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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 600973/2007

LADDCAP VALUE PARTNERS, LP

vs.

LOWENSTEIN SANDLER PC

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 12/11/08

MOTION SEQ. NO.

MOTION CAL. NO.

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 sequence 004 and 005 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that Lowenstein Sandler PC's motion seeking summary judgment and dismissing the complaint is granted only to the extent of dismissing the first, second and third causes of action; and it is further

ORDERED that the portion of Lowenstein Sandler PC's motion seeking summary judgment on the fourth cause of action is granted only to the extent that the portion of the fourth cause of action seeking disgorgement of fees already paid is dismissed; and it is further

ORDERED that Laddcap Value Partners LP, Robert B. Ladd and Laddcap Value Associates LLC's cross motion seeking partial summary judgment with respect to Lowenstein Sandler's liability on plaintiff's malpractice cause of action and seeking summary judgment on Lowenstein Sandler PC's counterclaim for breach of contract is denied; and it is further

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

Dated:

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that Lowenstein Sandler PC's motion to preclude (sequence 005) is denied as moot, and it is further

ORDERED that this action shall continue as to the fourth cause of action and the counterclaims and third party causes of action; and it is further

ORDERED that counsel for Lowenstein Sandler PC shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.



Dated 3/11/09 ENTER: J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LADDCAP VALUE PARTNERS, LP,

Plaintiff,

Index No.: 600973/07

-against-

DECISION

LOWENSTEIN SANDLER PC,

Defendant.

----------x

LOWENSTEIN SANDLER PC,

Counterclaim and Third-Party Plaintiff,

-against-

LADDCAP VALUE PARTNERS, LP,

Counterclaim Defendant

and

ROBERT B. LADD and LADDCAP VALUE ASSOCIATES LLC,

Third-Party Defendants.

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**EDMEAD, J.:**

**BACKGROUND**

Motion sequences numbered 004 and 005 are consolidated for disposition.

In motion sequence number 004, Defendant, Counterclaim and Third-Party Plaintiff law firm, (Lowenstein Sandler) moves to dismiss the complaint and cross claims, and for summary judgment on the third-party claim, pursuant to CPLR 3211 and CPLR 3212.

Plaintiff and Counterclaim Defendant (Laddcap) cross-moves for partial summary judgment.

In motion sequence 005, Lowenstein Sandler moves to preclude evidence submitted by Laddcap in its cross motion for partial summary judgment.

Laddcap is a New York based investment limited partnership, managed by its general partner, Laddcap Value Associates, LLC (Laddcap Associates). Robert B. Ladd (Ladd) is the managing member of Laddcap Associates. In April of 2005, Laddcap engaged the services of Lowenstein Sandler to advise it in connection with a possible acquisition of Fab Industries, Inc. Pursuant to this engagement, Lowenstein Sandler sent Laddcap a Letter of Engagement, specifying its fees and billing practices.

In the fall of 2005, Ladd, acting on behalf of Laddcap, sought Lowenstein Sandler's advice with respect to Laddcap's investment in Delcath Systems, Inc. (Delcath). Pursuant to this representation with respect to Delcath, a Schedule 13D was filed with the Securities and Exchange Commission (SEC) on October 17, 2005, evidencing Laddcap's intent to take an activist position in Delcath stock. This schedule is required to be filed by shareholders owning five or more percent of the outstanding shares of a corporation who intend to take some formal action against the company. According to this Schedule 13D, Laddcap stated that it intended to engage in some or all of the following

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activities:

1. Acquire additional Delcath shares or dispose of the shares it currently owns;

2. Communicate with existing Delcath shareholders, or other persons who may become shareholders, regarding the replacement of Delcath's existing officers and board members;

3. Seek removal of one or more board members;

4. Solicit proxies for the election of Laddcap nominees;

5. Seek to merge, consolidate or transfer assets of Delcath; or

5. Take any other action as Laddcap may determine.

At the time of the 13D filing, Ladd reviewed the Delcath Certificate of Incorporation and By-Laws provided to him by Lowenstein Sandler. According to this Certificate of Incorporation, any shareholder who sought to nominate a person for election to the board at the next annual meeting (June 13, 2006) was required to identify such nominee to Delcath by December 30, 2005.

On November 10, 2005, Ladd amended the Schedule 13D filing to indicate that Ladd, on behalf of Laddcap, was interviewing candidates to propose for election to the Delcath board of directors. Further, the amendment indicated that Laddcap may call a special meeting of the shareholders for the purpose of retaining an investment banking firm to assist Delcath in

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exploring "strategic alternatives."

