group Incorporated, as the "Non-Debtor

[8] The referenced ***Proposed Findings of Fact, Conclusions of Law and Judgment Awarding Various Monetary Damages*** issued in the FEI Shale Adversary Proceeding were more than 160 pages long and were issued after a lengthy trial. Suffice it to say that the HELP bankruptcy case and all litigation therein has been quite complex and contentious.

Parent" (noting, in so doing, that it never filed bankruptcy itself). As alluded to above, the precise claims that are asserted against the Defendants in this Lawyer-Defendant Adversary Proceeding are: (a) legal malpractice (*i.e.,* negligence); (b) breach of fiduciary duties; and (c) aiding and abetting breaches of fiduciary duties that were allegedly committed by certain officers and directors that were in control of the Debtor and the Non-Debtor Parent.[9] The alleged conduct of the Defendants that forms the basis of the three claims (as set forth in the First Amended Complaint) can be summarized as follows: (i) continued representation of the conflicted interests of the Debtor and the Non-Debtor Parent (in fact, allegedly ignoring conflicts of interest) when the conflicts between the two entities should have been apparent to any reasonable and prudent lawyer; (ii) failing to timely advise the Debtor of the need for independent counsel and management; (iii) failing to advise the Debtor of the Non-Debtor Parent's and the latter's chief executive officer's plans to take actions detrimental to the Debtor (Anthony Gumbiner was the chief executive officer and chairman of the Non-Debtor Parent); (iv)

[9] Notably, there was formerly a separate adversary proceeding pending before the undersigned bankruptcy judge against yet another law firm and its lawyers (hereinafter, the "Rochelle Lawyers") that acted as the former, court-approved bankruptcy counsel to the Debtors. The adversary proceeding involving the Rochelle Lawyers (the "Rochelle Action") also stated claims of malpractice, but it has been settled and dismissed.

zealously representing the Defendants' more established client that was likely to survive into the future (*i.e.,* the Non-Debtor Parent) while not zealously representing the client that was heading toward a financial meltdown (*i.e.,* the Debtor); (v) failing to advise the Debtor in the Fall of 2008 of "zone of insolvency" duties or the advisability of exploring alternatives to bankruptcy to maximize value for creditors, including possibly (a) an out-of-court restructuring with the Debtor's lenders, (b) aggressive strategies against the Non-Debtor Parent, or (c) monetization of assets during that time frame; and (vi) advising the Non-Debtor Parent and its chief executive officer (in secret consultation away from the Debtor) how to evade the Non-Debtor Parent's obligations to the Debtor—thus, allegedly aiding and abetting the chief executive officer's misconduct toward the Debtor (and, additionally, billing the Debtor for some of this consultation).

IV. LEGAL ANALYSIS

A. Preliminarily, the Lawyer-Defendant Adversary Proceeding is Not Barred by the Doctrine of *Res Judicata.*

The Defendants' Dispositive Motion now before the court first makes the argument that this Lawyer-Defendant Adversary Proceeding is barred by the doctrine of *res judicata* as a result of two similar adversary proceedings, involving the same nucleus of operative facts, relating to the HELP bankruptcy case, which adversary proceedings have earlier resulted in final judgments.

The two similar adversary proceedings were the FEI Shale Adversary Proceeding, mentioned earlier, and another adversary proceeding, Adv. Pro. No. 10-03358, in which the defendants were mostly former or current officers and directors of HELP and its Non-Debtor Parent (henceforth to be referred to, for ease of reference, as the "D&O Adversary Proceeding"). The bankruptcy court is not persuaded that *res judicata* bars the claims being asserted in this Lawyer-Defendant Adversary Proceeding. Thus, this argument should be overruled.

Res judicata, also known as claim preclusion, is, of course, a doctrine that prevents relitigation of issues. It literally means "the thing has been decided." Specifically, it means that a final judgment of a competent court is conclusive upon the parties in any subsequent litigation involving the same cause of action. It actually serves several policies important to our judicial system. It conserves judicial time and resources. It also supports several private interests, including avoidance of substantial litigation expenses, protection from harassment or coercion by lawsuit, and avoidance of conflicting rights and duties from inconsistent judgments.[10]

The elements of *res judicata* are: (1) the parties in both actions are identical or in privity; (2) the court in the

[10] *Sw. Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 94 (5th Cir. 1977).

previous action had competent jurisdiction at the time it issued its order; (3) the order was final in the first action; and (4) the same claims and causes of action are involved in both actions.[11] The Defendants are arguing that final judgments in the FEI Shale Adversary Proceeding and in the D&O Adversary Proceeding in this court bar the claims in this current Lawyer-Defendant Adversary Proceeding. This court believes that three out of the four elements of *res judicata* apply here. Two of the four elements are fairly indisputable: those being that (1) the courts in the FEI Shale Adversary Proceeding and in the D&O Adversary Proceeding had competent jurisdiction at the time of issuance of the orders resolving them; and (2) the orders were final in those two Adversary Proceedings. Also—while slightly less intuitive—the *res judicata* element of there being the same claims and causes of action involved in both actions is also met. The Fifth Circuit uses a "transactional test" to determine whether two suits involve the same causes of action, in which the critical test is whether the two suits involve the same nucleus of operative facts. "A 'cause of action' is a group of operative facts out of which different theories of liability could be asserted."[12] When applicable, *res judicata* (claim preclusion)

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[11] *See, e.g., United States v. Davenport,* 484 F.3d 321, 326 (5th Cir. 2007).

[12] *Chavers v. Hall,* No. 11-20833, 2012 WL 4074522, at *2 (5th Cir. Sept. 17, 2012).

bars any "claim in [the] later proceeding that was, or could have been, raised in the prior proceeding."[13] The critical issue is not the relief requested or the theory asserted, but whether the plaintiff bases the two actions on the same nucleus of operative facts. The court believes that the same nucleus of operative facts is, indeed, present in this Lawyer-Defendant Adversary Proceeding as was present in the D&O Adversary Proceeding and in the FEI Shale Adversary Proceeding.

However, the one element of *res judicata* that is missing here is the element of the parties in both actions being ***identical or in privity***. The Defendants argue that, although they themselves were not parties in the FEI Shale Adversary Proceeding and the D&O Adversary Proceeding, that they, as lawyers to certain of those defendants (namely the non-Debtor Parent), were ***in privity*** with such defendant. This court acknowledges that there are some cases in which courts have applied the privity doctrine to attorneys who were later sued in a subsequent lawsuit.[14] But imposition of the privity concept here seems inappropriate. The Restatement (Second) of the Law on Judgments (hereinafter, the "Restatement on Judgments") states that: "Generally speaking, the rules of procedure do not require

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[13] *Brooks v. Raymond Dugat Co. L C,* 336 F.3d 360, 362 (5th Cir. 2003).

[14] *See Martin v. Sanford*, No. 3:03-cv-1865, 2004 WL 224589, at *4 (N.D. Tex. Jan. 29, 2004 (M.J. Ramirez); *Sw. Airlines*, 546 F.2d at 94.

that all persons interested in a transaction be made parties to an action arising from it. The premise is that claimants ordinarily should be free to assert their claims by separate action if they wish."[15]

The Restatement on Judgments also states that there are difficulties with the concept of privity.

> First, the term 'privity,' unless it refers to some definite legal relationship such as bailment or assignment, is so amorphous that it often operates as a conclusion rather than an explanation. Second, the circumstance that persons have a close legal relationship with one another (such as husband and wife or owners of concurrent interests in property), or that one person helps another in litigation, by itself does not justify imposing preclusion on one of them on the basis of a judgment affecting the other. ***But preclusion can properly be imposed when the claimant's conduct induces the opposing party reasonably to suppose that the litigation will firmly stabilize the latter's legal obligations***.[16]

One problem here with imposing privity in this Lawyer-Defendant Adversary Proceeding is that the bankruptcy court does not believe that the Defendants (*i.e.,* the law firm or the individual lawyers) were ***misled*** or ***induced*** by the Plaintiff's conduct into thinking they were not going to be sued or that the Plaintiff would not continue to sue them. There was no reason to suppose that the prior litigation (*i.e.,* the FEI Shale Adversary Proceeding or the D&O Adversary Proceeding) would firmly

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[15] RESTATEMENT (SECOND) OF JUDGMENT § 62 cmt. a (2012).

