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SCANNED ON 12/1/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn _____ Justice PART 49

Index Number : 650058/2008
VERITAS CAPITAL MANAGEMENT
VS.
CAMPBELL, THOMAS J.
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 650058-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

ere read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

FILED
NOV 28 2008
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/24/08

Hon. Cahn
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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VERITAS CAPITAL MANAGEMENT L.L.C.,
VERITAS CAPITAL INVESTMENTS, LLC,
VERITAS CAPITAL MANAGEMENT II, LLC,
and VERITAS CAPITAL FUND MANAGEMENT, LLC,

Plaintiffs,

-against-

Index No. 650058/08

THOMAS J. CAMPBELL,

Defendant.

----------x

Herman Cahn, J,:

Motion Sequence numbers 001 and 002 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Defendant moves to dismiss the first through sixth causes of action based on documentary evidence, statute of limitations and failure to state a claim, CPLR 3211 (a) (1), (5) and (7). Defendant also moves to disqualify plaintiffs' counsel, Schulte Roth & Zabel LLP (Schulte Roth) on the ground that counsel previously represented defendant as well as plaintiffs, and that counsel may be called as a witness in this action (motion seq. 002), 22 NYCRR §§ 1200.21 and 1200.27, and Canon 9 of the Code of Professional Responsibility.

Plaintiffs allege that while defendant was employed by, and a member of, the plaintiffs, he secretly engaged in outside investment activities in pursuit of personal gain. They claim that he made personal investments in Omnicom Group, Inc., and failed to disclose those investments to plaintiffs' managers. They claim that this was in breach of a confidentiality agreement which defendant had signed in connection with his employment. They also contend that defendant breached his fiduciary duty and his duty of loyalty to them by failing to devote all of his time and

resources exclusively to managing and operating the business. They claim that defendant, whose employment was terminated on January 12, 2007, made false, defamatory statements about plaintiffs sometime after January 1, 2007, which statements violated the confidentiality agreement, and were defamatory per se.

Defendant seeks dismissal arguing that the claims fail because plaintiffs fail to allege that his personal investments unfairly competed with, or diverted, plaintiffs' business opportunities, fail to allege any duty breached by not disclosing those personal investments, and fail to specify the alleged defamatory statements. He also contends that the claims are contradicted by the documentary evidence. Defendant further asserts that the claims for breach of contract and defamation are untimely.

BACKGROUND

Plaintiffs Veritas Capital Management, LLC (Management I), Veritas Capital Investments, LLC (Investments), Veritas Capital Management II, LLC (Management II), and Veritas Capital Investments II (Investments II), are limited liability companies engaged in investing in middle market companies competing primarily in the defense and aerospace markets (Notice of Motion to Dismiss (N. Mot.), Ex. M, ¶¶ 2-6). Robert B. McKeon, a non-party to this action, was the majority member of Investments and Investments II, holding 62.5% interest in those companies, and was the majority member of non-parties Veritas Capital Fund I, LLC (Fund I) and Veritas Capital Fund II, LLC (Fund II) (see N. Mot., Exs. B, F, H, I).

Defendant Thomas J. Campbell was employed by Management I, Management II and Veritas Capital Fund Management, LLC (Fund Management), as an investment manager, from January 1993 through January 12, 2007 (id., ¶¶ 7,13). Campbell raised capital and managed

investments in a broad range of companies through buyouts, growth capital investments and leveraged capitalization (id., ¶ 14).

On January 8, 2000, Campbell executed a Confidentiality Agreement with Management I (the Confidentiality Agreement). In it, he agreed to devote all of his working time to the business of Management I (id., ¶ 17). Specifically, he agreed that during his employment period, he "will devote all of his working time exclusively to the business of [Management I] and he will not engage independently or with others in other investments or business ventures of any kind, other than routine investments in publicly-traded securities" (N. Mot., Ex. K, ¶ 2). He further agreed not to engage in "any conduct that is injurious to the reputation or interest of any of the Company Parties (as defined below), including but not limited to disparaging (or inducing or encouraging others to disparage) any of the Company Parties" (id., ¶ 3).

In connection with his employment, Campbell became a minority member of Management I and Investments I. Management I is the general partner of Fund I (Compl, ¶¶ 24-26). In connection with his employment by Management II, Campbell became a minority member of Management II and Investments II. Management II is the general partner of Fund II (id., ¶¶ 27-29).

In the Fund I and Fund II Limited Partnership Agreements, both McKeon and Campbell, as "Affiliates" of the general partner, agreed that they would devote all of their management time and resources exclusively to the management and operation of the partnership except for an immaterial portion of their time with respect to the "Excepted Investments and non-business interests" (N. Mot., Ex. D, Art. 6.1 [b]; N. Mot., Ex. I, Art. 6.1 [b]). In addition, they agreed not to engage independently or with others in other investments or business ventures of any kind,

except for certain "Excepted Investments" (N. Mot., Ex. D, Art. 6.7; N. Mot., Ex. I, Art. 6.7). These "Excepted Investments" generally were defined to mean investments made by the general partner and Affiliates prior to the date of each respective agreement as set forth in Exhibit C annexed to the Fund I Agreement (N. Mot., Ex. D, Art. 1.34). In addition, in the Fund II Agreement, the Excepted Investments included investment opportunities presented to Fund I and personal investments made by the Affiliates in marketable securities (which were defined as securities traded on any national securities exchange or otherwise so actively traded that the general partner determines that they have a readily ascertainable value), of up to $3 million, and "otherwise of the types not of primary interest to the Partnership" (N. Mot., Ex. I, Art. 1.34, 1.59).

