

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

BAMBOO SOLUTIONS CORPORATION)

Plaintiff,)

v.)

LAM QUOC LE et al.)

Defendants.)

Case No. CL 2013-1450

**PLAINTIFF BAMBOO SOLUTIONS CORPORATION'S
MEMORANDUM IN OPPOSITION TO DEFENDANT LAM LE'S DEMURRER**

Plaintiff Bamboo Solutions Corporation ("Bamboo") opposes the Demurrer filed by Defendant Lam Quoc Le ("Defendant"). The Complaint contains six counts against the Defendant and pleads sufficient facts to support all counts. Therefore, considering the allegations in the light most favorable to Bamboo, the Court should overrule the Demurrer.

Legal Standard

A demurrer tests the legal sufficiency of a pleading and should be sustained only if the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action. *Kitchen v. City of Newport News*, 275 Va. 378, 385 (2008); *see Lockett v. Jennings*, 246 Va. 303, 307 (1993); *Hop-In Food Stores, Inc. v. Serv-N-Save, Inc.*, 237 Va. 206, 209 (1989). A demurrer tests only the legal sufficiency of a pleading, not matters of proof. *Lockett*, 246 Va. at 307. When considering a demurrer, all facts properly alleged in the complaint are accepted as true. *Jared & Donna Murayama 1997 Trust v. NISC Holdings, LLC*, 284 Va. 234, 245 (2012). The facts admitted on demurrer include not only those alleged expressly in the complaint, but also those which can fairly be viewed as impliedly alleged, and those which can be reasonably

inferred from the facts alleged. *Rosillo v. Winters*, 235 Va. 268, 270 (1988). All that is required is that the complaint “clearly inform[] the opposite party of the true nature of the claim.” Va. Sup. Ct. R. 1:4(d).

Argument

I. Count I States a Valid Claim for Breach of Fiduciary Duty.

To state a claim for a breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages resulting from the breach. *Cartensen v. Chrisland Corp.*, 247 Va. 433, 443-44 (1994). These elements are alleged expressly in paragraphs 49, 51, and 52 of the Complaint.

Officers and directors owe a fiduciary duty to the company they serve. *See Adelman v. Conotti Corp.*, 215 Va. 782, 789 (1975) (“Under Virginia law an officer of a corporation, in his dealings with the corporation, has the same duty of fidelity which arises in dealings between a trustee and a beneficiary of the trust”). A fiduciary must tell his principal about anything “which might affect the principal’s decision whether or how to act.” *Owen v. Shelton*, 221 Va. 1051, 1054 (1981). An employee breaches his fiduciary duty if he solicits the employer’s clients or other employees prior to termination of employment. *Feddeman & Co. v. Langan Assocs.*, 260 Va. 35, 42 (2000). Directors of a corporation are required to exercise the utmost good faith and loyalty toward the corporation and may not act in a manner adverse to the corporation’s interest. *Id.* at 43. Usurpation of a corporate business opportunity is a breach of fiduciary duty. *Trayer v. Bristol Parking, Inc.*, 198 Va. 595, 603 (1956).

Moreover, resignation or termination does not automatically free an employee from his fiduciary obligations. *Today Homes, Inc. v. Williams*, 272 Va. 462, 474 (2006). A former employee may breach his duty to a former employer if the conduct began during employment or

if post-termination competition is “founded on information gained during the [employment] relationship.” *Id.*

The Complaint alleges clearly that Defendant was Bamboo’s Chief Operating Officer. (Compl. ¶ 2). This fact alone demonstrates the existence of a fiduciary obligation. The Complaint further alleges that Defendant secretly notified Bamboo employees of a valuable business opportunity while he was still employed by Bamboo (Compl. ¶ 40) and that he usurped that opportunity for his own personal benefit, concealing it from Bamboo and directing it to a new company that he formed (Compl. ¶¶ 32, 42). The Complaint further alleges that Defendant stole thousands of dollars from Bamboo. (Compl. ¶¶ 24, 25). All of these “bad acts” were in violation of Defendant’s fiduciary duties owed to Bamboo, and as alleged in paragraph 52 of the Complaint, Bamboo was damaged as a result. No further allegations are required to survive demurrer.