On January 5, 2006, Lowenstein Sandler sent Delcath a proposal to be included in the Delcath proxy solicitation, recommending the retention of an investment banking firm to assist Delcath in exploring a sale of its business.

In March, 2006, Ladd learned that he could not submit nominees for the board, because the December 30 deadline had passed. Ladd expressed his disappointment and surprise that he could not nominate potential directors for the June, 2006, election. Laddcap, in its complaint, maintains that Lowenstein Sandler failed to apprise it of this deadline.

On April 28, 2006, Laddcap issued a demand for a special shareholder meeting to vote on Laddcap's proposal to remove Delcath's CEO. Additionally, on May 25, 2006, on Lowenstein Sandler's advice, Laddcap launched a "just say no" campaign to Delcath shareholders, asking them to withhold their votes for the two incumbent directors up for re-election at the June meeting.

On June 5, 2006, Delcath published a Form 8-K with the SEC, reporting that the company had filed an incorrect version of its Certificate of Incorporation with the SEC. Under the incorrect version, directors could be removed only "for cause" upon a supermajority vote of the shareholders. Under the correct version of the Certificate of Incorporation, the directors could be removed "without cause" by a simple majority vote.

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On June 6, 2006, Laddcap amended its demand for a special meeting to add a demand that the shareholders vote on Laddcap's proposal to replace Delcath's entire board. Laddcap stated that this strategy stemmed from Delcath's disclosure of its correct Certificate of Incorporation. In the complaint, Laddcap asserts that Lowenstein Sandler should not have relied on Delcath's SEC filings with respect to the Certificate of Incorporation, but should have verified the information provided to the SEC by Delcath by searching the State files to determine whether the Certificate of Incorporation originally filed by Delcath was accurate.

At the shareholder meeting, the two incumbent directors were re-elected, but with only a minority of the shares voted. Lowenstein Sandler maintains that this result, indicating shareholder dissatisfaction, was a direct result of its advice regarding the "just say no" campaign. It is noted that at the time of the election, Laddcap owned approximately 10% of the Delcath shares.

After the shareholder meeting, the Delcath board announced that, as a result of the comments received from the shareholders, it was adding two independent and experienced directors to the board, and that it would be accepting shareholder nominees for those positions.

Ladd, allegedly on the advice of Lowenstein Sandler, did not

submit nominations, but commenced a shareholder consent solicitation on July 27, 2006, to replace the board, because he did not believe that the addition of two new board members would change the oversight management of the company. According to Delaware law, the state in which Delcath is incorporated, the consents, to be effective, must be delivered to Delcath within 60 days of the consent solicitation, in this case, by September 25, 2006.

On August 4, 2006, Delcath sued Ladd, Laddcap and Laddcap Associates in the federal court in the District of Columbia, alleging material misrepresentations in the consent solicitation materials. Delcath sought an injunction prohibiting Laddcap from taking any action based on the shareholder consents.

After the federal suit was filed, Ladd discussed whether Lowenstein Sandler would represent the defendants in the federal suit. A Lowenstein Sandler attorney allegedly told Ladd that this was a type of lawsuit in which Lowenstein Sandler had extensive experience, and it was agreed that Lowenstein Sandler would represent the Laddcap interests in the federal litigation. Laddcap now asserts that the attorney making this representation had no experience in these types of matters, and it was his representations that caused Laddcap to have Lowenstein Sandler handle this litigation.

On August 11, 2006, shortly after it was agreed that

Lowenstein Sandler would represent the Laddcap interests in the federal suit, Lowenstein Sandler sent Ladd a litigation hold letter, informing him of his obligation to retain documents relevant to the lawsuit. This letter was followed up the next day with an e-mail, reminding Ladd to preserve relevant documents.

On August 17, 2006, the District of Columbia court granted Laddcap's motion to remove the case to the federal district court either in New York or in Connecticut, and the same day the parties agreed to a temporary restraining order (TRO) to apply during the period it took to transfer the case to New York. The restraining order allowed Laddcap to continue to solicit consents, but prohibited it from taking any action based on those consents.

On August 24, 2006, Delcath re-applied for a TRO in the federal court in New York, and, as part of its application, Delcath included several affidavits in support of its underlying claims. On August 27, 2006, Laddcap responded to the Delcath application. Lowenstein Sandler decided to submit countering affidavits for certain of Delcath's factual assertions, but argued that the other assertions by Delcath were speculative and immaterial as a matter of law. Lowenstein Sandler allegedly explained this strategy to Ladd, indicating its belief that the Delcath arguments were speculative, and that it would not be in

Laddcap's best interests to inject too many factual disputes at this point in the litigation. Additionally, Lowenstein Sandler indicated that it would take a significant amount of time to investigate all of the factual allegations posited by Delcath, and that there was not enough time to do such investigation prior to the court hearing the application.