Plaintiffs allege that Campbell engaged in outside investment activities and failed to comply with the restrictions set forth in the Fund II Agreement, and failed to comply with his duty to disclose his noncompliance (Compl, ¶ 42). They allege that, in March 2001, Campbell came to McKeon and asked whether Veritas would consider forming a company with an affiliate of Omnicom Group, Inc. (Omnicom), which transaction would help Omnicom in getting certain assets off its books (McKeon Aff, ¶ 6). Omnicom is a publicly traded holding company that manages portfolio companies in the advertising, marketing services, specialty communications, interactive/digital media and media buying services industries. McKeon attests in his affidavit that he told Campbell that Veritas was not interested, and instructed Campbell not to pursue the venture on his own (id.). Campbell, however, went forward with the Omnicom transactions on his own and, through a variety of investment vehicles owned and controlled by him, he acquired investments with a value of approximately $174 million, earning approximately $100 million

(Compl, ¶¶ 43-47; see McKeon Aff, ¶ 12). Plaintiffs further allege that Campbell was devoting a substantial amount of time, effort and resources to these outside investment activities, which were prohibited by the Fund I and Fund II Agreements (Compl, ¶ 49). Campbell first informed plaintiffs of these outside investment activities in December 2006, when allegations regarding them became public because of litigation brought by Omnigroup shareholders regarding financial transactions by Omnigroup principals (id., ¶¶ 43, 50-51; see McKeon Aff, ¶¶ 7-10; McKeon Aff, Ex. A). McKeon asserts in his affidavit that he believes that Campbell was using Veritas resources to work on his Omnicom-related investment activities during business hours (McKeon Aff, ¶ 13).

On January 12, 2007, plaintiffs terminated Campbell's employment (Compl, ¶ 52; McKeon Aff, ¶ 14). Plaintiffs allege that if they had been aware of Campbell's outside investment activities sooner, they would not have permitted him to become a member of Management II and Investments II (McKeon Aff, ¶ 15).

Plaintiffs claim that thereafter he made certain false, disparaging and defamatory statements, including:

> (i) sometime after June 29, 2007, Campbell told McKeon's assistant that "word on the street is a lot of people are unhappy and leaving [Veritas], including administrative staff;"
>
> (ii) on November 4, 2007, Campbell told the assistant that he heard "there's a lot of tension in the ranks at Veritas," and that a Veritas employee "is going to take his envelope and leave;"
>
> (iii) Campbell told a Veritas investor, Tim Wegner, in late Spring, early Summer 2007, that McKeon "knew that [Campbell] was doing these [Omnicom] deals all

> along," and that McKeon "had been offered the same opportunities," but had decided not to engage in them; and
>
> (iv) Campbell told another Veritas investor, Paul Fishbein, the same thing in the late Spring 2007

(McKeon Aff, ¶ 16).

Plaintiffs also allege that, as a full-time employee of Management II, Campbell became a member of Investments II, and was entitled to receive certain distributions pursuant to an "Incentive Allocation Percentage" under the Investments II Agreement. They assert that because Campbell's employment was terminated prior to specified dates, that is, after three years but prior to four years from the Closing Date, that Incentive Allocation Percentage was reduced to 60% (Compl, ¶¶ 55-61).

The Complaint:

Based on these allegations, plaintiffs assert seven causes of action. The first cause of action is for breach of Campbell's duty of loyalty to Management I, Management II and/or Fund Management by engaging in outside investment activities and failing to disclose them in violation of the Confidentiality Agreement. The second is for breach of fiduciary duty owed by Campbell to Management I, Management II, Investments I and/or Investments II by the same acts. The third asserts that Campbell fraudulently induced Management II and Investments II to admit him as a member by failing to disclose his outside investment activities, and failing to disclose that he was not devoting all his time and resources to the operation of Fund II. The fourth seeks recovery for breach of the Confidentiality Agreement, for engaging in outside investing activity and failing to disclose it. The fifth also is for breach of paragraph 3 of the

Confidentiality Agreement for disparaging the plaintiffs and their employees and officers. The sixth is for defamation per se based on Campbell's alleged disparaging statements. Finally, the seventh cause of action seeks a declaration that Campbell's Reduction Percentage under the Investments II Agreement is 40%, and, therefore, that his Incentive Allocation Percentage is 60%.