Defendant argues that officers and directors of a corporation may prepare to leave their employers without breaching their fiduciary duties. (*See* Mem. Supp. Dem. at 4 (arguing, “Mere preparation is not a breach of fiduciary duty”). While it is true that employees have the right to make certain preliminary arrangements, prior to the termination of employment, to compete with their employer, the Complaint in this case alleges much more than mere preparation. Bamboo contends not only that Defendant formed a competing company while still Chief Operating Officer of Bamboo, but that he went beyond the planning stage and actually started doing business through the competing entity. (Compl. ¶¶ 32, 39). Moreover, Defendant’s own case—*Williams v. Dominion Tech. Partners, L.L.C.*—held that the right to make preliminary arrangements to compete while still employed is not absolute, and that “the exercise of the right may constitute a breach of fiduciary duty.” *Williams v. Dominion Tech. Partners, L.L.C.*, 265

Va. 280, 289 (2003). The allegations of the Complaint are sufficient and the Court should overrule the Demurrer.

II. Count II States a Valid Claim Against Defendant for Aiding and Abetting His Co-Defendant's Breach of Fiduciary Duty.

Relying on an unpublished circuit court case from an undisclosed jurisdiction, Defendant argues that Virginia does not recognize any cause of action for aiding and abetting any tort. Defendant is mistaken. In *Ratcliffe v. Walker*, 117 Va. 569 (1915), the Virginia Supreme Court held that “[a]ny person present at the doing of a wrong, encouraging or inciting the same by words, gestures, looks or signs, or who by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal.” *Id.* (citation omitted). More specifically (and more recently), in *Halifax Corp. v. Wachovia Bank*, 268 Va. 641 (2004), the Virginia Supreme Court affirmed the trial court’s assumption that “Virginia recognizes a cause of action for aiding and abetting a breach of fiduciary duty.” *Id.* at 659-60. The Virginia Supreme Court went on to hold that “unless [the defendant bank] actually knows a breach of fiduciary duty is occurring and participates with mens rea in the consummation of the breach, it should not be held liable for aiding and abetting the breach.” *Id.* at 664. In this case, Bamboo alleges specifically that Defendant knew his brother, co-defendant Quoc Anh Le, was breaching his fiduciary duty, and that Defendant actively participated in his brother’s breach with the requisite mens rea. (See Compl. ¶¶ 54-56). Count II therefore presents a valid claim.

III. Count III States a Valid Claim for Conversion.

Defendant demurs to Bamboo’s conversion claim because, according to him, “Lam is not alleged to have taken Bamboo property for himself” and because, in any event, a conversion claim cannot lie for the unlawful taking of money because money is not “tangible.” (See Mem. Supp. Dem. at 8). Here again, Defendant’s own authorities demonstrate that he is wrong on the

law. With respect to the conversion claim, Defendant relies solely on *Golden v. Chaplin*, 79 Va. Cir. 155 (Fairfax 2009). In that case, however, Judge Robert J. Smith rejected the argument Defendant is making here. While Judge Smith held that an action in conversion “generally applies to tangible personal property,” (citing *United Leasing Corporation v. Thrift Ins. Corp.*, 247 Va. 299 (1994)), he went on to clarify that “[t]his general rule, however, does not stand for the proposition that money cannot be the subject of conversion.” *Id.* He then overruled the defendant’s demurrer to the conversion count, finding that money could be the subject of a conversion claim.

A person is liable for conversion for the wrongful exercise or assumption of authority over another’s goods, depriving the owner of their possession, or any act of dominion wrongfully exerted over property in denial of, or inconsistent with, the owner’s rights. *Simmons v. Miller*, 261 Va. 561, 582 (2001). In *Simmons*, the Virginia Supreme Court affirmed a jury verdict entered against a corporate officer and director for conversion, based in part on its finding of sufficient evidence that the corporate officer had “deprived [the corporation] of the use and value of its property, including...cash.” *Id.* at 582.

In this case, Bamboo alleges that Defendant wrongfully exercised or assumed authority over Bamboo’s property, depriving Bamboo of its possession, and that Defendant wrongfully exerted numerous acts of dominion over Bamboo’s property in denial of, or inconsistent with, Bamboo’s rights. (*See* Compl. ¶¶ 59-60). The Complaint goes into detail about the scheme between Defendant and his brother to skim money from Bamboo by inflating expenses, falsifying reports, and embezzling large portions of the supposed expense-reimbursement payments. (*See* Compl. ¶¶ 18-24, 37). These allegations are more than sufficient to state a claim against Defendant for conversion and the Demurrer should be overruled.

IV. Count IV States a Valid Claim for Fraud.

The elements of a cause of action for fraud are (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 557-58 (1998) (citations omitted). Bamboo's Complaint contains all the requisite factual allegations. Contrary to Defendant's arguments, it is not necessary to specify the precise time and place for every alleged misrepresentation. If a complaint alleges specific facts that identify the representations made by the defendant to induce the plaintiff to take a course of action, the misrepresentations are pleaded with sufficient particularity. *See Campbell v. Bettius*, 244 Va. 347, 351 (1992) (reaching this conclusion).