On August 29, 2006, the district court granted Delcath's TRO application, and set a hearing date of September 18, 2006, to determine whether or not to grant a preliminary injunction. September 18, 2006, was one week before the deadline for delivering the consent solicitations.

On September 7, 2006, Delcath wrote to the court complaining about Laddcap's discovery responses. The letter stated that Laddcap had failed to produce six e-mails regarding Ladd's director nominees, Laddcap having indicated that all e-mails had been deleted by Ladd prior to the institution of the lawsuit. The letter attached the six e-mails in question, which Delcath had obtained as part of its discovery in a separate litigation in Connecticut against one of Ladd's prospective nominees, a Delcath executive named Foltz. Lowenstein Sandler was not representing any party in the Connecticut lawsuit. The court held a hearing regarding these e-mails the next day.

As a result of the hearing, the court authorized Delcath to depose Ladd later that day regarding his computer usage, and to

obtain a computer forensics expert to take possession of Laddcap's computers.

Ladd testified that he had a practice of deleting e-mails daily, but, post litigation, he retained Delcath related e-mails. He also testified that he never used his home computers for work purposes.

Immediately after his deposition, Ladd informed Lowenstein Sandler that his testimony about his home computer usage was false. The next day, Lowenstein Sandler filed a declaration on behalf of Ladd to clarify and supplement his previous testimony. This declaration stated that he, Ladd, did use his family home computers for work purposes.

Delcath made a spoliation charge against Ladd, and Lowenstein Sandler searched the Laddcap computers for the missing e-mails. On September 11, 2006, Lowenstein Sandler informed the court that it had located one of the six e-mails, but it appeared that Ladd had deleted the others, as well as some other documents that related to Delcath. Lowenstein Sandler states that Ladd read and approved this letter prior to it being sent to the court.

Later in the day, on September 11, 2006, Delcath, in a telephonic hearing, complained that it could not complete its forensic investigation of the Laddcap computers by September 18, 2006, the date set for the hearing on the preliminary injunction,

and requested an adjournment to October, extending the TRO until that date. Lowenstein Sandler argued that extending the TRO beyond the September 25, 2006, consent delivery date would render the consents void, and would have the effect of being a decision on the merits. Lowenstein Sandler argued that the TRO be modified so as to allow the consents to be filed and delivered, while prohibiting them from actually removing the board until the completion of the hearing. The court denied Lowenstein Sandler's request on September 20, 2006, giving weight to the charge of spoliation against Ladd, and the TRO was extended until October 2, 2006, the adjourned date for the hearing on the preliminary injunction.

Lowenstein Sandler filed an emergency appeal, and the Second Circuit heard arguments on September 25, 2006, the day the consents had to be delivered. The Second Circuit reversed the district court, and permitted the consents to be filed, which they were that afternoon. Later that day, Laddcap replaced Lowenstein Sandler as its counsel.

The complaint alleges that Lowenstein Sandler's moving the case from the District of Columbia to New York, and its failure to support the opposition to the TRO with affidavits to counter Delcath's factual assertions, caused an unwarranted delay in Laddcap's acquisition of consents, and further caused Laddcap undue expense. Laddcap also argues that Lowenstein Sandler

should have known about the six e-mails produced in the Connecticut litigation, which would have avoided further delays.

Two weeks after Lowenstein Sandler was replaced, Delcath and Laddcap settled the litigation. As a result of this settlement, Delcath increased its number of directors to seven, appointed Ladd as an independent director, filled one of the open board seats with one of Ladd's nominees, secured the resignation of one of the board members who had been re-elected at the June, 2006, shareholder meeting, and delivered stock to Laddcap worth over $300,000 as partial compensation for its fees in connection with the consent solicitation.

Laddcap paid all of Lowenstein Sandler's invoices in full between October, 2005, through July, 2006. For the period from August, 2006, through October, 2006, Lowenstein Sandler sent invoices totalling $832,917.07, for legal services rendered. On October 18, 2006, Laddcap wrote to Lowenstein Sandler, refusing to pay the August and September invoices, even though Laddcap had received partial reimbursement for those fees from Delcath. Also, for the first time, Laddcap disputed the amounts it had previously paid to Lowenstein Sandler.

After the settlement with Delcath, Delcath's CEO resigned, and one of Laddcap's nominees took over that position. By August, 2007, the three directors targeted by Laddcap's consent solicitation had left the company. In February, 2007, Foltz, the

Delcath executive who was being sued in Connecticut as one of Ladd's nominees, returned to Delcath as an executive. On October 5, 2007, Ladd, at his examination before trial (EBT), stated that Delcath was in its strongest financial position in history.