[16] *Id.* at cmt. c (emphasis added).

stabilize or foreclose the Defendants' legal obligations. Also, the court notes that the privity concept seems to more often be applied ***offensively*** against the former non-party (that is, where the former non-party—here the Attorney-Defendants—did not participate—and then later ***they***, in fact, want to litigate). The concept is that ***the former non-party*** should be barred, because ***it*** was in privity with the one who already litigated.[17] It is a bit more atypical to apply it in this defensive context, where the Lawyer-Defendants had no reason to be misled earlier.

In summary, the court determines that this Lawyer-Defendant Adversary Proceeding is not barred by the doctrine of *res judicata*.

B. The Problematic Negligence Claim.

Turning now to the three specific claims asserted in the First Amended Complaint, the court starts with the negligence claim. A negligence claim against an attorney is essentially the same as what is more commonly known as a "legal malpractice" claim.[18] To succeed in a legal malpractice or negligence action, a plaintiff must prove: (a) the attorney owed the plaintiff a duty; (b) the attorney breached that duty; (c) damages occurred;

[17] *Sw. Airlines*, 546 F.2d at 94-96.

[18] *Cosgrove v. Grimes,* 774 S.W.2d 662, 664 (Tex. 1989).

and (d) the breach was the proximate cause of such damages.[19] And the law in this regard is that an attorney performing legal services has a duty of care and "is held to the standard of care that would be expected to be exercised by a reasonably prudent attorney."[20] The focus is on whether the attorney adequately represented the client. When an attorney undertakes a representation of a client, he impliedly represents that he possesses the required degree of learning, skill and ability to prosecute the representation, and that he will exercise reasonable and ordinary care and diligence in the use of such skill and in the application of such knowledge to the client's matter.[21]

The Dispositive Motion argues that the Defendants should be granted a judgment on the pleadings on the negligence claim because the First Amended Complaint fails to plead certain elements of the negligence tort (most prominently, ***proximate causation*** and ***damages***) beyond mere legal conclusions, conjecture,

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[19] *Alexander v. Turtur & Assocs., Inc.,* 146 S.W.3d 113, 117 (Tex. 2004); *Peeler v. Hughes & Luce,* 909 S.W.2d 494, 496 (Tex. 1995); *Cosgrove,* 774 S.W.2d at 665; *Floyd v. Hefner,* 556 F. Supp. 2d 617, 649 (S.D. Tex. 2008).

[20] *Id.* at 660.

[21] *Cook v. Irion,* 409 S.W.2d 475, 477 (Tex. App.—San Antonio, 1966, no writ), *disapproved on other grounds by Cosgrove,* 774 S.W.2d at 665.

guess, and speculation.[22] The Defendants further argue that they are entitled to summary judgment as a matter of law on the negligence claim (even if a plausible claim could be deemed to be established on the face of the First Amended Complaint) because the Plaintiff lacks competent expert testimony on ***proximate causation*** and ***damages*** or any other potential evidence thereon—it being necessary to establish that ***"but for"*** the Defendants' conduct, a specific transaction would have occurred on certain terms (not merely a hypothetical transaction could have occurred). The Plaintiff admittedly has no evidence of any real transaction that ***could have*** and ***would have*** occurred ***"but for"*** the Defendants' conduct.[23]

The court agrees that the Defendants are entitled to judgment on the pleadings on the negligence claim because, even if all facts pleaded by the Plaintiff are assumed to be true,

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[22] *Bell Atlantic Co. v. Twombly* , 550 U.S. 544 (2007).

[23] *See* Defs. App. Ex. F, p. 145 (lines 3-13), p. 146 (lines 1-4), p. 161 (lines 9-17), p. 162 (lines 8-12), p. 163 (lines 11-25), p. 164 (lines 1-5), p. 166 (lines 1-6 & 20-25), p. 167 (lines 1-9), p. 170 (line 5) through p. 171 (line 22); App. Ex. G, p. 208 (lines 3-25), p. 210 (lines 1-24); Defs. App. Ex. L-3, pp. 371-375; Pl. App. B, Ex. B, p. 42 (line 6) through p. 44 (line 21); Pl. App. B, Ex. C, p. 48 (lines 1-9); Pl. App. C, Ex. E, p. 1694 (line 8) through p. 1695 (line 8) & p. 1701 (lines 3-22).

NOTE: the **Defendants' Appendix** (which is referred to throughout this Report and Recommendation as **"Defs. App. Ex. __, p. __ (lines __)"** is found at DE # 213 and the **Plaintiff's Appendix** (which is referred to throughout this Report and Recommendation as **"Pl. App. __, Ex. __, p. __ (lines __)"** is found at DE # 238 (Appendix A), DE # 239 (Appendix B) and DE # 240 (Appendix C).

there is no plausible claim for relief under the *Twombly* standard.[24] And, even if the Plaintiff has, in fact, pleaded sufficient facts to state a plausible claim for negligence, the Defendants are nevertheless entitled to summary judgment because, with regard to negligence, there was no summary evidence submitted by the Plaintiff to create a genuine issue of a disputed fact as to proximate causation and damages.[25] To be perfectly clear, bad things happened to HELP: poorer-than-expected exploration and production results; plummeting gas

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[24] *Twombly,* 550 U.S. at 544.

[25] Summary judgment is appropriate when the movant has established that the pleadings, affidavits, and other evidence available to the court demonstrate that no genuine issue of material fact exists, and the movant is, thus, entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006*); Lockett v. Wal-Mart Stores, Inc*., 337 F. Supp. 2d 887, 891 (E.D. Tex. 2004). The court must view all evidence in a light most favorable to the non-moving party. *Piazza's Seafood,* 448 F.3d at 752; *Lockett,* 337 F. Supp. 2d at 891. Factual controversies must be resolved in favor of the non-movant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994). If the movant satisfies its burden, the non-movant must then come forward with specific evidence to show that there is a genuine issue of fact. *Lockett,* 337 F. Supp. 2d at 891; *see also Ashe v. Corley*, 992 F.2d 540, 543 (5th Cir. 1993). The nonmovant may not merely rely on conclusory allegations or the pleadings. *Lockett,* 337 F. Supp. 2d at 891. Rather, it must demonstrate specific facts identifying a genuine issue to be tried in order to avoid summary judgment. FED. R. CIV. P. 56(e); *Piazza's Seafood,* 448 F.3d at 752; *Lockett,* 337 F. Supp. 2d at 891. Moreover, "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992)). Thus, summary judgment is proper if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

prices; insufficient cash flow; lack of new financing opportunities; liquidity crisis; value erosion; insolvency; and bankruptcy. But the necessary ***causal connection*** between alleged negligent acts or omissions of the Defendants and an injury (or, for that matter, HELP's ultimate demise) is utterly missing from the First Amended Complaint and is likewise utterly missing from the summary judgment evidence. Nowhere is there an allegation or any piece of evidence that "but for" the Defendants' breach of duty of care, that "x" could have been averted or that "y" (*i.e.*, a positive, value-producing transaction) would have happened.[26]

Specifically, the negligence claim (as described in the First Amended Complaint, at pp. 4-15) is multifarious, with the Plaintiff alleging that the Defendants: (a) failed to properly advise officers and directors of HELP of their special duties during a "zone of insolvency," despite having every reason to know of HELP's financial difficulties for months; (b) failed to disclose conflicts of interest that were developing between HELP and the Non-Debtor Parent; (c) protected the Non-Debtor Parent's interests to the detriment of the interests of HELP and, in fact, did not disclose certain strategies that the Non-Debtor Parent was developing to avoid paying obligations to HELP; and (d) did

[26] *See* Defs. App. Ex. G, p. 208 (lines 3-25); Defs. App. Ex. L-3, pp. 371-75; Defs. App. Ex. N, p. 403 (line 9) through p. 405 (line 21); Pl. App. C, Ex. E, pp. 1694-95 & 1701.

not advise HELP of viable alternatives to filing bankruptcy such as an out-of-court restructuring, sale of assets, or even litigation against the Non-Debtor Parent.