The Motion to Disqualify:

On his disqualification motion, Campbell argues that plaintiffs' counsel Schulte Roth was representing himself, McKeon and the plaintiffs, in connection with these transactions and, thus, has an impermissible conflict. He contends that a Schulte partner, Benjamin Polk, provided legal advice to him and McKeon, separately and jointly regarding the formation, structure and membership terms of the Veritas entities. Campbell asserts that Polk drafted the agreements relating to his and McKeon's rights between themselves and the Veritas entities, providing legal advice to both Campbell and McKeon. Campbell also contends that Schulte served as counsel in connection with various Veritas investment activities and, in that context, had an attorney-client relationship with Campbell. Moreover, Campbell urges that Schulte Roth must be disqualified under the advocate-witness rule, because Polk and another Schulte Roth attorney are likely to be necessary witnesses in this action and in another related action between these parties entitled Campbell v McKeon, et al., Index No. 600673/08, pending before this court.

The Motion to Dismiss:

Campbell moves to dismiss on a number of grounds. He argues that plaintiffs' claims for breach of the duty of loyalty and breach of fiduciary duty fail to allege that his personal investments unfairly competed with plaintiffs, or diverted business opportunities to Campbell or

others, to plaintiffs' detriment. Without such allegations, Campbell asserts, there was no sufficient allegation of breach of his duty of loyalty as an employee, or his fiduciary duty as a member of some of the Veritas entities. He contends that there are no allegations that he used plaintiffs' time, facilities or proprietary secrets in creating a competing business, and that his personal investments in any way competed with plaintiffs' business. He asserts that Fund I was engaged in investment opportunities in middle market companies in aerospace, automotive components, branded consumer products and metals, and that Fund II, was involved in investing in the defense and aerospace industries. He maintains that Omnicom was not in any of those businesses. He further contends that there are no allegations that he profited on his personal investments at the expense of plaintiffs, or that his pursuit of personal investments conflicted with plaintiffs' interests, so there is no breach of fiduciary duty.

Campbell contends that the breach of contract claims fail because they fail to allege that the Confidentiality Agreement was signed by plaintiffs and, therefore, the contract is unenforceable. In addition, he maintains that they are time-barred to the extent that they rely upon acts before March 6, 2002, more than six years before this action was commenced.

With respect to the fraudulent inducement claim, he urges that there is no duty identified which he breached by not disclosing the personal investments. Campbell also argues that the defamation claim fails to specifically plead the alleged defamatory statements, and is barred by the one year statute of limitations. Finally, Campbell contends that the complaint allegations are directly contradicted by the documents relied upon by plaintiffs.

DISCUSSION

The motion to dismiss is granted only as to the first, second, third and sixth causes of

action for failure to state a claim. The motion is also granted as to portions of the fourth and fifth causes of action as to alleged contract breaches occurring prior to March 6, 2002 on statute of limitations grounds. The motion for disqualification is denied.

The Motion to Disqualify:

The motion to disqualify is denied.

In support of his motion to disqualify, Campbell relies upon two provisions of the Code of Professional Responsibility: (1) DR 5-108 (22 NYCRR § 1200.27) ("Conflict of Interest; Former Client"); and (2) DR 5-102 (22 NYCRR § 1200.21) ("Lawyer as Witness"). With respect to former clients, the Code sets out two prohibitions on attorney conduct. First, Disciplinary Rule 5-108 (A) (1) prohibits an attorney from representing "another person in the same or a substantially related matter in which that person's interest is materially adverse to the interests of the former client" (DR 5-108 [A] [1]; 22 NYCRR 1200.27 [a] [1]). Second, DR 5-108 (A) (2) provides that "an attorney may not use 'any confidences or secrets of the former client except as permitted by DR 4-101 (C) or when the confidence or secret has become generally known" (*Jamaica Public Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636 [1998] [citing DR 5-108 [A] [2]; 22 NYCRR 1200.27 [a] [2]; *see also Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130 [1996]).

In seeking disqualification under DR 5-108 (A) (1), the moving party must show: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel; (2) that the matters involved in the prior and the present representations are "substantially related"; and (3) that the interests of the former client and present client are materially adverse (*Reem Contracting Corp. v Resnick Murray St. Assocs.*, 43 AD3d 369, 371 [1st Dept

2007][citing *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d at 131; *see also Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 151 [1st Dept 2006], *lv denied* 8 NY3d 802 [2007]). The movant has the burden of establishing all three elements in order for an irrebuttable presumption of disqualification to arise (*Jamaica Public Serv. Co. v AIU Ins. Co.*, 92 NY2d at 636; *see Lightning Park, Inc. v Wise Lerman & Katz, P.C.*, 197 AD2d 52, 55 [1st Dept 1994]).

The Court of Appeals has recognized that disqualification motions present significant competing concerns. While the Code provisions establish ethical standards to guide lawyers in their professional conduct (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]), they are not to be applied rigidly as if they are controlling law (*id.*; *see also Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d at 132). A balance must be maintained between the vital interest in avoiding the appearance of impropriety, the concern for a party's right to representation by counsel of its choice, and the danger that disqualification motions can become "tactical 'derailment' weapons for strategic advantage in litigation" (*Jamaica Public Serv. Co. v AIU Ins. Co.*, 92 NY2d at 638 [citation omitted]). Accordingly, the movant bears the burden of establishing that this drastic remedy is warranted (*O'Donnell, Fox & Gartner, P.C. v R–2000 Corp.*, 198 AD2d 154, 155 [1st Dept 1993]).