Ladd had agreed, allegedly on the advice of Lowenstein Sandler, to reimburse Foltz for his legal costs in the Connecticut lawsuit. Up to September 27, 2006, in accordance with this agreement, Laddcap paid such counsel fees, but when Foltz failed to join with Laddcap in the Delcath settlement, Laddcap informed Foltz' counsel that it was refusing to pay any additional legal fees for the Connecticut action. Laddcap was sued on this guaranty agreement, and the matter was eventually settled. Laddcap asserts that Lowenstein Sandler should never have advised it to guarantee Foltz' legal expenses.

On March 26, 2007, Laddcap filed the instant lawsuit against Lowenstein Sandler, alleging four causes of action: one, fraud in the inducement; two, breach of fiduciary duty; three, malpractice; and four, a declaration that it owes no legal fees because Lowenstein Sandler failed to enter into a written retainer agreement with Laddcap.

Lowenstein Sandler instituted a third party action, alleging breach of contract, tortious interference with contract, unjust enrichment, and damages based on an alternate theory of quantum meruit.

**DISCUSSION**

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Each of Laddcap's causes of action will be discussed sequentially.

Laddcap's first cause of action, for fraud in the inducement, is based on the representations of Lowenstein Sandler's attorneys that Laddcap should retain Lowenstein Sandler to represent it in the federal litigation that alleged that Laddcap had made material misrepresentations on its consent solicitation. The fraud alleged to have been committed by Lowenstein Sandler amounts to statements to the effect that it would be highly cost effective to continue to use Lowenstein

Sandler as litigation counsel because it was already familiar with the underlying facts; that the Lowenstein Sandler lawyers who would defend Laddcap were specialists in that area of law; that so long as Laddcap got enough votes it would win the consent solicitation; and that Lowenstein Sandler would staff the federal action with its identified proxy solicitation specialists. Complaint ¶ 15.

In it opposition papers, Laddcap further states that the attorney making the above-indicated representations was newly admitted, with less than one year of experience, and therefore was neither expert nor capable in this field.

Not in the complaint, but in its opposition papers, Laddcap further states that additional grounds for fraud on the part of Lowenstein Sandler include billing a not-yet-admitted law school graduate as an associate attorney, and attempting to cover-up its failure to point out the December 30 deadline for nominations to the board to Laddcap.

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

> "[a] mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 1999]) Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required "to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282,

282-283 [1st Dept 1994]).

CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged deception.

In the instant matter, the allegations of fraud that appear in the complaint amount to "little more than mere puffery, opinions ... or future expectations that do not constitute actionable fraud." *Elghanian v Harvey*, 249 AD2d 206, 206 (1st Dept 1998), *Schonfeld v Thompson*, 243 AD2d 343 (1st Dept 1997) (alleged misrepresentations that are merely promissory or merely puffery are not actionable as fraud). Furthermore, statements regarding future intentions are not fraudulent, absent a showing that the person making the statement never intended to fulfill the promise, which is not alleged in the instant case. *Parisi v Metroflag Polo, LLC*, 51 AD3d 424 (1st Dept 2008).

Laddcap's allegation that Lowenstein Sandler's billing an unadmitted attorney as an associate constitutes a fraud is without merit. The term "associate" has been interpreted by the courts and ethics committees to mean a salaried lawyer-employee who is not a partner in the firm (NYC Eth Op 1996-8). In New York, it is common practice for law firms to bill new members of the firm who have graduated law school and taken the bar exam as "associates" while they await admission to the bar. *See*

*generally, 1097 Holding LLC v Ballesteros*, 19 Misc 3d 1126(A) (Sup Ct, NY County 2008); *Bell v Helmsley*, 2003 NY Slip Op 50866U (Sup Ct, NY County 2003). Consequently, this allegation fails to support a cause of action sounding in fraud.

Laddcap also maintains that, despite Lowenstein Sandler's representations, it did not assign an experienced attorney to represent the Laddcap interests in the federal litigation. This assertion is refuted by the fact that at least one of the attorneys assigned to the matter, Robert Minion, is a Stanford graduate with over 20 years of legal experience.

Laddcap's assertion that Lowenstein Sandler engaged in a fraudulent cover-up of its failure to inform Laddcap of the December 30 notification date is also without merit. These allegations of fraud are conclusory on the part of Ladd and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b).

Accordingly, Laddcap's cause of action for fraud is dismissed.