The key misrepresentations are set forth in paragraphs 14, 18, 21-24, 37 and 63. Bamboo contends that Defendant lied to Bamboo about the amount of expenses incurred by the Vietnam office, and that he did so on multiple occasions. Defendant's misrepresentations to Bamboo were material to Bamboo's decision to send money to Defendant's brother in Vietnam for supposed reimbursement of those expenses. (Compl. ¶ 64). Bamboo contends Defendant "knowingly and intentionally misrepresented the actual expenses" and that he made the false statements "with the intent to mislead Bamboo and to induce Bamboo to send hundreds of thousands of dollars to the Representative Office." (Compl. ¶¶ 63, 65). The Complaint also alleges that Bamboo relied on Defendant's misrepresentations and paid the requested funds, resulting in damages. (Compl. ¶ 66). These allegations are sufficient to state a claim for fraud.

V. Counts V and VI State Valid Claims for Attempted Statutory Business Conspiracy and Actual Statutory Business Conspiracy.

To prevail in a claim for statutory business conspiracy, a plaintiff must prove that two or more persons "combine[d], associate[d], agree[d], mutually undert[ook] or concert[ed] together

for the purpose of ... willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever.” *21st Century Sys., Inc. v. Perot Sys. Gov’t Servs., Inc.*, 284 Va. 32, 46-47 (2012) (quoting Va. Code § 18.2-499(A)). In addition, “any person who **attempts** to procure the participation, cooperation, agreement or other assistance of any one or more persons” to enter into such a conspiracy shall be equally liable. Va. Code § 18.2-499(B) (emphasis added); see *Greenspan v. Osheroff*, 232 Va. 388, 399 (affirming liability award for plaintiff on claim of attempted conspiracy).

Defendant appears to argue that the business-conspiracy statute carries a heightened pleading standard, and that a complaint must allege “details of time and place.” (See Mem. Supp. Dem. at 9). No such heightened pleading standard exists. Once again, Defendant’s own case debunks his argument: “Contrary to the defendants’ assertion, no Virginia court has adopted a ‘heightened pleading standard of particularity’ with respect to conspiracy claims. *Kayes v. Keyser*, 72 Va. Cir. 549 (Charlottesville 2007) (cited by Defendant on page 9 of his Memorandum).

Defendant also argues that “because Lam and Anh were both Bamboo’s agents at all relevant times, the intracorporate immunity doctrine also protects Lam against both the conspiracy and attempt claims.” (Mem. Supp. Dem. at 9). Defendant has not read the Complaint carefully, as Bamboo alleges clearly that Defendant entered into the conspiracy “since leaving the employee of Bamboo.” (Compl. ¶ 43). Thus, the intra-corporate immunity doctrine is inapplicable.

The Complaint contains all the requisite allegations. Bamboo alleges that Defendant and his brother “participated and continue to participate in a scheme to take Bamboo’s entire team of SharePoint programmers and developers and relocate them at Appvity, their new business

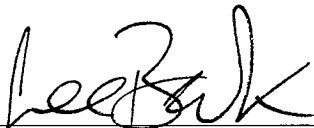
created for the purpose of taking Bamboo's resources and using them to compete against Bamboo." (Compl. ¶ 44). This was done for the purpose of willfully and maliciously injuring Bamboo in its business. (Compl. ¶ 73). A conspiracy to pillage a large group of employees of a former employer and relocate them to another company has been found sufficient by the Virginia Supreme Court to support a claim for business conspiracy. *See Advanced Marine Enterps., Inc. v. PRC Inc.*, 256 Va. 106, 117-18 (1998).

Bamboo has also sufficiently alleged an attempted conspiracy. In paragraphs 45 and 46 of the Complaint, Bamboo alleges that Defendant has attempted to orchestrate a mass resignation of Bamboo employees and re-direct them to Defendant's competing company. To state a valid claim for attempted conspiracy, it is not necessary to allege that the attempted conspiracy was successful. *See* Va. Code § 18.2-499(B). Therefore, Counts V and VI state actionable claims for both attempted and actual statutory business conspiracy.

CONCLUSION

The Court should overrule the Demurrer in its entirety and order Defendant to file an answer to the Complaint. Bamboo has alleged sufficient facts against Defendant to support all six of its claims.

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2013, a true and correct copy of the foregoing Memorandum in Opposition to Demurrer was served by facsimile on:

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