In the instant matter, Campbell has failed to meet his high burden of establishing that he had a prior attorney-client relationship with Benjamin Polk and Schulte Roth. In the absence of an agreement by the parties to the contrary, the attorney for a business entity represents the entity, and not its officers, members or employees (*see Omansky v 64 N. Moore Assoc.*, 269 AD2d 336, 336 [1st Dept 2000]; *Polovy v Duncan*, 269 AD2d 111, 112 [1st Dept 2000]; *Talvy v American*

Red Cross in Greater New York, 205 AD2d 143, 149 [1st Dept 1994], *affd* 87 NY2d 826 [1995]). This applies in the case of limited liability companies (*see Morris v Morris*, 306 AD2d 449, 452 [2d Dept 2003]), as well as partnerships (*see Dembitzer v Chera*, 285 AD2d 525 [2d Dept 2001]; *Omansky v 64 N. Moore Assoc.*, 269 AD2d 336; *see also Finkelman v. Greenbaum*, 14 Misc 3d 1217 [A], 2007 WL 102464 *10 [Sup Ct, Nassau County Jan 10, 2007]). The attorney- client relationship between a law firm and a business entity does not in itself create an attorney-client relationship between the law firm and a shareholder or member of the entity, unless the law firm assumed an affirmative duty to represent the shareholder or member (*Omansky v 64 N. Moore Assoc.*, 269 AD2d at 336, *see also Kushner v Herman*, 215 AD2d 633, 633 [2d Dept 1995]; *Walker v Saftler, Saftler, & Kirschner*, 239 AD2d 252, 253 [1st Dept 1997]; *LaMotte v Beiter*, 2006 WL 4682182 [Sup Ct, New York County May 30, 2006]; *Stratton Group, Ltd. v Sprayregen*, 466 F Supp 1180, 1184, n3 [SDNY 1979]). In determining whether an attorney-client relationship exists, the court must consider the actions of the parties (*Pellegrino v Oppenheimer & Co.*, 49 AD3d 94, 99 [1st Dept 2008]). There must be an explicit undertaking to perform a specific task (*id.*). A "party cannot create the relationship by his or her own beliefs or actions" unilaterally (*id.* at 99 [citing *Jane St. Co. v Rosenberg & Estis, P.C.*, 192 AD2d 451 [1st Dept], *lv denied* 82 NY2d 654 [1993]).

Campbell fails to present any evidence from his prior relationship with Polk that shows that Polk had agreed to and was acting as his personal attorney. Campbell asserts that he discussed with Polk a certain provision of Management I's Operating Agreement in detail, seeking his legal advice. He also claims that Polk also assisted him, McKeon and others in drafting the private placement memorandum for Fund I, and that he sought and obtained Polk's

advice and services in connection with the Fund I entities (Campbell Aff, ¶¶ 10-11, 13). He further alledges that Polk provided legal advice to him and McKeon regarding the formation and organization of the Fund II entities, and that he recalled specifically discussing provisions of the agreement regarding the fee allocations between the members and seeking Polk's legal advice (*id.* at ¶¶ 18, 20-21). Campbell also asserts that he and McKeon sought and obtained Polk's advice regarding Fund II's investments and the drafting of all the documents.

In response, Polk states in his affidavit that neither he nor Schulte Roth ever represented Campbell individually. Polk asserts that he prepared the documents governing the plaintiff entities based on decisions made by McKeon (Polk Aff, ¶¶ 7-8). He recalled a conversation with Campbell in which Campbell told him that he wanted to ask McKeon to include in the operating agreement for Management I a provision prohibiting McKeon's unilateral reduction of Campbell's interests, and that Polk raised the matter with McKeon, who agreed to address it in the documents (*id.*, ¶ 9). Polk asserts that Campbell acknowledged that Polk was counsel to the Veritas entities and McKeon when he said to Polk "I know you're Bob's lawyer." (*id.*, ¶ 10). Polk unequivocally states that Campbell never communicated to him that he expected that Polk would keep any part of their conversation confidential, and that Campbell's purpose in communicating with Polk was to ask him to ask McKeon to agree to the protection Campbell wanted (*id.*, ¶ 11). Again, with respect to the Fund II documents, Polk affirms that McKeon instructed him as to how to structure everything, and that he did not recall any conversation with Campbell in which Campbell communicated to him that he expected that Polk would keep the conversation confidential from McKeon (*id.*, ¶ 15-17). Polk unequivocally states that he did not represent Campbell individually, and that his professional relationship with Campbell has always

been derived exclusively from his role as counsel to the Veritas entities. He further states that no law firm with which he has been associated, or been a member of, has ever represented Campbell individually, executed a retainer agreement with him, or charged him for providing any legal services (*id.*, ¶ 25). He asserts that he did not consider Campbell his client, Polk never expressed to Campbell that he viewed him as his client, and Campbell never asked Polk to represent him individually in connection with the Veritas entities, and Polk has not done so (*id.*, ¶ 26).