Laddcap's second and third causes of action, for breach of fiduciary duty and malpractice, are also dismissed.

The complaint states that the bases for the alleged breaches of fiduciary duty are the acts and/or omissions that form the bases for the malpractice claim. Complaint ¶¶ 37 - 44.

Recently, the Appellate Division, First Department, stated

that a plaintiff, in a legal malpractice/breach of fiduciary obligation lawsuit, may not seek to recover damages for a law firm's "breach of fiduciary duty on legal grounds less rigorous than those required for recovery under a theory of legal malpractice." *Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 4 (1st Dept 2008). In that case, the court went on to say that

> "to recover against an attorney, a client or third party is required to prove both the breach of a duty owed to and damages sustained as a result [internal citations omitted]."

*Id.* at 5-6.

The court further stated that, "in the context of an action asserting attorney liability, the claims of malpractice and breach of fiduciary duty are governed by the same standard of recovery." *Id.* at 6.

In order to sustain an action for legal malpractice, the proponent must prove three elements: one, that the attorney was negligent; two, that such negligence was a proximate cause of plaintiff's losses; and three, proof of actual damages. *Brooks v Lewin*, 21 AD3d 731 (1st Dept 2005).

> "In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages, so that a failure to establish proximate cause requires dismissal regardless whether negligence is established. Even if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice. Moreover, speculative damages cannot be a basis for legal

malpractice [internal citations omitted]."

*Pellegrino v File*, 291 AD2d 60, 63 (1st Dept 2002).

In the instant matter, Laddcap asserts in the complaint, paragraph 42, that Lowenstein Sandler lacked the "skill, experience and/or learning" to handle the securities litigation for which it was retained by Laddcap. In its opposition papers, Laddcap further enunciates the following acts which it alleges constitute legal malpractice: (1) Lowenstein Sandler failing to alert Laddcap to the December 30 deadline, causing Laddcap to seek a consent solicitation rather than have its directors elected; (2) Lowenstein Sandler's failure to submit detailed affidavits to counter all of the factual assertions in Delcath's TRO application, causing the court to issue a TRO; (3) Lowenstein Sandler's failure to acquire the e-mails Ladd deleted but which were given in discovery in the Connecticut action against Foltz so as to defeat the imposition of the TRO; (4) Lowenstein Sandler's failure to advise Ladd of the consequences of signing a guaranty for Foltz' legal expenses, causing Laddcap to engender additional legal fees; (5) Lowenstein Sandler's relying on the Delcath Certificate of Incorporation filed with the SEC, which resulted in Laddcap not being informed of the correct method to remove directors; and finally, (6) Lowenstein Sandler's failing to employ a trial strategy that would defeat the allegations lodged in the federal litigation in an efficient and effective

manner, which caused Laddcap to be obligated for additional legal fees.

Each of these assertions by Laddcap that Lowenstein Sandler's actions constituted negligence, the first requirement to maintain a cause of action based on a theory of malpractice, shall be discussed in turn.

The missed December 30 deadline.

According to the Schedule 13D filed by Laddcap, nominating persons to be placed on Delcath's annual proxy solicitation for directorship was one of several objectives specified. Although Ladd asserts that placing dissident nominees on the Delcath proxy statement was its primary objective, this assertion is unsupported by any other evidence, either testamentary or documentary. Lowenstein Sandler maintains that, had Laddcap decided on having its own slate of directors placed on the Delcath proxy solicitation, it would have had to amend its Schedule 13D accordingly, which it did not do. *See SEC v Amster & Co.*, 762 F Supp 604 (SDNY 1991) (any material change with respect to a qualifying shareholder, i.e., the owner of at least 5% of the outstanding shares,'s intent must be reported on an amended Schedule 13D); *Azurite Corp. Ltd. v Amster & Co.*, 52 F3d 15 (2d Cir 1995) (under the securities law, once a shareholder's plan is definite, it must file or amend its Schedule 13D; until the shareholder's course of action is definite, there is no

requirement of disclosure); *TCS Capital Management, LLC v Apax Partners, L.P.*, 2008 US Dist Lexis 19854 (SD NY 2008).

Laddcap's assertion that it was definitely going to attempt to place its own nominees on the Delcath proxy solicitation, requiring that the December 30 deadline be met, is only supported by Ladd's own testimony. The amended Schedule 13D that was filed by Laddcap in November, 2005, only states that Laddcap is interviewing potential nominees, not that it had definitely decided to nominate potential directors.