To be clear, the problem with the First Amended Complaint with regard to the negligence count is that, while it is clear that the Defendants, as lawyers, owed a duty of care to their clients, and while, if the facts pleaded are true, there ***would*** be a plausible claim for breach of that duty of care (and/or there ***would*** be genuine issues of material facts raised in this regard), the ***alleged damages*** pleaded are hypothetical, speculative, and theoretical[27]—in fact, eerily similar (if not spot-on) to a theory of "deepening insolvency"[28] that has been roundly rejected in recent years.[29] Specifically, after describing the

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[27] *See* Defs. App. Ex. L-3, pp. 371-375.

[28] *See* Pl. App. A, Ex. A, pp. 2, 6-8; 48-49; Pl. App. B. Ex. F, pp. 65-67; Pl. App. C, Ex. A, p. 2.

[29] *See, e.g.*, *In re SI Restructuring, Inc.*, 532 F.3d 355, 363 (5th Cir. 2008) (plaintiff asserted that the unsecured creditors were harmed because the value of the debtor-company deteriorated as a result of a loan transaction, thus decreasing the amount of funds available for the creditors; the plaintiff denied seeking damages under a "deepening insolvency theory," but its expert quantified the harm suffered by the debtor based on this theory, estimating the value of the company at the time of the loan transaction at issue, and conducting a later estimate of the company's value at the time it filed for bankruptcy; the Fifth Circuit stated that a deepening insolvency theory of damages has been criticized and rejected by many courts and that it agreed with the Third Circuit Court of Appeals, which recently concluded that deepening insolvency is not a valid theory of damages); *Seitz v. Detweiler, Hershey & Assocs., P.C. (In re CitX Corp., Inc.),* 448 F.3d 672, 678 (3d Cir. 2006) (Seitz's malpractice claim fails because he cannot establish harm or causation; he could not establish harm because deepening insolvency is not a valid theory of damages for negligence).

Defendants' alleged breach of duty of care and overall inadequate and conflict-laden legal representation, the First Amended Complaint states in conclusory fashion that: "[a]s a direct result . . . [HELP]'s value was substantially diminished in 2008."[30] And, in reviewing the discovery material submitted by the parties in connection with the Dispositive Motion (*i.e.,* the answers to Interrogatories propounded upon the Plaintiff and the deposition excerpts of the Plaintiff and his two expert witnesses, Messrs. Roger Whelan and David Payne),[31] it is clear

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Note that the Plaintiff has denied, in post-hearing briefing, that he is presenting a "deepening insolvency" theory—stating, instead, that he is presenting a straightforward diminution of value damages theory allowed under Texas malpractice and fiduciary law. But, given that the Plaintiff has identified no tangible missed transaction attributable to the Defendants, and given that the First Amended Complaint and summary judgment evidence simply suggest that missed hypothetical transactions in Fall 2008 would have been more value-maximizing for HELP's creditors than the ultimate March 2009 bankruptcy filing, this court cannot help but view the Plaintiff's damages theory in this Adversary Proceeding as strikingly similar to the waning theory of deepening insolvency. While it is true that the Plaintiff does not mention in his First Amended Complaint any extra debt that was layered onto HELP between Fall 2008 and March 2009 (and incurrence of more debt during a specific time frame has typically been an element of the "deepening insolvency" theory), the fact is that there was, indeed, several millions of dollars of debt incurred by HELP between Fall 2008 and March 2009.

[30] *See* First Amended Complaint ¶ 51. *See also id.* at ¶¶ 53, 55, 58 (alleging that HELP suffered "diminution of its business enterprise value").

[31] *See* Defs. App. Ex. F, p. 145 (lines 3-13), p. 146 (lines 1-4), p. 161 (lines 9-17), p. 162 (lines 8-12), p. 163 (lines 11-25), p. 164 (lines 1-5), p. 166 (lines 1-6 & 20-25), p. 167 (lines 1-9), p. 170 (line 5) through p. 171 (line 22); App. Ex. G, p. 208 (lines 3-25), p. 210 (lines 1-24); Defs. App. Ex. L-3, pp. 371-375; Pl. App. B, Ex. B, p. 42 (line 6) through p. 44 (line 21); Pl. App. B, Ex. C, p. 48 (lines 1-9); Pl. App. C, Ex. A, pp. 2, 6-8.

that the Plaintiff is ***not*** asserting in the Lawyer-Defendant Adversary Proceeding that the Defendants' conduct led to a particular lost monetization transaction or a particular lost out-of-court workout. Rather, the theory of the Plaintiff is that there was ***business enterprise value*** in the 6-month window before HELP's bankruptcy filing that was higher than the ***business enterprise value*** at the time of the bankruptcy filing and, according to the Plaintiff's theory of the case, it is ***rational to assume*** the assets of HELP could have been sold or an out-of-court restructuring accomplished during that window and in such a way that would have been better for HELP than its ultimate bankruptcy result.[32] The Plaintiff and experts do not even put a probability on a possible transaction that could have occurred.[33] They simply posit that a value-producing transaction was possible and rational to assume.[34]

Under Fifth Circuit precedent applying Texas law, "[t]o establish [proximate] causation in legal malpractice cases, a

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[32] *See* Pl. App. C, Ex. E, pp. 1490-99.

[33] *See* Defs. Ex. N, p. 405 (lines 3-7).

[34] *See* Pl. App. C, Ex. E, p. 1694 (line 8) through p. 1695 (line 8) & p. 1701 (lines 3-22); Defs. App. Ex. F, p. 162 (lines 8-12), p. 163 (line 11) through p. 164 (line 5), p. 170 (line 5) through p. 171 (line 22) & p. 174 (line 25) through p. 175 (line 19); Defs. App. Ex. G, p. 208 (lines 3-25).

plaintiff must show cause in fact and foreseeability."[35] Causation in fact requires proof that an "act or omission was a substantial factor in bringing about injury, without which the harm would not have occurred."[36] "Foreseeability requires more than someone viewing the facts retrospectively and theorizing an extraordinary sequence of events through which the defendant's conduct brings about injury."[37]

The First Amended Complaint flunks *Twombly's* pleading standard because it contains only speculations, inferences, guesses, and conjectures about proximate causation. Under *Twombly*, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[38] A plaintiff "'must plead enough facts to state a claim to relief that is plausible on its face,' and his 'factual allegations must be enough to raise a right to

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[35] *Harrison v. Taft, Stettinius & Hollister, L.L.P.,* 381 F. App'x 432, 435 (5th Cir. 2010). The proximate cause standard also applies to a fiduciary duty claim against an attorney. *See Baker Botts, L.L.P. v. Cailloux,* 224 S.W.3d 723, 736 n.14 (Tex. App.—San Antonio 2006, pet. denied). These elements "cannot be established by mere conjecture, guess, or speculation." *Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472, 477 (Tex. 1995).

[36] *Id.* (internal quotations omitted).

[37] *Craig Hall v. Fulbright & Jaworski, L.L.P.,* No. 05-95-00488-CV, 1996 WL 87211 at *3 (Tex. App.—Dallas Feb. 29, 1996, no writ) (not designated for publication).

[38] *Twombly*, 550 U.S. at 555.

relief above the speculative level.'"[39] "The court should not strain to find inferences favorable to the plaintiffs or accept conclusory allegations, unwarranted deductions, or legal conclusions."[40] Pleadings—like the First Amended Complaint here—that allege a mere ***possibility*** of a sequence of events, but do not ***show*** an actual missed transaction that would have produced value, do not form a basis for relief, and are thus subject to dismissal.[41]

Chief District Judge Fitzwater recently dismissed a similar complaint brought by a receiver-plaintiff against a law firm, holding that a conclusory pleading of proximate causation is insufficient under *Twombly.* In Judge Fitzwater's case, called *Reneker v. Offill*[42] a receiver for a set of entities alleged "little more than ... that [law firm-defendant] never informed the [entity clients] of the illegality of their actions."[43]

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[39] *Vinewood Capital LLC v. Sheppard Mullin Richter & Hampton, LLP,* 735 F.Supp.2d 503, 515 (N.D. Tex. 2010) (Means, J.) (quoting *Twombly*, 550 U.S. at 555, 570).