In his reply affidavit, Campbell asserts that throughout his involvement with the Veritas entities he repeatedly asked Polk to explain to him the legal consequences of the various agreement he entered into in connection with Veritas, and that Polk explained everything to him in detail (Campbell Reply Aff, ¶ 5). He counters that he did on occasion ask that Polk not share with McKeon matters that Campbell and Polk discussed (*id.*, ¶ 7). Campbell further states that he sought legal advice from Polk regarding McKeon's investment in a company known as DynCorp, at issue in the related action between these parties, asking whether McKeon could take that investment opportunity for himself, and that Polk said that McKeon was within his rights to do so, advising Campbell not to raise the issue (Campell Reply Aff, ¶ 8).

Taken together, this proof fails to demonstrate that Polk has an attorney-client relationship with Campbell individually. Rather, the evidence shows that Polk advised Campbell as the attorney representing the Vertias entities. Polk's advice about the provisions of the agreements clearly were to Campbell as a member and/or employee of those entities. The fact that Polk went through the agreements and explained the various provisions is entirely consistent with his role as the Veritas entities' lawyer. Campbell fails to present any evidence, other than conclusory claims, that Polk or Schulte Roth affirmatively assumed a duty to represent

Campbell separate and apart from the plaintiffs (*see Omansky v 64 N. Moore Assoc.*, 269 AD2d at 336; *Kalish v Lindsay*, 47 AD3d 889 [2d Dept 2008]; *Walker v Saftler, Saftler, & Kirschner*, 239 AD2d at 253). Campbell fails to present evidence that Polk had explicitly undertaken to perform any specific tasks for him (*Pellegrino v Oppenheimer & Co.*, 49 AD3d at 99). Their discussions regarding the provisions of the agreements relating to the allocations between Campbell and McKeon were simply negotiations over those agreements. Polk's statements in his affidavit that Campbell referred to him as McKeon's lawyer is telling. It demonstrates that even Campbell was aware that Polk was not his lawyer, but was "Bob's [McKeon's] lawyer." Campbell's own beliefs and actions in seeking out and speaking to Polk about matters concerning the Veritas entities cannot create an attorney-client relationship with himself, individually, where there was none (*see id.*). It should be emphasized here that Polk has always represented the Veritas entities, and this is not a situation where a law firm has changed sides, from a former client to a current client whose interests are adverse (*Talvy v American Red Cross in Greater New York*, 205 AD2d at 150-51; *cf Casita, L.P. v MapleWood Equity Partners (Offshore), Ltd.*, 34 AD3d 251, 251-52 [1st Dept 2006]; *Matter of Greenberg*, 206 AD2d 963, 965 [4th Dept 1994]).

Therefore, because Campbell cannot prove the first of the three required factors, the irrebuttable presumption of disqualifications does not arise. As a result, Campbell must show that confidential information was disclosed by him to Polk as his attorney. Campbell has been unable to identify any such information. Instead, he has provided conclusory statements that he disclosed confidential information, saying only that "other than with respect to specific matters which Mr. Polk was instructed to communicate to Mr. McKeon, I made it clear to Mr. Polk that

such communications were intended to be confidential" (Campbell Reply Aff, ¶ 7). Campbell never actually specifies what "such communications" were. In addition, Campbell clearly was aware of McKeon's relationship to Polk, and did not have a reasonable basis to believe confidences he might reveal to Polk would be withheld from McKeon or plaintiffs (*see Kinlay v Henley*, 7 Misc 3d 1017 [A], 2005 WL 1021570, at *2 [Sup Ct, New York County March 21, 2005] [Cahn, J.]; *see Talvy v American Red Cross of Greater New York*, 205 AD2d at 149 ["[n]one of plaintiff's conversations with [the attorney] involved a client confidence since plaintiff at all times knew that [the attorney] represented his employer . . . and all his communications with [the attorney] took place in the context of that representation"]). Polk had an obligation to disclose to his client, the Veritas entities, whatever he learned from his client's employees or members in carrying out his duties as counsel. "Absent such an obligation, the ability of a lawyer to represent a corporate client would be imperiled" (*id.* at 150). Indeed, the express purpose of Campbell's communications with Polk about the agreements drafted by Polk was for Polk to discuss the subject with McKeon to obtain his approval to draft the documents as Campbell was suggesting (*see* Polk Aff, ¶¶ 9-11).

With respect to Campbell's communications to Polk about McKeon's DynCorp investment, that investment is unrelated to this action by plaintiffs, and will be addressed on motions now pending in that related action. Accordingly, Campbell has failed to meet his heavy burden of identifying confidential information disclosed by a former client to his attorney, and disqualification is not warranted.

Disqualification also is not warranted under the advocate-witness rule. Campbell urges that Polk's testimony will be necessary in this action. He argues that Polk drafted the relevant

operating agreements, and will be called to testify about them. He asserts that Polk's testimony will be prejudicial to the interests of the Veritas entities and that his testimony, or that of Ronald Richman, a litigation partner also from Schulte Roth, who met with Campbell before his termination, is necessary on the issue of plaintiffs' termination of his employment. In opposition, plaintiffs contend that Campbell cannot demonstrate any specific disputed facts necessitating Polk's or Richman's testimony. Plaintiffs also argue that Campbell has failed to make a showing that either Polk or Richman's testimony would contradict plaintiffs' positions on the claims.

The advocate-witness rule in DR 5-102 (A) provides that "[a] lawyer shall not act, or accept employment that contemplates the lawyer's acting as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client" (22 NYCRR 1200.21; *see Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 74 [1st Dept 2002]). The moving party carries a heavy burden of "identifying the projected testimony" and "demonstrating how it would be 'so adverse to the factual assertions or account of events offered on behalf of the clients as to warrant his disqualification'" (*Broadwhite Assocs. v Truong*, 237 AD2d 162, 163 [1st Dept 1997] [internal citation omitted]). Absent such a showing, it appears that the movant is simply seeking a strategic advantage by disqualifying his adversary's attorney of longstanding (*id.*).

Whether a lawyer "ought to be called" means whether the lawyer's testimony is "necessary" (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-46 [1987]; *Talvy v American Red Cross of Greater New York*, 205 AD2d at 152). While testimony may be relevant and even highly useful, it still may not be strictly necessary (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d at 446). "A finding of necessity takes into

account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (*id.* [internal citation omitted]; *Talvy v American Red Cross of Greater New York*, 205 AD2d at 152). Simply because an attorney was involved in the transaction at issue, or has relevant knowledge, does not make that attorney's testimony necessary (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d at 445; *Talvy v American Red Cross of Greater New York*, 205 AD2d at 152). Testimony that is merely cumulative is not strictly necessary (Ethical Consideration 5-10; *see Broadwhite Assocs. v Truong*, 237 AD2d at 163).

Campbell fails to demonstrate that it is necessary to call either Polk or Richman as witnesses. Campbell fails to provide any information about specific factual disputes that will necessitate Polk's testimony on Campbell's behalf. His conclusory assertion that disqualification is warranted simply because Polk drafted the operating agreements, and the meaning of some of the provisions may be at issue, fails to meet his heavy burden. He has failed to demonstrate that there will be a need to go behind the various agreements (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d at 446). He has simply not provided any basis to determine the significance of the matters, the weight of the testimony or the unavailability of other evidence. In fact, he does not even assert that Polk's testimony would be so adverse to the factual accounts of events offered on behalf of the Veritas entities. As plaintiffs aptly point out, Polk drafted the documents based on McKeon's instructions, and both Campbell and McKeon are available to testify if such parole evidence becomes necessary.

With respect to Richman, again, Campbell fails to demonstrate that his testimony is necessary. The only thing Richman would testify about is his meeting on December 20, 2006 with Campbell, which meeting, Campbell alleges, was the pretext for terminating him. The

events of that meeting do not appear to be relevant to any significant issue in this action. Moreover, Campbell himself can testify as to what occurred at the meeting, and McKeon can testify as to the basis for the decision to terminate Campbell. In addition, Campbell fails to show how plaintiffs will be prejudiced if Richman is called to testify on Campbell's behalf (*see Broadwhite Assocs. v Truong*, 237 AD2d at 163). Therefore, disqualification of either Polk or Richman is not warranted under the advocate-witness rule. As a result, there also is no basis to disqualify their firm, Schulte Roth.

The Motion to Dismiss:

First cause of action:

The first cause of action, for breach of the duty of loyalty, is dismissed.

The duty of loyalty is implied in the employer-employee relationship. It rests on the rule that a person who acts as an agent for another shall not in the same matter act for him or herself (*Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d 241, 247-48 [1st Dept 1989]). Unless the parties otherwise agreed, an agent is subject to a duty not to compete with the principal regarding the subject matter of the agency (Restatement [Third] of Agency § 8.04]). The duty of loyalty "has been limited to cases where the employee, acting as the agent of the employer, unfairly competes with his employer, diverts business opportunities to himself or others to the financial detriment of the employer, or accepts improper kickbacks (*Sullivan & Cromwell LLP v Charney*, 15 Misc 3d 1128 (A) *5 , 2007 WL 1240437 [Sup Ct, New York County April 30, 2007] [Fried, J.], citing *Western Elec Co. v Brenner*, 41 NY2d 291 [1977] [kickbacks]; *Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936] [earning secret

profits at expense of employer]; *Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d at 247-48 [diverting corporate opportunities]; *Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964] [competing with employer]).

Here, plaintiffs allege that Campbell breached the duty of loyalty by making personal investments with Omnicom and not disclosing them, and because his investments violated the terms of the Confidentiality Agreement (Compl, ¶¶ 65-66). They fail to allege, however, that he acted in a manner inconsistent with his agency or trust. They do not allege that Campbell unfairly competed with them. They do not allege that he was creating a competing investment fund, or that he improperly used plaintiffs' time, resources or confidential information to create a competing business. In addition, there is no allegation that Campbell received any improper kickbacks (*see Western Elec Co. v Brenner*, 41 NY2d at 295).

Moreover, they also fail to allege that he diverted any corporate opportunity that belonged to the Veritas entities. There have been several tests developed by courts to determine whether a venture should be considered a corporate opportunity (*see Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d at 247-48). One test is to determine whether the corporation has an "interest" or "tangible expectancy" in the opportunity (*id.*). The Fund I and Fund II private placement memoranda expressly provide that the funds would focus on investments in middle market companies in aerospace, automotive components, branded consumer products and metals (Fund I), and defense and aerospace (Fund II) (N. Mot., Exs. E at 12, J at 2). There is nothing in the complaint or in the affidavit in opposition that Campbell's personal investments in Omnicom were in those industries. In fact, McKeon asserted in his affidavit that when Campbell presented

the opportunity to invest in Omnicom to McKeon that McKeon stated that Veritas was not interested in engaging in those investments (McKeon Aff, ¶ 6).

A second test for determining whether a corporate opportunity has been diverted is whether the opportunity is the same as, necessary for, or essential to the line of plaintiffs' business (*see Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d at 248). Again, there are no such allegations here. A third method has been to determine if the parties understood, or it is reasonable to conclude that they understood, that the agent would simultaneously pursue other interests, even if related to, or in competition with, the company (*see id.*). In the instant case, it is reasonable to conclude, based on the language in the Confidentiality Agreement and the Fund Agreements, that the parties understood that both Campbell and McKeon would simultaneously pursue personal investments. Accordingly, Campbell's pursuit of such investments fails to provide a basis for claiming a breach of the duty of loyalty.

It is also fatal to plaintiffs' claim that they fail to allege that the time Campbell allegedly spent making the personal investments in Omnicom so diverted his attention from plaintiffs' business' that plaintiffs' business suffered. Thus, they fail to allege harm.

Finally, this claim simply duplicates plaintiffs' breach of contract claims, and is dismissed on that basis as well (*see William Kaufman Organization, Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000]). Accordingly, the first cause of action for breach of the duty of loyalty is dismissed.

Second cause of action:

The second cause of action, for breach of fiduciary duty is also dismissed. This claim is

based on the same allegations as the breach of the duty of loyalty and the breach of contract claims. As determined above, these allegations regarding Campbell's personal investments in Omnicom do not constitute a breach of his duty of loyalty, or of any fiduciary duty. An officer of a corporation is in a fiduciary relationship, and must discharge his duties in good faith (*see Foley v D'Agostino*, 21 AD2d at 66-67). Thus, the officer may not derive personal profit at the expense of the corporation (*see Bertoni v Catucci*, 117 AD2d 892 [3d Dept 1986]), unfairly compete with it, or without consent divert or exploit for his own benefit corporate opportunities (*see Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d at 248). There are no allegations that Campbell personally profited at the expense of plaintiffs, or that he pursued the investments in conflict with plaintiffs' interests. As with the first cause of action, this claim simply duplicates the breach of contract claims.

Third cause of action:

The third cause of action, for fraudulent inducement, fails to state a claim, and is dismissed. This claim is based on the allegations that Campbell fraudulently induced Management II and/or Investments II into permitting him to become a member by failing to disclose, and knowingly concealing, his personal investments which allegedly violated the Fund I and Fund II Agreements. To state a claim for fraudulent inducement, plaintiffs must plead: (1) a material misrepresentation of fact; (2) that defendant had a duty to disclose; (3) that defendant failed to disclose with the intention of inducing the plaintiff to rely; (4) that plaintiff justifiably relied upon the misrepresentation or nondisclosure; and (5) that plaintiff suffered an actual injury (*see Rivera v JRJ Land Property Corp.*, 27 AD3d 361, 364 [1st Dept 2006]). It is well-settled that a fraud claim fails where the fraud alleged merely relates to a party's claimed intent to

breach a contractual obligation (*see 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [1st Dept 2004]). Plaintiffs' fraudulent inducement claim, here, simply duplicates and is based on the identical facts as the breach of contract claims. It alleges no independent facts sufficient to give rise to tort liability (*see Barington Capital Group, L.P. v Arsenault*, 281 AD2d 166, 166-67 [1st Dept 2001]; *Comtomark, Inc. v Satellite Communications Network, Inc.*, 116 AD2d 499, 500 [1st Dept 1986]).

Plaintiffs also fail to assert factual, as opposed to conclusory, allegations of an intent to defraud (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 356 [1st Dept 2004]).

In addition, plaintiffs have not claimed any special damages proximately caused by the alleged misrepresentation that are not recoverable under the contract damages sought in the fourth and fifth causes of action for breach of contract. This is further evidence that these claims are duplicative (*see Town House Stock LLC v Coby Housing Corp.*, 36 AD3d 509, 509 [1st Dept 2007]; *Krantz v Chateau Stores of Canada, Ltd.*, 256 AD2d 186, 187 [1st Dept 1998]). Accordingly, the third cause of action is dismissed.

Sixth cause of action:

The sixth cause of action, for defamation per se, is dismissed for failure to state a claim. The elements of a defamation claim are: defamatory language of or concerning the plaintiff; published without privilege or authorization; to a third party; and damage to plaintiff's reputation (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; *see generally* Prosser and Keeton, Torts § 111, at 771-85 [5th ed]). Where a plaintiff alleges slander per se, e.g. injury in trade, business or profession, special damages need not be pleaded (*see Liberman v Gelstein*, 80

NY2d 429, 435 [1992]). A claim for slander in business and profession must be based on statements that are not compatible with the proper conduct of business, trade, profession or the office itself (*see Liberman v Gelstein*, 80 NY2d at 435, citing Prosser and Keeton, Torts§ 112, at 791 [5th ed]). The statements must be made in reference to a matter of significance and importance for that purpose, not just a general reflection on the plaintiff's character or qualities (*id.*; *see also Attas v Park East Animal Hosp., Inc.*, 235 AD2d 246 [1st Dept 1997]). CPLR 3016 requires that the particular words complained of must be set forth in the complaint, as well as the time, place, an manner of the false statement, and to whom the statement was made (*Dillon v City of New York*, 261 AD2d at 38).

Here, the statements relied upon by plaintiffs fail to meet the pleading requirements for slander per se. The June 29, 2007 statement, and the two November 4, 2007 statements by Campbell to Sharon Brown, that "word on the street is a lot of people are unhappy and leaving [Veritas], including administrative staff," "there's a lot of tension in the ranks at Veritas," and that a Veritas employee "is going to take his envelope and leave" (McKeon Aff, ¶ 16) are not the type of statements that are not compatible with the proper conduct of business. They are general statements about employee morale, and do not reflect upon the plaintiffs' performance or judgment as investment funds and investment fund managers. They do not reflect on the performance of plaintiffs' duties or infer some kind of unprofessional conduct (*see Chiavarelli v Williams*, 256 AD2d 111, 113 [1st Dept 1998]). In addition, these statements were made to a current employee of plaintiffs, not to an outside investor, and fail to impute to plaintiffs unfitness in the performance of their business. Accordingly, the statements are not reasonably susceptible of a defamatory meaning.

The remaining two statements upon which plaintiffs rely in their defamation claim are that: (i) Campbell told Tim Wegner, a Veritas investor, that McKeon knew that Campbell was doing these Omnicom deals all along, and that McKeon was offered the same opportunities and decided not to engage in them; and (ii) Campbell told Paul Fishbein substantially the same thing (McKeon Aff, ¶ 16). Not only do these allegations lack specificity with regard to the time and place that these statements were allegedly made, the statements do not refer to plaintiffs, and are not defamatory to them. The statements are about McKeon, who is not a party to this action. They are not sufficiently of and concerning plaintiffs (*see Carlucci v Poughkeepsie Newspapers, Inc.*, 57 NY2d 883, 885 [1982]) to constitute a basis for a defamation per se claim (*see Afftrex, Ltd. v General Elec. Co.*, 161 AD2d 855, 856 [3d Dept 1990] [defamation claim dismissed because statement reflected on company's former principal, not company itself]). Therefore, plaintiffs' sixth cause of action for defamation is dismissed.

Fourth and fifth causes of action:

Plaintiffs' fourth and fifth causes of action, for breach of contract, are dismissed only to the extent that they seek recovery for actions which occurred prior March 6, 2002, more than six years before this action was commenced. A claim for breach of contract is subject to a six-year statute of limitations (CPLR 213 [2]). The claim accrues at the time of the breach (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-03 [1993]). The action was commenced on March 6, 2008. The complaint alleges that Campbell began making personal investments which violated the Confidentiality Agreement at the end of 2000 or early 2001 (Compl, ¶ 44), that he continued in his outside investment activities until his employment was terminated on January 12, 2007 (*id.*, ¶ 49), and that he made disparaging remarks about plaintiffs in 2007 (*id.*,

¶ 101). To the extent that the complaint relies on Campbell's actions prior to March 6, 2002, more than six years before the action was commenced, those claims are dismissed.

Plaintiffs' assertion that Campbell should be equitably estopped from pleading the statute of limitations is denied. They fail to present any basis for the application of that doctrine.

The remainder of the breach of contract claims withstand dismissal. Campbell's argument that because plaintiffs did not sign the Confidentiality Agreement, there was no contract between the parties, is rejected. The party to be charged, Campbell, admittedly signed the agreement, and his signature is sufficient evidence that he intended to be bound (*see Flores v Lower East Side Serv. Ctr., Inc.*, 4 NY3d 363, 368 [2005]). As such, only the portions of the fourth and fifth causes of action for breach of contract, based on breaches occurring prior to March 6, 2002, are dismissed on statute of limitations grounds.

Accordingly, it is

ORDERED that the motion to dismiss is granted only to the extent that the first, second, third and sixth causes of action are dismissed for failure to state a claim, and the portions of the fourth and fifth causes of action with regard to breaches of contract occurring before March 6, 2002 is dismissed on statute of limitations grounds, and is otherwise denied; and it is further

ORDERED that the motion to disqualify plaintiffs' counsel Benjamin Polk , Ronald Richman, and Schulte Roth & Zabel LLP is denied.

Dated: November 24, 2008

ENTER:

J.S.C.