To defeat a motion for summary judgment, the opponent must be able to present arguments based on evidentiary facts, and not rely on surmise, conjecture or speculation. *Grullon v City of New York*, 297 AD2d 261 (1st Dept 2002). Since Laddcap cannot evidence its definitive intention to attempt to place its own nominees on the Delcath proxy solicitation prior to December 30, it cannot assert that Lowenstein Sandler's alleged failure to alert it to that deadline was either malpractice or caused it any damages. To assert that Lowenstein Sandler was negligent, Laddcap would have to provide legally sufficient evidence that its strategy was determined prior to December 30, and that Lowenstein Sandler was alerted to that fact. This Laddcap has failed to do.

In motion sequence number 005, Lowenstein Sandler moves to preclude various calendar entries submitted by Ladd to bolster

his statement that he was vetting nominees for the Delcath proxy in November and December of 2005. In an earlier deposition, Ladd testified that he maintained no calendar records.

Firstly, these entries, by themselves, do not indicate that any nominees had been selected by Ladd prior to the December 30 deadline, and, even if they had demonstrated such a determination, there is no evidence to indicate that such strategy was conveyed to Lowenstein Sandler, which might raise an obligation on its part to alert Ladd to the deadline date. Secondly, the presentation of these calendar sheets are self-serving, conculsory, and directly contradict Ladd's earlier deposition testimony and, therefore, are insufficient to raise a triable issue of fact. *Avevalo v Nasdaq Stock Market, Inc.*, 28 AD3d 242 (1st Dept 2006); *Lupinsky v Windham Construction Corp.*, 293 AD2d 317 (1st Dept 2002). Under these circumstances, Lowenstein Sandler's objection to the use of these records are of no consequence.

The trial strategy employed by Lowenstein with respect to opposing the TRO and the overall federal litigation.

As a general rule, "an attorney's selection of one among several reasonable courses of action does not constitute malpractice [citation omitted]." *Orchard Motorcycle Distributors, Inc. v Morrison Cohen Singer & Weinstein, LLP*, 49 AD3d 292, 293 (1st Dept 2008); *Zarin v Reid & Priest*, 184 AD2d 385

(1st Dept 1992). Furthermore, Laddcap has failed to provide an affidavit from an expert who states that the strategies employed by Lowenstein Sandler failed to meet ordinary legal standards. *Darby & Darby, P.C. v VSI Int'l., Inc.*, 95 NY2d 308 (2000).

In its opposition, Laddcap provides the affidavit of Richard W. Cohen (Cohen), the attorney hired to replace Lowenstein Sandler. Lowenstein Sandler, in motion sequence number 005, moves to preclude this affidavit, asserting that Laddcap failed to identify Cohen as an expert, pursuant to its demand under CPLR 3101 (d) (1). In its response, Laddcap avers that Cohen's affidavit is not offered as expert opinion, but as an affidavit from a fact witness. Laddcap Opposition ¶ 4.

Regardless of whether Laddcap was required to identify Cohen as an expert, his affidavit is unavailing to support a claim of malpractice. In *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP* (301 AD2d 63, 68-69 [1st Dept 2002]), a legal malpractice action in which the plaintiff relied on the affidavit of another attorney to oppose a summary judgment motion, the court, in affirming the grant of summary judgment, stated:

> "[e]ssentially, the affiant-attorney was offering a legal opinion as to what performance or absence thereof constitutes legal malpractice. But making those determinations is the function of a court. As we recently pointed out in another case, 'expert witnesses should not ... offer opinion as to the legal obligations of parties ...; that is an issue to be determined by the trial court. Expert opinion as to a legal conclusion is impermissible.' An expert may not be utilized to offer opinion as to the legal standards which he believes

> should have governed a party's conduct. We do not rely on an attorney's affidavits to tell us what constitutes malpractice. Moreover, the affidavit offered here raises an additional concern. It is tinged with the sense that since the affiant would have done things differently, therefore the attorney being challenged was incompetent. Such a contest of strategies is easily reduced to a malpractice standard that impermissibly compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney, for whom bias is a necessary concern, rather than measuring counsel's performance against the much more objective standard of the profession's commonly prevailing practices [citations omitted]."

Further, Laddcap has failed to evidence that a different strategy would have resulted in a different outcome. Its assertions are merely unsupported conjecture. *Wilson v City of New York*, 294 AD2d 290 (1st Dept 2002).

Lowenstein Sandler's failure to produce e-mails.

The e-mails in question were part of the discovery produced in the Foltz litigation in Connecticut, a suit in which Lowenstein Sandler was not involved. Ladd had testified that he destroyed all these e-mails, and this false statement occasioned a claim of spoliation by Delcath. Ladd Deposition at 461. It is beyond cavil that the client who stated that he destroyed the evidence can claim that his attorney should have either, one, known he was lying or, two, obtained the evidence from attorneys on a different case in a different state involving a lawsuit in which the challenged attorney was taking no part.