[40] *RJ Sunset LLC v. Nationwide Ins. Co.,* 4:11-CF-84, 2011 WL 2038593, at *2-*3 (S.D. Tex. May 20, 2011) (internal quotations omitted) (dismissing complaint for conclusorily alleging the elements of the claim).

[41] *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (also holding that assertions of legal conclusions are not entitled to the assumption of truth).

[42] No. 3:08-CV-1394, 2009 WL 3365616, at *5 (N.D. Tex. Oct. 20, 2009).

[43] *Id.* at *5.

Because the receiver did not allege that the entity clients were unaware that their actions were illegal or that their illegal actions were caused by or committed as a result of negligent advice from their attorneys, the court held that the complaint failed to plead sufficient facts to support a plausible case for causation.[44] The court consequently dismissed the complaint as insufficient under *Twombly*, because "it would have been speculative to assume that any change in [law-firm-defendant's] actions would have altered the actions of the [entity-clients] themselves."[45] By analogy, courts also have found damage theories—like the Plaintiff's—that are based upon the non-occurrence of a hypothetical transaction to be impermissibly speculative.[46]

Without alleging some factual basis for the Plaintiff's

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[44] *Id.* at *6.

[45] *Id.*

[46] *See CQ, Inc. v. TXU Mining Co., L.P.,* 565 F.3d 268, 277-79 (5th Cir. 2009) (affirming summary judgment for defendant and exclusion of plaintiff's expert who would have testified that "but for" the defendant's breach of a confidentiality agreement, plaintiff and defendant would have agreed to an ongoing licensing agreement, holding that the exclusion was proper because a "hypothetical licensing agreement based on speculation and conjecture cannot be said to reliably measure [plaintiff's] actual loss."); *Hebert Acquisitions, LLC v. Tremur Consulting Contractors, Inc.*, No. 03-09-00385-CV, 2011 WL 350466, at *5 (Tex. App.—Austin, Feb. 4, 2011, no pet.) (plaintiff-purchaser's "overpayment" damages were speculative, conjectural, and unrecoverable, because there was no evidence that defendants would have sold the company that plaintiff purchased for the lower price plaintiff claimed he would have offered if given proper financial statements).

theory that HELP would have followed advice to seek, find, and close an actual transaction (and that a specific counter-party would have entered into one on precise terms that would have made HELP better off), the First Amended Complaint provides no facts that, taken as true, show that any act of the Defendants proximately caused HELP to suffer the claimed "diminution in value."[47] Moreover, simply arguing "diminution in enterprise value"—even if negligent conduct were shown—is not enough. Without a specific transaction being implicated, arguing "diminution in value" is virtually the same as arguing a theory of deepening insolvency as a cause of action or other basis of damages. As mentioned earlier, courts including the Fifth Circuit have dismissed deepening insolvency as a cause of action or stand alone basis for damages.[48] As in the *Reneker* case, the Plaintiff's First Amended Complaint does not contain "sufficient

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[47] *See Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 384 (5th Cir. 2009) ("To raise a right to relief, the complaint must contain either direct allegations or permit properly drawn inferences to support 'every material point necessary to sustain a recovery'; thus '[d]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief.'") (quoting *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995)).

[48] *See, e.g.*, *Torch Liquidating Trust*, 561 F.3d at 392 (noting that Delaware does not recognize a cause of action for deepening insolvency); *In re SI Restructuring, Inc.*, 532 F.3d 355, 363 (noting that deepening insolvency as a theory of damages had been criticized and rejected by many courts and ultimately agreeing with the Third Circuit, which recently concluded that deepening insolvency is not a valid theory of damages); *Seitz v. Detweiler, Hershey & Assocs., P.C. (In re CitX Corp., Inc.),* 448 F.3d 672, 677-78 (deepening insolvency is not a valid theory of damages for negligence).

factual allegations to support the requisite element that [the Attorney Defendants]" proximately caused damage, and it must be dismissed.[49]

Finally, the court determines that the Defendants in this Lawyer-Defendant Adversary Proceeding are entitled to summary judgment as a matter of law on the negligence claim (even if a plausible claim could be deemed to be established on the face of the First Amended Complaint) because Plaintiff lacks competent expert testimony on proximate causation and damages or any other potential evidence on essential elements of the Plaintiff's claim—***again***, it being necessary to establish that ***"but for"*** the Defendants' conduct, a specific transaction would have occurred on certain terms (not merely a hypothetical transaction could have occurred). The Plaintiff admittedly has no evidence of any real possible transaction that ***could have*** and ***would have*** occurred ***"but for"*** the Defendants' conduct.[50] No evidence of a possible

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[49] *See Reneker*, 2009 WL 3365616, at *6. *See also Hoffman v. L&M Arts,* 774 F.Supp.2d 826, 846-47 (N.D. Tex. 2011) (Fitzwater, C. J.) (granting motion to dismiss complaint containing only conclusory allegations regarding elements of intent and causation based upon *Twombly's* plausibility standard); *Washington v. Whittington*, No. 10–0356, 2010 WL 3834589, at *5 (W.D. La. Aug. 19, 2010) ("Conclusory allegations of causation do not suffice to withstand a motion to dismiss.").

[50] *See* Pl. App. C, Ex. E, p. 1509 (line 23) through p. 1506 (line 12) (Deposition of Plaintiff Expert Payne):

> Q: In any one of these hypothetical transactions with FEI or Chesapeake or any other third party, would there be a provision in there to address . . .

sale transaction. No evidence of a possible financing transaction. No evidence of any viable out-of-court restructuring scenario.[51]

> A: Well, . . . any provision related to, that's, you know, certainly possible between a buyer and seller.
>
> Q: You just don't know what they would have agreed to?
>
> A: Right, because I'm not testifying as to a specific transaction between a specific buyer and a specific seller.

See also Defs. App. Ex. N, p. 404 (lines 9-22) (deposition of Plaintiff Expert Payne):

> Q: Which one of these monetization transactions was available?
>
> A: Well, under the fair value standard, you're looking at a hypothetical cross-section, so, you know, any one of those could have been available and there's others.
>
> Q: All right. You say it could have been available. You don't know if a full or partial sale or exchange of properties to FEI was available, do you?
>
> A: Well, I know from the record there was some interest in that. I'm not saying that the – that that was absolutely the outcome and ordain that outcome, but it is a rational outcome.

[51] *Pierre v. Steinbach*, 378 S.W.3d 529, 534 (Tex. App.—Dallas 2012, no pet.) (to prove proximate cause in "malpractice cases involving business transactions, a plaintiff must show that the other party would have agreed to the additional or changed term in the contract and that the inclusion of the term would have put the plaintiff in a better position"); *Tolpo v. Decordova*, 146 S.W.3d 678, 683-85 (Tex. App.—Beaumont 2004, no pet.) (in a case where plaintiff sued his former attorney for alleged negligence in preparing a purchase-and-sale contract, where purchaser had not performed under the contract, the plaintiff complained that attorney had omitted a contract term and plaintiff's theory was had the term not been omitted, the purchaser could not have avoided his obligation to purchase the property; plaintiff held not to have raised a fact issue on the "causation" prong of negligence, because there was no evidence that the purchaser would have entered into the contract if the omitted provision had gone in the contract); *Harrison v. Taft, Stettinius & Hollister, L.L.P.*, 381 F. App'x 432, 435 (5th Cir. 2010) (affirming district court's finding that, without testimony from a counter-party

The Plaintiff has alleged that "[p]rudent managers and counsel would have explored every avenue available before filing a bankruptcy proceeding. This could include a sale of [HELP's] interests to FEI Shale or other third parties in whole or in part in order to preserve any remaining business enterprise value for [HELP] for its creditors." First Amended Complaint, p. 12, ¶ 48. This is classic so-called "inference stacking." It is asking the court to infer that there was such a transaction available, it could have been closed, and it would have yielded a better result than the ultimate bankruptcy case yielded. To be clear, the Plaintiff puts forth ***no allegation*** or ***evidence*** that there was a potential counter-party that would have purchased assets from HELP in the relevant mid-2008 to early-2009 time frame,[52] or provided alternative sources of funding (it cannot identify anyone that would have entered into these types of deals, much

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to a contact that it would have agreed to a certain missing term therein, plaintiff did not raise a fact issue on causation; plaintiff's expert could not raise a fact issue by only speculating that a counter-party to contract would have agreed to a missing term and that the missing term would have made plaintiff better off); *Floyd v. Hefner*, 556 F. Supp. 2d 617, 663-64 (S.D. Tex. 2008) (granting summary judgment on legal malpractice and breach of fiduciary duty claims because there was no evidence that but for the lawyers' advice and actions, the challenged actions would not have taken place; plaintiff's expert testimony to the contrary was speculative, conclusory and insufficient to prove causation).

[52] *See* Pl. App. C, Ex. E, p. 1490 (line 9) through p. 1495 (line 16) (Plaintiff's expert Payne admitting that there was never any full or partial sale with FEI Shale that was proposed, and that he did not know what FEI Shale might have done) & p. 1497 (line 17) through 1506 (line 21).

less what the terms of the deals would have been and that they would have been better for HELP than its ultimate result in bankruptcy). There is no affidavit from FEI Shale. In fact, there are findings in the FEI Shale Adversary Proceeding that FEI Shale refused to provide any more funding to HELP. *See* DE # 424, p. 90. Finally, the First Amended Complaint states that "[a]t a minimum, Defendants should have considered contacting [HELP's] lender, HPI, to negotiate a restructure of [HELP's] debt obligations. HPI had already modified [HELP's] loans on more than one occasion. . . . Yet, Defendants never advised [HELP's] independent board of directors to make any effort to contact HPI." First Amended Complaint, p. 13, ¶ 50. Assuming this is true, that the Defendants never advised HELP to attempt to negotiate with its secured lender HPI, again, ***there is no evidence of what would have happened if HELP had,*** and that this would have been a better result than the bankruptcy. In fact, to the contrary, there is summary judgment evidence from the owner of HELP's secured lender HPI (Craig Hall), indicating that HPI itself had borrowed much of the money it lent to HELP, and that HPI was under so much financial pressure in the fall of 2008 and early 2009 that HPI itself almost filed bankruptcy.[53] There is

[53] *See* Defs. App. Ex. K, pp.352-54 (Deposition of Craig Hall of HPI, stating that HPI was under so much pressure from its own banks in the Fall 2008 time frame that HPI itself almost filed bankruptcy). *See also* Pl. App. C, Ex. E, p. 1485 (lines 17-23) (suggesting that the indebtedness/note on which HELP was obligated to HPI was pledged as

not even a hint of a possible foregone deal with HPI (in fact, to the contrary, it appears that HPI was not in any position to negotiate or make concessions because it had its own economic stakeholders—primarily various bank lenders—to answer to).[54] In summary, the Plaintiff would need allegations or evidence of terms of an actual foregone deal, and that HELP and the counter-party would have closed on it, and that the Defendants were at fault for the foregone deal not having occurred. The First Amended Complaint is a classic example of so-called inference stacking;[55] the classic example of there being "no there there."[56] Accordingly, this court recommends that the Defendants be granted judgment on the pleadings and/or summary judgment on the negligence claim.

C. The Problematic Claim of Aiding/Abetting Others' Breaches of Fiduciary Duty.

The Plaintiff asserts that Mr. Anthony Gumbiner, "the key

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collateral to HPI's lenders, with the Plaintiff's own expert admitting that he did not know if that affected HPI's ability to enter into a possible out-of-court restructuring) & p. 1488 (line 21) through p. 1489 (line 13).

[54] *See* Pl. App. C, Ex. E, p. 1484-1486.

[55] *Baker Botts, L.L.P. v. Cialloux,* 224 S.W.3d 723, 734-736 (Tex. App.—San Antonio 2007, pet. denied) (plaintiff's speculative evidence as to whether certain events would have happened absent the attorney's alleged breach of duties would have required "impermissible inference stacking" to reached the desired conclusion and could not support a judgment for plaintiff).

[56] GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY (1937).

officer in both [HELP] and [the Non-Debtor Parent],"[57] owed fiduciary duties to HELP, including duties of utmost honesty, good faith and full disclosure. First Amended Complaint, ¶¶ 2 & 56-58 (with paragraph 56 referring to Mr. Gumbiner as "Chief Executive" and "Chairman" of the "Board of Directors" of HELP).[58] Mr. Gumbiner is purported to have breached those fiduciary duties allegedly owed to HELP, by doing such things as putting his own pecuniary interests above the duties he owed to HELP, subjecting HELP to unreasonable risks without full disclosure of such risks, withholding material information regarding the Non-Debtor Parent's plans from some of HELP's independent board members and officers to the detriment of HELP, and generally taking actions detrimental to HELP for the benefit of the Non-Debtor Parent and himself. The primary acts complained of (out of several) are Mr. Gumbiner's pushing for the declaration and payment of a $12

[57] There seems to be some dispute as to whether Mr. Gumbiner was actually ever an officer or director of ***HELP*** or, rather, was simply an officer and director of ***HELP's general partner,*** Hallwood Energy Management, LLC. *See* Defendants' Brief in Support of Motion for Summary Judgment or for Judgment on the Pleadings, p.45 [DE # 212]. Note that HELP's .01%-ownership general partner was Hallwood Energy Management, LLC (earlier known as HEC 4 Management, LLC) and HELP's 99.99%-ownership limited partner (at least at inception) was the Non-Debtor Parent. *See* Def. App. Ex. J-1, p. 303. Whichever is correct appears to be irrelevant. As explained above, fiduciary duties of any person that might have existed *vis-a-vis* HELP were eliminated in HELP's partnership agreement. *Id.* at pp. 310 & 312.

[58] *See also* First Amended Complaint, at ¶ 11 (stating that Mr. Gumbiner served simultaneously as the chief executive and chairman of the board of both HELP and the Non-Debtor Parent Group, from the time HELP was formed until three days before HELP filed bankruptcy on March 1, 2009, at which time Mr. Gumbiner resigned his positions at HELP.)

million dividend by the Non-Debtor Parent in December 2008, at a time when it had a $3.2 million funding obligation to HELP; plotting ways for the Non-Debtor Parent to avoid said $3.2 million funding obligation to HELP; and, also, allegedly concealing from the independent officers of HELP and HELP's creditors his intent to put HELP in bankruptcy, to all of their detriment. The Defendants are accused of knowingly participating, assisting and encouraging all of Mr. Gumbiner's misbehavior. First Amended Complaint, ¶¶ 56-58. As with the negligence claim, this misbehavior is described as having caused damages to HELP in the nature of lost business enterprise value.

The Dispositive Motion argues that the Defendants in the Lawyer-Defendant Adversary Proceeding: (a) are entitled to a judgment on the pleadings, even if all facts are assumed as true, because there is no plausible claim for relief under the *Twombly* standard; ***and,*** (b) even if the Plaintiff has, in fact, pleaded sufficient facts to state a plausible claim for aiding and abetting breach of fiduciary duty under a *Twombly* standard, Defendants are nevertheless entitled to summary judgment on this count, as there is no evidence to create a genuine issue of a disputed fact that might support certain elements of the claim. The Defendants' primary argument is that ***neither Mr. Gumbiner nor any other officer or director of HELP or the Non-Debtor Parent owed fiduciary duties to HELP*** (since fiduciary duties were

contractually eliminated in HELP's limited partnership agreement) and, thus, there could not be a claim against ***anyone*** for ***aiding and abetting*** an officer's or director's alleged breach of a fiduciary duty.

This claim can quickly be disposed of. The Defendants are indeed correct. Specifically, HELP was a Delaware Limited Partnership.[59] The limited partnership agreement through which HELP was created and governed provides that HELP shall be governed by Delaware law.[60] A partnership agreement that provides for the application of Delaware law shall be governed by and construed under the law of the State of Delaware in accordance with its terms.[61] And the law of the State of Delaware—specifically, the Delaware Limited Partnership Act, at Section 17-1101(d)—authorizes a Delaware Limited Partnership to ***eliminate fiduciary duties*** as to partners or other persons who otherwise may have such duties. Specifically:

> To the extent that, at law or equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied covenant of good faith and fair

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[59] *See* Defs. App. Ex. J-1 and J2.

[60] *See* Defs. App. Ex. J-1, p. 326, § 10.7.

[61] DEL. CODE ANN. tit. 6, § 17-1101(i) (2010).

dealing.[62]

HELP took advantage of this aspect of Delaware law and, indeed, replaced common law fiduciary duties that might otherwise apply with limited contractual duties. By the plain language of the HELP limited partnership agreement,[63] Mr. Gumbiner and others could only be liable for (a) gross negligence, (b) willful misconduct, (c) breach of the partnership agreement, or (d) a transaction providing him with an improper personal benefit that was not otherwise permitted by the limited partnership agreement. However, breach of fiduciary duty was carved out:

> **Section 5.4. Liability of Partners and Indemnification.**
>
> (a) The General Partner, the Limited Partners and their Affiliates, and their partners, officers, directors, employees and agents, shall not be liable, responsible or accountable in damages or otherwise to the Partnership or the other Partners for any acts or omissions that do not constitute gross negligence, willful misconduct or a breach of the express terms of this Agreement or for transactions from which such person derived an improper personal benefit (which shall not include any benefit permitted by Section 5.7(b) or any other provision of this Agreement) . . ..
>
> **Section 5.6 Duties of the Partners, Directors and Officers**
>
> (a) Except as otherwise expressly provided in this Agreement, none of the Limited Partners, the General Partner or any of their respective officers or Affiliates shall, to the fullest extent permitted by

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[62] DEL. CODE ANN. tit. 6, § 17-1101(d) (2010)

[63] Defs. App. Ex. J-1.

> Section 17.1101(d) of the Act, have any duties (whether fiduciary, quasi-fiduciary or otherwise and whether existing by statute, in equity, at common law or otherwise) or obligations whatsoever, by virtue of the relationships established pursuant to this Agreement, to take or refrain from any action that may impact the Partnership, the General Partner, any limited Partner or any of their respective Affiliates.
>
> (b) The provisions of this Agreement, including this Article V, to the extent they restrict the fiduciary and other duties and liabilities of a Person otherwise existing at law or in equity, constitute an agreement to restrict and replace such fiduciary and other duties and liabilities of such Person under Section 17-1101(d) of the Act . . ..[64]

It should be noted that the Delaware Chancery Court has recognized the ability of a limited partnership, under Delaware law, to eliminate fiduciary duties as part of its organizational governance scheme.[65] Principles of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain.[66] And, although Section 17-1101(d) of the Delaware Limited Partnership Act does ***not*** permit contractual elimination of the implied covenant of good faith and fair dealing, the Plaintiff has not alleged, in this Lawyer-Defendant Adversary Proceeding, that this implied covenant was

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[64] Defs. App. Ex. J-1, pp. 310 & 312.

[65] *Lonergan v. EPE Holdings LLC,* 5 A.3d 1008, 1017 (Del. Ch. 2010).

[66] DEL. CODE ANN. tit. 6, § 17-1101(c) (2010); *Brickell Partners v. Wise*, 794 A.2d 1, 3 (Del. Ch. 2001).

breached by Mr. Gumbiner.[67] Moreover, the Plaintiff has not alleged in this Lawyer-Defendant Adversary Proceeding that Mr. Gumbiner acted with gross negligence, committed willful misconduct, breached the partnership agreement, or received an improper benefit from HELP that was not otherwise permitted by the partnership agreement.

Finally, assuming that the claim for aiding and abetting breach of fiduciary duty could somehow be deemed to be viable, notwithstanding the applicable limited partnership agreement and Delaware law cited above, this court still believes that the claim must fail, for the very same reason that the negligence claim must fail—*i.e.,* because of there being missing allegations and missing summary judgment evidence regarding injury and proximate cause. *See* Section IV.B., herein. To be clear, no plausible facts have been pleaded that might establish proximate causation and damages, and no summary judgment evidence has been presented by the Plaintiff that might create a disputed fact issue on these elements. Simply arguing "diminution in enterprise value"—even if there were breaches of fiduciary duties by Anthony Gumbiner that were aided and abetted—is not enough.

[67] Moreover, the Delaware Chancery Court has cautioned that, when a limited partnership agreement eliminates fiduciary duties, courts should be all the more hesitant to resort to the implied covenant of good faith and fair dealing. Respecting the elimination of fiduciary duties in a limited partnership agreement requires that courts not bend an alternative and less powerful tool, *i.e.,* the implied covenant of good faith and fair dealing, into a fiduciary substitute. *Lonergan,* 5 A.3d. at 1018.

As mentioned earlier, proximate cause and damages requires proof that a particular "act or omission was a substantial factor in bringing about injury, without which the harm would not have occurred."[68] "Foreseeability requires more than someone viewing the facts retrospectively and theorizing an extraordinary sequence of events through which the defendant's conduct brings about injury."[69] It is clear from the summary judgment record that the Plaintiff lacks competent evidence on proximate causation and damages—***again***, it being necessary to establish that ***"but for"*** the Defendants' conduct, a specific transaction would have occurred on certain terms (not merely a hypothetical transaction could have occurred).

D. The Breach of Fiduciary Duty Claim.

Lastly, the Plaintiff has brought a breach of fiduciary duty claim. The Defendants have once again argued that such claim does not pass muster under the *Twombly* pleading standard or, alternatively, that Defendants are entitled to summary judgment as a matter of law on this claim.

First, to be clear, unlike the claim of ***aiding and abetting*** breach of fiduciary duty, discussed above, this claim is premised

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[68] *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (internal quotations omitted).

[69] *Craig Hall v. Fulbright & Jaworski, L.L.P.,* No. 05-95-00488-CV, 1996 WL 87211, at *3 (Tex. App.—Dallas Feb. 29, 1996, no writ).

on the notion that the Defendants ***themselves*** (who would not be covered by the HELP limited partnership agreement) committed ***their own*** breaches of fiduciary duties owed to HELP. To be sure, this claim (at least in theory—if not always in reality) is something distinguishable from negligence. While negligence (*i.e.,* legal malpractice), involves the lawyer's performance of his services, and whether he breached his duty to exercise the reasonable and ordinary care of a prudent attorney in performing those services (and, if so, whether a breach of this duty of care proximately caused some damages), breach of a fiduciary duty by a lawyer involves a lawyer's ***fidelity and integrity (not skill and care)***.[70] An attorney does, indeed, owe a fiduciary duty to his client as a matter of law.[71] An attorney's fiduciary duty owed to his client requires the attorney to render a full and fair disclosure of the facts material to the client's representation.[72] Breaches of this fiduciary duty are tantamount to concealment.[73] An attorney's fiduciary duty "includes absolute candor, openness, and honesty, without concealment or

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[70] *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

[71] *Floyd v. Heffner*, 556 F. Supp. 2d 617, 661 (S.D. Tex. 2008).

[72] *Id.*

[73] *Id.*

deception."[74] Also, a claim for an attorney's breach of fiduciary duty may arise when an attorney obtains improper benefit from representing the client, "benefitting improperly from the attorney client relationship by subordinating the client's interests to [the interests of the attorney], [improperly] retaining the client's funds, engaging in self-dealing, improperly using the client's confidences, failing to disclose conflicts of interest, and making misrepresentations to obtain these results."[75] Boiling the matter down to its essence, the focus of a breach of fiduciary duty claim may involve outright concealment somehow of a lawyer, or may involve an attorney obtaining an improper benefit from representing a client, whereas, in contrast, the focus of a legal malpractice claim is simply whether the attorney adequately and skillfully

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[74] *Id.*

[75] *Id. See also Archer v. Med. Protective Co.,* 197 S.W.3d 422, 427-28 (Tex. App.—Amarillo 2006, pet. denied) (finding that client stated independent claim for breach of fiduciary duty because client's allegations concerned a matter of divided loyalty, *i.e.,* lawyer put his own interest in keeping the business and favor of insurer over representation of client's/insured's interests); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.,* 97 S.W.3d 179, 190 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that client's complaints regarding law firm's failure to disclose and counsel client about conflicts of interest, its failure to withdraw from representing client in light of conflicts, and its failure to advise client to retain separate counsel because of conflicts were appropriately classified as a breach of fiduciary duty claim independent of negligence claim); *Jackson Law Office, P.C. v. Chappell,* 37 S.W.3d 15, 22-23 (Tex. App.—Tyler 2000, pet. denied) (holding that evidence of failure to disclose, misrepresentation, conflict of interest, and self-dealing supported jury's finding that attorneys breached their fiduciary duty).

represented the client.[76]

As this court understands the First Amended Complaint, the Plaintiff is alleging that the Defendants breached their fiduciary duties of loyalty, utmost honesty, good faith, and full disclosure by at least the following: (a) ignoring actual conflicts of interest between HELP and the Non-Debtor Parent, to the detriment of HELP, and to the benefit of Mr. Gumbiner and the Defendants (First Amended Complaint, ¶ 1); (b) choosing instead to zealously represent the interests of their more established clients, the Non-Debtor Parent and Mr. Gumbiner, while not zealously representing their other client, HELP (First Amended Complaint, ¶ 1); (c) not alerting HELP's independent officers and directors that Mr. Gumbiner did not intend to allow the Non-Debtor Parent to fund the remaining $3.2 million it was obligated to fund HELP and, in fact, the Non-Debtor Parent intended to pay a $12 million dividend to its shareholders which was prohibited by an agreement with HELP (First Amended Complaint, at ¶¶ 26, 28, 29, 30, 31, 32, 33, 37, 38, 39, 46, 49); (d) billing HELP, not the Non-Debtor Parent, for time the Defendants spent in devising arguments to avoid the $3.2 million payment owed by the Non-Debtor Parent to HELP—while HELP's independent officers were not allowed to attend discussions regarding same (First Amended

[76] *Floyd,* 556 F. Supp. 2d at 662.

Complaint, at ¶ 38); and, in summary (e) the Defendants allegedly breached their fiduciary duties owed to HELP in at least the following particulars (i) favoring the interests of the Non-Debtor Parent and Mr. Gumbiner over the interests of HELP; (ii) placing their own interest above the interests of HELP; (iii) representing the Non-Debtor Parent in HELP's bankruptcy in opposition to the interests of HELP; (iv) representing the Non-Debtor Parent in bankruptcy adversary proceedings adverse to HELP; and (v) concealing information from the independent officers of HELP regarding the Non-Debtor Parent's conduct and plans (First Amended Complaint ¶ 54).

1. The Anti-Fracturing Rule Does Not Preclude this Claim.

The Defendants have argued, among other things, that the breach of fiduciary duty claim against them is nothing more than a re-spun negligence claim and is, thus, barred by the anti-fracturing rule in Texas. Under Texas law, a plaintiff cannot fracture a legal malpractice claim into multiple causes of action.[77] The so-called rule "against dividing or fracturing a negligence claim prevents legal malpractice plaintiffs from opportunistically transforming a claim that sounds only in negligence into other claims."[78] Specifically, "[i]f the gist of

[77] *Reneker v. Offill*, No. 08-cv-1394, 2009 WL 804134, at *7 (N.D. Tex. Mar. 26, 2009) (C.J. Fitzwater).

[78] *McLendon v. Detoto*, No. 14-06-00658-CV, 2007 WL 1892312, at *2 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (not reported in

a client's complaint is [truly nothing more than] that the attorney did not exercise the degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim."[79] Dividing a claim for legal malpractice into separate claims for negligence, breach of contract, fraud, or any other claim will not change that the claim is one sounding in negligence.[80] Texas law does not permit a plaintiff to fracture or fragment a claim that sounds only in negligence into other claims.[81]

The Plaintiff essentially maintains that he is asserting separate, alternative theories for the Defendants' conduct: specifically, the Defendants did not ***merely*** give inadequate legal advice to HELP—breaching their duty to act as reasonable prudent lawyers—but, in fact, breached their fiduciary duties to show abundant good faith, utmost honesty and the like, ***and*** the Defendants also were ***actively concealing*** from HELP strategies of the favored-client, the Non-Debtor Parent.

This court disagrees with the Defendants that the gravamen

S.W.3d).

[79] *Id*.

[80] *Id.*

[81] *See generally Won Pak v. Harris*, 313 S.W.3d 454, 457 (Tex. App.—Dallas 2010, pet. denied) (and citations therein).

of the breach of fiduciary duty claim is one-and-the-same as the negligence claim. To be clear, for the anti-fracturing rule to apply, the crux of the lawsuit must focus on the quality or adequacy of the attorney's representation. Admittedly, if a complaint alleges fiduciary duties, it does not necessarily follow that there is a cause of action separate and apart from negligence. Very often, the breach of fiduciary duty claim is a disguised fragmenting of the negligence claim. But here, there appears to be more to the allegations and activities than just recasting claims of negligence under different labels. There is a theory here of failure to disclose and intentional concealment ***(and favoring the client that would survive over the client that was on its death-bed).*** If true, this may very well go to the integrity and fidelity of the lawyers and is subject to differing views, facts, and explanations and deserves an airing past summary judgment. Thus, this court does not believe the claim is barred by the anti-fracturing rule.

2. Improper Benefit.

The Defendants have also argued that the breach of fiduciary duty claim against them cannot prevail because an ***improper benefit*** must be pleaded or shown with summary judgment evidence in connection with this claim, and mere payment of legal fees to the Defendants (really, just to Hunton & Williams, LLP, not the individual lawyers) is ***not an improper benefit***. The Defendants

urge that "payment of fees" is the only "benefit" that has been implicated by the Plaintiff.

While an improper benefit is often discussed as one of the hallmarks or essentials of a breach of fiduciary duty claim against a lawyer,[82] and while payment of legal fees does not itself constitute an improper benefit,[83] this court finds some nuance here to warrant allowing the breach of fiduciary claim to proceed to trial. "An attorney breaches his fiduciary duty when he benefits improperly from the attorney-client relationship by, among other things, ***subordinating his client's interest to his own***, retaining the client's funds, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends."[84] Here, the nuance the court perceives is that it has been alleged (and shown with some summary judgment evidence) that Defendant Hunton & Williams, LLP subordinated HELP's

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[82] *Reneker*, 2009 WL 804134, at *9-10; *McGuire, Craddock, Strother & Hale, P.C. v. Transcontinental Realty Investors, Inc.,* 251 S.W.3d 890, 894 (Tex. App.—Dallas 2008, pet. denied).

[83] *Won Pak v. Harris*, 313 S.W.3d at 458 (noting, in affirming lower court's summary judgment in favor of attorney on breach of fiduciary duty claim, that plaintiffs did "not allege [the attorney] obtained an improper benefit from his representation or his failure to disclose any conflict of interest"); *Reneker*, 2009 WL 804134, at *7.

[84] *Id.* (citing *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied)) (emphasis added). Note that Chief Judge Fitzwater clarified in *Reneker* that "failing to disclose conflicts of interest" in this context means conflicts between ***lawyer and client***, not conflicts among multiple clients.

interest to ***its own interest in preserving a lucrative relationship with the Non-Debtor Parent and Mr. Gumbiner***. Specifically, HELP was headed to bankruptcy—this was clear at least as of mid-January 2009—and the Defendants kept representing both HELP and the Non-Debtor Parent for at least a month thereafter before resigning from representing HELP and referring HELP to new counsel that would represent it in connection with preparing for and filing a bankruptcy. All the while, the Defendants were discussing with the Non-Debtor Parent and Mr. Gumbiner theories of how to avoid funding their obligations to HELP. The theory of the Plaintiff's claim here is that the Defendants decided to cleave to and favor the clients that would survive. The allegation is that the Defendants were keeping the potential long-term client happy at the expense of HELP and its creditors. The allegedly improper benefit was the expectation of substantial fees from the Non-Debtor Parent and Mr. Gumbiner in future representations (as well as, perhaps, the improper benefit of HELP paying some of the fees billed by the Defendants relating to strategizing with the Non-Debtor Parent). "An attorney's 'pursuit of his own pecuniary interests over the interests of his client . . . can be viewed as claims involving breached fiduciary duties.'"[85] Again, the court believes this is all subject to

[85] *Jacobs v. Tapscott*, No. 04-CV-1968, 2006 WL 2728827, at *6 (N.D. Tex. Sept. 25, 2006) (Fitzwater, C.J.), *aff'd on other grounds*, 277 Fed. Appx. 483 (5th Cir. 2007) (per curium), *cert denied*, 129 S.

differing views, facts, and explanations and deserves an airing past summary judgment.

3. But What About the Absence of Proximate Causation and Damages?

As discussed at length in Section IV.B above, the bankruptcy court has concluded that utterly absent from this Lawyer-Defendant Adversary Proceeding (either in the First Amended Complaint or the summary judgment evidence) is the necessary ***causal connection*** between alleged acts or omissions of the Defendants and an injury. Nowhere is there an allegation or any piece of evidence that "but for" the Defendants' acts or omissions, that "x" would have been averted or that "y" (*i.e.*, a positive, value-producing transaction) would have happened.[86] The Defendants argue that a breach of fiduciary duty claim must fail for this reason—just as the negligence claim fails for this reason. However, Texas law has made clear that there is no requirement of actual damages in connection with a breach of fiduciary duty claim against lawyers. Rather, in the situation of there being no damages proximately caused, ***forfeiture of fees***

Ct. 299 (2008) (quoting *Archer v. Med. Protective Co.*, 197 S.W.3d 422, 427-28 (Tex. App.—Amarillo 2006, pet. denied)).

[86] *See* Defs. App. Ex. G, p. 208 (lines 3-25); Defs. App. Ex. L-3, pp. 371-75; Defs. App. Ex. N, p. 403 (line 9) through p. 405 (line 21); Pl. App. C, Ex. E, pp. 1694-95 & 1701.

may be a remedy.[87]

The Texas Supreme Court explained in the case of *Burrow v. Arce* when fee forfeiture may or may not be appropriate in the situation of a lawyer's breach of fiduciary duty. Adopting the view of the then-proposed RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (Proposed Final Draft No. 1, 1996), the Texas Supreme Court stated that the forfeiture remedy is restricted to situations of "clear and serious" violations of duty and that a violation is "clear" if a "reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer would have known that the conduct was wrongful."[88] Some of the non-exclusive factors that should be considered in determining whether a violation is clear and serious are: (a) gravity and timing of the violation; (b) its willfulness; (c) its effect on the value of the lawyer's work for the client; and (d) the adequacy of other remedies.[89] The Texas Supreme Court added another consideration, stating that courts should give great weight to the public interest in maintaining the integrity of the

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[87] *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999) ("To limit forfeiture of compensation to instances in which the principal sustains actual damages would conflict with both justifications for the rule. It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. An agent's compensation is not only for specific results but also for loyalty.").

[88] *Id.* at 241.

[89] *Id.* at 243.

attorney-client relationship.[90] The principle underlying the forfeiture remedy is that the lawyer is not entitled to be paid when he has not provided the loyalty bargained for and promised and there is a pre-supposition that the lawyer's clear and serious violation of a duty to a client destroyed or severely impaired the attorney-client relationship and, therefore, the attorney's right to compensation.[91] An attorney's compensation is not only for specific results but also for loyalty, and the failure to provide either impairs the right to compensation.[92] Forfeiture also serves as a deterrent, discouraging lawyers from being disloyal and taking person advantage of their trust.[93] Forfeiture is punitive in nature, its central purpose being to protect relationships of trust from disloyalty or misconduct.[94] The Texas Supreme Court summed up this area of law as follows:

> A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct . . . and therefore you are without remedy. . . . It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without full disclosure, it is a

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[90] *Id.* at 244.

[91] *Id.* at 237-38.

[92] *Id.* at 238-40.

[93] *Id.*

[94] *Id.*

> betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."[95]

In summary, the court believes there is disputed summary judgment evidence that creates disputed fact issues on whether there was a breach of fiduciary duty by the Defendants. This claim must go to trial. The court believes the requirement of an "improper benefit" is, indeed, alleged in the First Amended Complaint and is supported with some summary judgment evidence here (although the alleged "improper benefit" is certainly not as blatant as some situations involving such things as retaining a client's funds, engaging in self-dealing, improperly using client confidences, *etc.*), in that the ***Defendants are alleged to have subordinated HELP's interests to their own interest*** of keeping future business and fees from the Non-Debtor Parent and Mr. Gumbiner. However, there is no allegation or any summary judgment evidence that would create a causal connection between any act/omission and injury. Specifically, there is no allegation or summary judgment evidence of actual damages. Thus, the only possible remedy available to the Plaintiff, if a breach of fiduciary duty is determined to have occurred, is a forfeiture of some level of fees. Whether forfeiture of all or part of an agent's compensation is appropriate must be determined by a court

[95] *Id.* at 239.

based on the equity of the circumstances.[96] When contested fact issues must be resolved, a party is entitled to have that resolution made by a jury.[97] But the ultimate decision on the amount of any fee forfeiture must be made by the court.[98] Complete forfeiture of fees may not be necessary for the remedy to serve its purpose.[99] Finally, it would appear that the remedy would only be available as to the Defendant Hunton & Williams, LLP, and not the individual Lawyer-Defendants, since Hunton & Williams, LLP was the Defendant that billed and collected fees.

E. Waiver and In Pari Delicto

Finally, the Defendants have made arguments that the Plaintiff's claims are barred as a matter of law under a waiver theory because: (a) HELP signed a waiver letter on February 7, 2009, consenting to Hunton & Williams, LLP's future representation of the Non-Debtor Parent and waiving any conflicts associated with that;[100] and (b) HELP never moved to disqualify Hunton & Williams, LLP from representing the Non-Debtor Parent during HELP's bankruptcy case. The Defendants also argue that the Plaintiff's claims are barred as a matter of law because bad

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[96] *Id.* at 245.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 241.

[100] Defs. App. Ex. J-3, pp. 347-348.

acts, if any, that were committed by Mr. Gumbiner and assisted by the Defendants would have actually been committed wrongfully to benefit HELP; thus, the Plaintiff, as trustee for the Debtor, is barred by in *pari delicto*.[101] The court determines these doctrines to have no merit or applicability here. Thus, these arguments should be overruled.

V. CONCLUSION

In summary, this court believes that one narrow claim should go to trial: the claim for breach of fiduciary duty. And if there was a breach of fiduciary duty, then the remedy of forfeiture of fees paid by HELP to the Defendant, Hunton & Williams, LLP may be appropriate with regard to any fees paid by HELP to Hunton & Williams, LLP. To be clear, the court does not believe there is any viable claim for damages that has been pleaded or on which the summary judgment evidence creates a disputed fact issue. The court only believes there is a possible remedy of fee forfeiture available. Any remedy of damages is barred by lack of pleading a plausible claim and lack of summary judgment evidence on causation and injury.

Indeed, the most significant problem with this Lawyer-Defendant Adversary Proceeding is proximate causation and

[101] *Perterson v. Winston & Strawn, LLP,* No. 11 C 2601, 2012 WL 4892758, at *5 (N.D. Ill. Oct. 10, 2012).

damages. The First Amended Complaint and summary judgment evidence demonstrate that the Plaintiff's damages theory is flawed. It is akin to a deepening insolvency model. No damages are linked to specific conduct of the Defendants nor a specific missed opportunity. This court concludes that the Defendants are entitled to judgment on the pleadings and/or summary judgment on both the negligence claim and the aiding and abetting breach of fiduciary claim. However, the Plaintiff should be allowed to proceed to trial on his breach of fiduciary duty claim, but should only have a possible remedy of forfeiture of fees as to the Defendant Hunton & Williams, LLP. It appears there are disputed fact issues for a jury on the breach of fiduciary duty claim but, in the event a breach is found to exist, the District Judge should determine the equitable remedy of forfeiture of fees and whether some or all fees that Hunton & Williams, LLP collected should be forfeited.

WHEREFORE, IT IS RECOMMENDED THAT:

1. Partial summary judgment and/or judgment on the pleadings be **GRANTED** in favor of the Defendants on: Count One (Negligence) and Count Three (Aiding/Abetting in Breaches of Fiduciary Duties).

2. Summary judgment and/or judgment on the pleadings be **DENIED** as to Count Two (Breach of Fiduciary Duty), except that the remedy, in the event liability is found thereon, should be

limited to possible fee forfeiture only as to Defendant Hunton & Williams, LLP.

****** END OF REPORT AND RECOMMENDATION******