The Foltz guaranty.

Laddcap asserts that Lowenstein Sandler committed malpractice by advising Ladd to sign the agreement guaranteeing Foltz' legal fees. In his deposition, Ladd states that he signed the guaranty without coercion and with full knowledge of its effect. Ladd Deposition, at 581. Laddcap maintains that Lowenstein Sandler is mischaracterizing the testimony, in which Ladd said that he did not want to sign, but did sign on advice of counsel. However, Ladd did sign of his own free will, and in its opposition, Laddcap fails to rebut this evidence.

Laddcap merely asserts that Ladd's deposition should not be admitted without a ruling as to the admissibility of the questions and the propriety of the objections raised at the EBT. However, no such motion has been made, nor does Laddcap aver that the objectionable portion of the deposition concerns the colloquy pertaining to this claim. As a consequence, the court may therefore consider such evidence. *See generally Zylinski v Garito Contracting*, 268 AD2d 427 (2d Dept 2000).

Lowenstein Sandler's reliance on Delcath's SEC filings as to the contents of Delcath's Certificate of Incorporation.

Not only was this allegation absent from the complaint, but Laddcap has failed to provide any legal support for its assertion that it is malpractice for an attorney to rely on the submissions and statements made under oath to a federal agency without researching the original documents from a different source.

> "Although '[a] court may properly look beyond the allegations in the complaint and deny summary judgment where party's papers in opposition to the motion raise triable issues of fact,' the plaintiff fail[s] to raise a triable issue of fact with respect to the new theory. Speculation and surmise are insufficient to defeat a motion for summary judgment [internal citations omitted]."

*Pesantes v Komatsu Forklift USA, Inc.*, 58 AD3d 832, 832 (2d Dept 2009).

Laddcap has also failed to substantiate its claim that it has suffered damages due to the alleged negligence of Lowenstein Sandler, a second requisite element needed to maintain this type of action. Laddcap's statements that it might have been able to have its own board members elected without the consent solicitation, and that the federal lawsuit would have ended earlier had Lowenstein Sandler employed a different trial strategy, thereby reducing Laddcap's legal fees, are mere speculation, and insufficient to meet a plaintiff's burden with respect to opposing a summary judgment motion in a legal malpractice suit. *Siciliano v Forchelli & Forchelli*, 17 AD3d 343 (2d Dept 2005). The court notes Laddcap's attempt to indicate, in its opposition papers, that it would have won the directorships at the June, 2006, meeting by Ladd's creative statistical analysis that Laddcap won by a "landslide" (Ladd Aff ¶ 28), but this, too, is mere speculation and conjecture on Ladd's part.

"Although the question of whether malpractice has been

> committed is ordinarily a triable factual issue, summary judgment may be granted if the attorney can establish that the client cannot prove at least one of the elements of malpractice [citations omitted]."

*Guiles v Simser*, 35 AD3d 1054, 1055 (3d Dept 2006); *Adamski v Lama*, 56 AD3d 1071 (3d Dept 2008)

Since Lowenstein Sandler has established that Laddcap has failed to meet the negligence element of a malpractice suit, summary judgment is warranted.

Therefore, for the foregoing reasons, that portion of Lowenstein Sandler's motion seeking summary judgment on Laddcap's causes of action based on a breach of a fiduciary duty and malpractice is granted.

The fourth cause of action seeks a declaration that Laddcap does not owe any fee to Lowenstein Sandler, because Lowenstein Sandler failed to provide Laddcap with a retainer agreement. This cause of action also seeks disgorgement of the fees it has already paid. This is the same issue presented by Lowenstein Sandler's third-party action for breach of contract, based on its legal representation of Laddcap.

By Joint Order dated December 30, 2001, the Appellate Divisions promulgated Part 1215 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York (22 NYCRR § 1215), which became effective on March 4, 2003. Pursuant to this rule, attorneys are mandated to provide a "client a written letter of engagement before commencing the

representation, or within a reasonable time thereafter." Subsection (b) of section 1215 delineates the information that must be addressed in such a letter of engagement:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

An attorney is also permitted to enter into a written retainer agreement with the client in lieu of providing a letter of engagement.

22 NYCRR § 1215.2 indicates certain exceptions to the mandates of § 1215.1, which includes, in subsection (b), "representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client."

Laddcap maintains that the letter of engagement allegedly sent to it by Lowenstein Sandler on April 21, 2005, is insufficient to meet the requirements of 22 NYCRR § 1215.1, both with respect to the scope of the representation and the notice of the right to arbitrate disputes, and therefore Lowenstein Sandler's claim for breach of contract must be dismissed.

The letter of engagement in question, appearing as Exhibit 5

to the Affirmation of Michelle A. Rice in support of Lowenstein Sandler's motion for summary judgment, attaches a detailed Policy Statement outlining all of Lowenstein Sandler's billing practices and charges, but it never mentions a client's right to arbitrate any fee dispute. However, "Part 137 of the Rules of the Chief Administrator of the Courts ... does not apply to legal-fee disputes that involve sums greater than $50,000." *Utility Audit Group v Apple Mae & R Corp*, ___ AD3d ___, 2009 WL 485488, 2009 NY App Div Lexis 1416 (2d Dept 2009). Since the fees generated by the subject representation are far in excess of $50,000, this argument posited by Laddcap fails.

The letter of engagement states that the scope of the services to be provided as, "to serve as your attorneys with respect to various matters that may arise from time to time, including but not limited to various matters relating to Fab Industries, Inc." This statement may be too indefinite to meet the standards envisioned by the Appellate Divisions with respect to Lowenstein Sandler's representation of Laddcap in the Delcath matters, and therefore raises a question of fact precluding summary judgment on this issue.

Although 22 NYCRR § 1215.2 provides that such letters of engagement are not necessary for representation that is of a similar kind as previously rendered to a client, Lowenstein Sandler's initial representation of Laddcap commenced after 22

NYCRR § 1215.1 was in effect, and so a letter of engagement meeting the statutory requirement needed to be in effect for the earlier representation, which, as indicated above, may not be the case.

Therefore, Lowenstein Sandler's motion for summary judgment for breach of contract, the contract being the letter of engagement, is denied, and Laddcap's cross motion seeking summary judgment on this portion of Lowenstein Sandler's motion is also denied.

Lowenstein Sandler has also pled, as an alternative to its cause of action for breach of contract, a cause of action to recover its fees based on a theory of quantum meruit.

An attorney who represents a client who fails to meet the requirements of 22 NYCRR § 1215.1 may still recover the value of the services rendered under a theory of quantum meruit. *Nicoll & Davis LLP v Ainetchi*, 52 AD3d 412 (1st Dept 2008); *Utility Audit Group v Apple Mae & R Corp, supra; Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54 (2d Dept 2007). Further, "a client may not use an attorney's noncompliance with 22 NYCRR § 1215.1 as a sword to recover fees already paid for properly-earned legal services." *Beech v Gerald B. Lefcourt, P.C.*, 12 Misc 3d 1167A (Civ Ct NY County 2006).

Lowenstein Sandler's motion seeking a summary judgment on Laddcap's fourth cause of action, seeking a declaratory judgment

that Laddcap does not owe Lowenstein Sandler any fees pursuant to the letter of engagement and that it is entitled to recover the fees already paid, is denied, but only to the extent that it refers to unpaid fees, for the reasons stated above. As a consequence, Laddcap's motion seeking summary judgment on this cause of action is also denied.

Lowenstein Sandler, in its counterclaim and third-party action, in addition to the causes of action for breach of contract and damages under a theory of quantum meruit discussed above, sets forth a cause of action for tortious interference with contract against Ladd and Laddcap Associates; a cause of action for unjust enrichment against Ladd, Laddcap Associates, and Laddcap; and a cause of action seeking contribution from Ladd and Laddcap Associates. However, Lowenstein Sandler's motion for summary judgment only seeks summary judgment on its breach of contract claim asserted in the counterclaim and third party action, and therefore these causes of action need not be addressed at this time.

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that Lowenstein Sandler PC's motion seeking summary judgment and dismissing the complaint is granted only to the extent of dismissing the first, second and third causes of action; and it is further

ORDERED that the portion of Lowenstein Sandler PC's motion seeking summary judgment on the fourth cause of action is granted only to the extent that the portion of the fourth cause of action seeking disgorgement of fees already paid is dismissed; and it is further

ORDERED that Laddcap Value Partners LP, Robert B. Ladd and Laddcap Value Associates LLC's cross motion seeking partial summary judgment with respect to Lowenstein Sandler's liability on plaintiff's malpractice cause of action and seeking summary judgment on Lowenstein Sandler PC's counterclaim for breach of contract is denied; and it is further

ORDERED that Lowenstein Sandler PC's motion to preclude is denied as moot, and it is further

ORDERED that this action shall continue as to the fourth cause of action and the counterclaims and third party causes of action; and it is further

ORDERED that counsel for Lowenstein Sandler PC shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: March 11, 2009

ENTER:

Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD