IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

The Michelin Retirement Plan, et al.,	:	**C.A. No. 6:16-cv-03604-HMH-JDA**
Plaintiffs,	:	
v.	:	
Dilworth Paxson LLP, et al.,	:	
Defendants.	:	

DEFENDANTS DILWORTH PAXSON LLP'S AND TIMOTHY B. ANDERSON'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' CLAIMS

Defendants Dilworth Paxson LLP ("Dilworth") and Timothy B. Anderson ("Anderson") (Dilworth and Anderson are referred to, collectively, as the "DP Defendants") submit this Memorandum of Law in Support of their Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

FACTUAL BACKGROUND

Plaintiff, The Michelin Retirement Plan ("the Plan"), is an employee welfare benefit plan established and maintained by Michelin North America, Inc., a corporation with its principal place of business in this judicial division. Complaint, ¶1. Plaintiff, the Investment Committee of the Plan (the "Investment Committee"), characterizes itself as a fiduciary of the Plan. *Id.*, ¶2.

On January 19, 1999, the Investment Committee entered into an Investment Management Agreement with Hughes Capital Management, LLC ("Hughes Capital"), a Virginia limited liability company. *Id.*, ¶¶4, 36. Plaintiffs allege that through the Investment Management Agreement, Hughes Capital assumed responsibility to "manage and invest certain Plan funds." *Id.*, ¶¶36-37.

Between August 22, 2014 and August 26, 2014, Hughes Capital allegedly purchased over $27 million in bonds for nine of its clients, including Michelin North America. *Id.*, ¶¶39, 72. The bonds were issued by Wakpamni Lake Community Corporation, a tribally-chartered corporation associated with the Oglala Sioux Tribe of the Pine Ridge Reservation in South Dakota. *Id.*, ¶5. According to the Complaint, Hughes Capital notified Plaintiff, the Investment Committee, of the Wakpamni Lake Community Corporation bond acquisition (the "Wakpamni Lake Bond") by letter dated September 2, 2014.[1] *Id.*, ¶40. After "considering the investment," Plaintiffs claim they "expressed concerns regarding the Bonds' valuation and suitability" and demanded that the Wakpamni Lake Bond be sold. *Id.*, ¶¶41, 75. The Investment Committee says it confirmed its demand that Hughes Capital dispose of the Wakpamni Lake Bond by letter dated October 10, 2014.[2] *Id.*, ¶41. In that same letter, the Investment Committee claims it (1) notified Hughes Capital it was terminating the Investment Management Agreement and (2) directed Hughes Capital to transfer the Plan's portfolio, except the Wakpamni Lake Bond, to Northern Trust Investments, Inc. *Id.* Plaintiffs allege that despite multiple "false" communications from Hughes Capital thereafter about efforts to sell the Wakpamni Lake Bond, the Wakpamni Lake Bond was never sold. *Id.*, ¶76. Plaintiffs also say that the Wakpamni Lake

[1] The letter is not attached to the Complaint.

[2] This letter is also not attached to the Complaint.

Bond proceeds were not invested in an annuity contract as required by the Bond Indenture but, rather, were misappropriated and utilized by defendant Jason Galanis "for his own benefit and that of his associates." *Id.*, ¶91.

Over two years later, Plaintiffs initiated this 58 page, 11 count Complaint against 23 defendants. Although the Complaint lists Dilworth as the first defendant, and contains conclusory allegations that the defendants, generally, carried out a "fraudulent conspiracy" (*see, e.g., id.*, Preliminary Statement), through various "purposeful, deceptive and reprehensible acts" (*id.*), Plaintiffs do not identify a single act by either Dilworth or Anderson which could support a claim for fraud or conspiracy.[3] Indeed, despite top billing, the DP Defendants' role was limited to representing Dilworth's client, Burnham Securities, Inc., as placement agent for the bonds, including the Wakpamni Lake Bond. *Id.*, ¶16. As counsel for Burnham Securities, Inc., an SEC-registered broker-dealer (*id.*, ¶14), Dilworth is alleged to have taken three actions:

> (1) provided a summary of the bond program to the Bond issuer, Wakpamni Lake Community Corporation (*id.*, ¶48);
>
> (2) forwarded an email to the Bond Indenture Trustee (*id.*, ¶54); and
>
> (3) drafted the standard investment (or "big boy") letter as part of the closing documents. *Id.*, ¶72.

Plaintiffs claim that these actions give rise to two causes of action against Dilworth and Anderson. Specifically, Plaintiffs seek to hold the DP Defendants liable under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1132(a)(3), which authorizes a plan beneficiary, participant, or fiduciary to bring a civil action:

> (A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or

[3] Plaintiffs also do not allege the required elements of fraud or conspiracy against either Dilworth or Anderson.

> (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan.

Complaint, Second Cause of Action, ¶¶130-39. Alternatively, and even though the Plaintiffs have no attorney-client relationship with the DP Defendants, Plaintiffs seek to hold the DP Defendants liable for Professional Negligence-Legal Malpractice. *Id.*, Tenth Cause of Action, ¶¶206-15.

Because this Court lacks subject matter jurisdiction and personal jurisdiction over the DP Defendants, because this jurisdiction is an improper venue, and because Plaintiffs have failed to state a cognizable claim against Dilworth or Anderson, Plaintiffs' claims against Dilworth Paxson LLP and Timothy Anderson must be dismissed, with prejudice.

ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER THE DP DEFENDANTS.

It is well established that a district court may assert personal jurisdiction over an out-of-state defendant only where the defendant has "certain minimum contacts" with the forum state such that the maintenance of the suit "does not offend traditional notions of fair play and substantial justice."[4] *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003) (citation omitted). These "notions of fair play and substantial justice" are embodied in the Due Process Clause of the Fourteenth Amendment. The Supreme Court standard "injects an element of foreseeability" into the analysis, which is satisfied when a defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the

[4] For the reasons set forth, *infra*, at pages 12-16 and 19-22, because this is not a proper ERISA enforcement action, Plaintiffs may not rely on ERISA to provide the basis for personal jurisdiction.

benefits and protections of its laws." *Platinum Hail and Dent Co. v. Ultimate Hail and Dent Co.*, No. CA:6-15-1658, 2015 WL 5602618, at *3 (D.S.C. Sept. 23, 2015) (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 474-75, 105 S.Ct. 2174, 85 L.Ed.2d 528(1985).[5] For personal jurisdiction to exist, the United States Supreme Court has determined that an out-of-state defendant must either have contacts with the forum so "continuous and systematic" that the defendant is "essentially home in the forum State" (*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011) (discussing general jurisdiction)) or "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, __ U.S. __, 134 S.Ct. 1115, 1121, 188 L.Ed.2d 12 (2014) (discussing specific jurisdiction).

A. <u>The Court Lacks General Jurisdiction Over the DP Defendants.</u>

As the Supreme Court recently confirmed, "the paradigm" forums for the exercise of general jurisdiction over a corporation are "the place of incorporation and the principal place of business." *Daimler AG v. Bauman*, __ U.S. __, 134 S.Ct. 746, 760, 187 L.Ed.2d 624 (2014) (citation omitted). Only in an "exceptional case" is general jurisdiction available anywhere else. *Id.*, 134 S.Ct. at 761 n. 19. Where an out-of-state defendant does not have an enduring relationship with South Carolina sufficient to indicate substantial, continuous and systematic contact, general jurisdiction is lacking and, therefore, personal jurisdiction does not exists. *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 837 (D.S.C. 2015) (no general jurisdiction where plaintiff failed to offer sufficient evidence that defendant has an enduring relationship with South Carolina so as to render it as home there).

[5] Copies of all unpublished decisions cited in this Memorandum are included in Exhibit 1 hereto.

In this instance, Plaintiffs concede that Dilworth is a Pennsylvania limited liability partnership "organized under the laws of Pennsylvania" with its principal place of business in Pennsylvania, not South Carolina. Complaint, ¶16. Anderson is alleged to have been associated with Pennsylvania-based Dilworth during the time relevant to Plaintiffs' claims. *Id.*, ¶17. Neither Dilworth nor Anderson is alleged to maintain an office in South Carolina, to be licensed to practice law in South Carolina, to own bank accounts or property in South Carolina or to otherwise transact any business operations in, or provide services to, individuals in this forum. Simply stated, neither Dilworth nor Anderson is claimed to be at home in South Carolina and, therefore, neither can be subject to general personal jurisdiction in this Court.

B. <u>The Court Also Lacks Specific Jurisdiction Over the DP Defendants.</u>

South Carolina's long-arm statute lists eight bases on which a court may exercise specific jurisdiction. S.C. Code Ann. §36-2-803. "When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him." S.C. Code Ann. §36-2-803(B).

Here, Plaintiffs claim that personal jurisdiction exists under "§36-2-803(d) and (g)" [sic][6] of the long-arm statute "since a part of the contract was to be performed in South Carolina and the Defendants knew the identity of Plaintiff whose location is a matter of public record." Complaint, ¶30. Plaintiffs do not identify which "contract" they allege gives rise to specific jurisdiction under S.C. Code Ann. §36-2-803(A)(7), leaving the Court and the DP Defendants to speculate on the basis for personal jurisdiction. Indeed, and as set forth in the Complaint, the

[6] Plaintiffs cite to provisions of the South Carolina long-arm statute before it was amended in 2005. Former subsection (d) is now subsection 4 and former subsection (g) is now subsection 7. References to the long-arm hereinafter will be to the currently applicable long-arm statute provisions.

only contract to which the DP Defendants are a party is the retention agreement between Dilworth, a Pennsylvania limited liability partnership, and Burnham Securities, Inc. a New York company with offices in California. Complaint, ¶16. *See also* Exhibit 2.[7] There are no allegations that any part of that contract was to be performed in this forum.

Moreover, for a forum state to exercise specific jurisdiction, the defendants' suit-related conduct must "create a **substantial connection** with the forum state." *Walden*, 134 S.Ct. at 1121 (emphasis added). "Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated'." *Id.*, at 1122 (citation omitted). Indeed, the minimum contacts analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.*

Here, Plaintiffs appear to be relying on their own incidental presence in South Carolina to provide the basis for specific jurisdiction over the DP Defendants. In *Walden*, the Supreme Court concluded that a defendant who had "never travelled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada," but who allegedly "directed his conduct at plaintiffs whom he knew had Nevada connections," could not be subject to jurisdiction in Nevada. *Id.*, at 1124-25. In reversing the Ninth Circuit decision, the Supreme Court held that the lower court improperly "shift[ed] the analytical focus from [defendant's] contacts with the forum to his contacts with [the plaintiff]." *Id.*, at 1124. According to the Supreme Court, the Court of Appeals approach "impermissibly allow[ed] a plaintiff's contacts

[7] The Dilworth Retention Letter with Burnham Securities, Inc., is among the documents referred to in the Complaint, but not attached to it. "[W]hen a plaintiff fails to introduce a pertinent document as part of his complaint, the defendant may attach the document to a motion to dismiss the complaint and the [c]ourt may consider the same without converting the motion to one for summary judgment." *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

with the defendant and forum to drive the jurisdictional analysis, when, in fact, the focus should be on the contacts that the defendant created with the forum state, if any." *Id.*, at 1125. *See, e.g., Consulting Engineers Corp. v. Geometric Ltd.*, 561 F.3d 273, 279-80 (4th Cir. 2009) (no jurisdiction over Colorado company alleged to have engaged in a conspiracy where company had no office or employees in forum, owned no property, had no on-going business activities and contacts were limited to 4 telephone conversations and 24 emails with in-state plaintiff because connection was "too attenuated" to justify the exercise of personal jurisdiction); *Platinum Hail*, 2015 WL 5602618, at *5 (no jurisdiction over defendant that entered into a settlement agreement with a South Carolina entity; even though part of the contract was to be performed in South Carolina and the brunt of the injury was supposedly felt in South Carolina, absent "sufficient concrete examples" of defendant's "purposeful availment of South Carolina," the minimum contacts test could not be met.)

The DP Defendants are not alleged to have any contacts with South Carolina, much less "sufficient concrete" contacts meaningful enough to support the exercise of personal jurisdiction. In truth, the DP Defendants

-- have never had an office in South Carolina,

-- are not registered to do business in the forum,

-- do not maintain an agent in the state,

-- are not licensed to practice in this jurisdiction,

-- do not have any South Carolina employees,

-- do not own real or personal property here,

-- do not solicit business in state; and

-- have never deliberately engaged in significant or long-term business activities within South Carolina. *See* Affidavit of James W. Hennessey, Exhibit 3 hereto, ¶4.d and Affidavit of Timothy B. Anderson, Exhibit 4 hereto, ¶5. There is also no evidence that the DP Defendants committed an intentional tort much less that they aimed tortious conduct at this forum in a manner that the forum can be said to be the focal point. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). *See also* Exhibit 3, ¶4.d and Exhibit 4, ¶5. Absent evidence of actions by the DP Defendants sufficient to create the necessary **substantial** connection between the DP Defendants and this forum, the exercise of specific personal jurisdiction under S.C. Code Ann. §36-2-803(A)(7) would not comport with the due process clause.

Plaintiffs' allegation of personal jurisdiction under S.C. Code Ann. §36-2-803(A)(4) is similarly unavailing. Indeed, Section 36-2-803(A)(4) provides that jurisdiction is permissible only ***if*** the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State." S.C. Code Ann. §36-2-803(A)(4). Plaintiffs do not, and cannot, allege that the DP Defendants meet this requirement. *See* Exhibit 3, ¶4.d. and Exhibit 4, ¶5. To the extent the DP Defendants are alleged to have taken any actions, none of those actions is alleged to have taken place in South Carolina. *See*, *e.g.*, Complaint, ¶48 (Dilworth and Anderson (located in Pennsylvania) provided WLCC (located in South Dakota) a summary of the bond program); *id.*, ¶54 (Dilworth (located in Pennsylvania) forwarded email instructions from Jason Galanis (located in California) to US Bank (located in Minnesota)); *id.*, ¶72 (Dilworth and Anderson (located in Pennsylvania) prepared a letter). Without any connection to the forum, the exercise of specific personal jurisdiction under S.C. Code Ann. §36-2-803(A)(4) would offend

the traditional notions of fair play and, therefore, is as constitutionally infirm as the argument for personal jurisdiction under S.C. Code Ann. §36-2-803(A)(7).

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

A. Plaintiffs Do Not Own the Bond and, Therefore, Lack Standing.

Article III, §2, of the United States Constitution limits the jurisdiction of federal courts to "cases" and "controversies" which "restricts the authority of the federal courts to resolving 'the legal rights of litigants in actual controversies'."[8] *Genesis Healthcare Corp., v. Symczyk*, __ U.S. __, 133 S.Ct. 1523, 1528, 185 L.Ed.2d 636 (2013) *quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (citation omitted). An "essential and unchanging part of the case-or-controversy requirement" requires plaintiffs to demonstrate that they have standing to adjudicate their claim in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). *See, also, Warth v. Seldin*, 442 U.S. 490, 517-18, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (the rules of standing are "threshold determinants of the propriety of judicial intervention.") To satisfy Article III's standing requirements, a plaintiff must show three elements:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
>
> (2) the injury is fairly traceable to the challenged action of the defendant; and
>
> (3) it is likely … that the injury will be redressed by a favorable decision.

[8] The mere fact that a complaint contains an allegation that a federal act was violated in insufficient to confer federal jurisdiction. *Mulcahey v. Columbia Organic Chemicals Co., Inc.*, 29 F.3d 148, 154 (4th Cir. 1994).

Smith v. Catamaran Health Solutions, LLC, 2016 WL 4555325, at *4 (D.S.C. Sept. 1, 2016) *citing Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The party invoking this Court's jurisdiction bears the burden of establishing all three elements of standing. *Lujan*, 504 U.S. at 561.

In determining whether subject matter jurisdiction exists, the district court is to regard the pleadings' allegations "as mere evidence on the issue." *Richmond, Fredricksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991) (citations omitted). Moreover, when analyzing subject matter jurisdiction, the district court should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Id.*

Here, all of Plaintiffs' causes of action are premised on the proposition that they purchased a Wakpamni Lake Bond for $8,102,154, which sum was supposedly diverted by defendants other than the DP Defendants. *See, e.g.*, Complaint, ¶39: "Hughes Capital raided $8,102,154 of employee retirement funds from [Plaintiff Michelin Retirement Plan] to purchase a Wakpamni Lake Bond;" *id.*, ¶91: the largest portion of the proceeds were "misappropriated by Jason Galanis for his own benefit and that of his associates." However, the Wakpamni Lake Bond issued at closing lists neither Plaintiff as the bond owner. *See* Exhibit 5 attached hereto. Rather, the Registered Owner of the Wakpamni Lake Bond at closing was Michelin North America Master Trust. *Id.* Michelin North America Master Trust is neither a party to this action, nor are there any allegations from which this Court can determine what, if any, relationship Plaintiffs have to that entity, much less that the relationship is sufficient for

Plaintiffs to claim a right possessed by Michelin North America Master Trust.[9] Absent any injury in fact to these Plaintiffs, Plaintiffs' Complaint should be dismissed for lack of standing.[10]

B. Plaintiffs Lack Standing Because They Did Not Suffer Injury in Fact.

Alternatively, because Plaintiffs are not proper parties under ERISA, the Second Cause of Action must be dismissed for lack of standing.

1. The Plan.

Section 502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3), explicitly limits standing to bring suit to "a plan beneficiary, participant, or fiduciary." Because ERISA contains a "carefully crafted and detailed enforcement scheme," courts are unwilling to infer causes of action involving parties not expressly enumerated in ERISA. *Mertens v. Hewitt Associates*, 508 U.S. 248, 254, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). *See also, Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 247, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) ("§502 (a) itself demonstrates Congress' care in delineating the universe of *plaintiffs* who may bring certain civil actions" (emphasis in the original)); *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 21, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) ("[t]he express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties ... as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes.")

[9] Even if such an allegation had been made, the Bond Indenture specifically limits the rights of any person or entity other than "the parties hereto, if there is one, and the Owners of the Bonds." *See* Exhibit 6 hereto, Section 12.4, p. 44.

[10] When it appears that a federal court lacks jurisdiction of the subject matter, "the court shall dismiss the action." *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) citing Federal Rule of Civil Procedure 12(h)(3).

Here, Plaintiff Michelin Retirement Plan is not alleged to be either a participant, beneficiary or a fiduciary and, therefore, the Plan has not set forth the required allegation to support its standing to proceed under §1132(a)(3). *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986) (the requirement that plaintiff be a participant, beneficiary or fiduciary is both a standing and subject matter jurisdictional requirement). In fact, plans themselves are not named in ERISA, leading multiple courts to reject the argument that a plan can ever have standing under ERISA. *See, e.g., Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 891-93 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983) (district court could not exercise subject matter jurisdiction over claims brought under ERISA by a pension plan); *Brennan v. Consolidated Rail Corp. Matched Savings Plan*, No. 99-5785, 2000 WL 217664, at *3 (E.D. Pa. Feb. 11, 2000) (a plan is not a fiduciary as a matter of law); *Chicago District Council of Carpenters Pension Fund v. Reinke Insulation Co.*, No. 94 C 2296, 1995 WL 383007, at *2 (N.D. Ill. June 23, 1995) (a plan cannot assert fiduciary status under ERISA).

2. The Investment Committee.

In contrast, Plaintiff Investment Committee summarily alleges it is "a fiduciary of the Plan and as such is a proper Plaintiff with standing to bring this action against Defendants." Complaint, ¶35. The bare allegation that one is a fiduciary is wholly deficient. Indeed, the test of fiduciary status is not how one arbitrarily labels oneself; rather, fiduciary status is determined by examining the "functional terms of control and authority over the plan …." *Mertens*, 508 U.S. at 262.

In this case, apart from labelling the Investment Committee as a fiduciary, the Complaint is devoid of any facts alleging the nature of the services and functions performed by the

Investment Committee sufficient to make it a fiduciary. Indeed, the Investment Committee conceded that its power "to control and manage the assets of the Plan" exists only "to the extent of its power of appointment of investment managers." Complaint, ¶35. As described, the Investment Committee performs an administrative task of signing a contract and eschews any role in the control and management of the assets. In fact, according to The Investment Committee, it had such little power to control and manage the assets of the Plan that it didn't know about the Wakpamni Lake Bond purchase until at least ten days after it was made. *Id.*, ¶40. The Investment Committee's lack of control over plan assets is further evidenced by its allegation that the bond was purchased against its wishes. *Id.*, ¶75. Because the allegations of the Complaint belie the Investment Committee's status as an entity with a cognizable claim under ERISA, the Second Cause of Action should be dismissed for lack of standing on this basis as well. *See St. Francis Hosp. and Medical Center v. Blue Cross & Blue Shield of Connecticut, Inc.*, 776 F. Supp. 659, 661 (D. Conn. 1991) (the power to appoint, change or terminate a plan administrator, without more, does not confer fiduciary status). *See, also,* DOL Interpretive Bulletin Relating to ERISA, 29 C.F.R. §2509-78-8.D-2 (a person who performs purely ministerial functions is not an ERISA fiduciary.)

C. Plaintiffs Also Lack Standing Because The Alleged Injury is Not Traceable to These Defendants.

Even assuming one or both Plaintiffs are proper parties to this suit, because the alleged injury here is not traceable to the DP Defendants, the Second and Tenth Causes of Action against the DP Defendants must still be dismissed, with prejudice.

First, through their Second and Tenth Causes of Action, Plaintiffs seek to hold the DP Defendants liable for some unspecified "knowing participation" in actions undertaken by certain other defendants. *See, e.g.,* Complaint, ¶¶135, 210. The "bad actors" identified by Plaintiffs

were Michelle A. Morton, Gary T. Hirst, AAM/Hughes Capital and Jason Galanis, not the DP Defendants or Dilworth's client Burnham Securities, Inc. *Id.*, ¶133. The allegations do not identify a single act by either DP Defendant which could be characterized as "participation" with any of these alleged "bad actors." Nor do Plaintiffs cite any facts to support the notion that the DP Defendants had knowledge of any bad act committed by any other defendant. Although Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement the pleader is entitled to relief," "a formulaic recitation of the elements of the cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Because Plaintiffs do not even attempt to trace their alleged damages to the DP Defendants, they should be precluded from proceeding against those defendants on their Second and Tenth Causes of Action.

Second, the damages Plaintiffs claim entitlement to are simply not attributable to the DP Defendants.

1. The Second Cause of Action-ERISA.

ERISA explicitly limits Plaintiff's recovery to "appropriate equitable relief." 29 U.S.C. §1132(a)(3); *Dantzler v. Time Warner Cable*, 2016 WL 4523166, *2 (D.S.C. Aug. 12, 2016) (only equitable relief is available under §1132(a)(3)). *See also Hemelt v. United States*, 122 F.3d 204, 207 (4th Cir. 1997) (money damages are not available pursuant to section 502(a)(3)). In *Mertens v. Hewitt Associates*, the United States Supreme Court confirmed that ERISA eliminated the ability to recover direct and consequential damages from "persons who had no real power to control what the plan did" such as professionals providing services to an ERISA plan. 508 U.S. at 262. *See also Montanile v. Board of Trustee of the Nat'l Elevator Industry Health Benefit Plan*, __ U.S. __, 136 S.Ct. 651, 659, 193 L.Ed.2d 556 (2016) ("Equitable remedies 'are, as a

general rule, directed against some specific thing; they give or enforce a right to or over some particular thing … rather than a right to recover a sum of money generally out of the defendant's assets'.")

Through the Second Cause of Action, Plaintiffs do not seek an equitable remedy but, rather, seek "actual damages and consequential damages … costs and attorneys' fees." Complaint, *ad damnum* clause, (a). Absent a claim for relief against the DP Defendants that is available under ERISA, this Court lacks the jurisdiction to proceed with respect to the Second Cause of Action. *See Mulcahey*, 29 F.3d at 152-53 (federal jurisdiction does not exist unless the plaintiff could avail himself of the remedies provided by the federal statute.)

2. The Tenth Cause of Action-Professional Negligence-Legal Malpractice.

Plaintiffs also cannot trace their claimed bond losses to any alleged legal malpractice of the DP Defendants. In order to pursue a legal malpractice claim against a Pennsylvania lawyer, there must be an attorney-client relationship, *i.e.*, privity between the attorney and the plaintiff.[11] *Guy v. Liederbach*, 459 A.2d 744, 746, 750 (Pa. 1983). *See also Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 806 (Pa. Super. 2007), *appeal denied*, 945 A.2d 171 (2008) ("[t]o maintain a claim of legal malpractice based on negligence, a plaintiff must show an attorney-client or analogous professional relationship with the defendant-attorney.") The only exception to the privity requirement is for "persons who are legatees under a will … who lose their intended

[11] South Carolina law, as the law of the forum, governs the conflict of law question in an action in South Carolina federal court. *Williams v. Mutual of Omaha*, 297 F.2d 876, 879 (4th Cir. 1962). In South Carolina, the law governing an action in tort is *lex loci delicti*, or the law of the state "in which in injury occurred, not where the results of the injury were felt or where the damages manifested themselves." *Rogers v. Lee*, 414 S.C. 225, 231, 777 S.E.2d 402 (S.C. App. 2015). Here, although the results Plaintiffs complain of were allegedly felt in South Carolina, assuming *arguendo* those results are attributable to the DP Defendants, the injury occurred in Pennsylvania where the DP Defendants undertook all their actions.

legacy due to the negligence of the testator's attorney." *Hess*, 925 A.2d at 806 citing *Guy v. Liederbach*, 459 A.2d at 752. South Carolina has adopted *Guy v. Liederbach*, and similarly recognizes that a cause of action for legal malpractice requires privity between the parties except when the claim is advanced by persons who are named in an estate planning document or otherwise identified in the instrument by their status. *See Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132, 140-41 (S.C. 2014).

Plaintiffs do not allege to be in privity with the DP Defendants. Under applicable Pennsylvania law, Plaintiffs also do not qualify as third-party beneficiaries of the DP Defendants' attorney-client relationship with Burnham Securities, Inc., which did not involve creation of an estate document. Absent a duty to Plaintiffs in this instance, Plaintiffs' alleged damages are simply not traceable to Dilworth or Anderson.[12] Accordingly, Plaintiffs also lack standing to proceed on their Tenth Cause of Action against the DP Defendants.

III. ASSUMING PLAINTIFFS MAY PROCEED ON A CLAIM FOR PROFESSIONAL NEGLIGENCE, VENUE IS IMPROPER HERE.

Although not in an attorney-client relationship with Dilworth, Plaintiffs assert a right to proceed against the DP Defendants for professional negligence-legal malpractice. Complaint, ¶¶206-15. For the reasons set forth above, the DP Defendants contest Plaintiffs' standing to proceed on the Tenth Cause of Action because there is no duty to the Plaintiffs, either directly or

[12] The DP Defendants' role as counsel to the placement agent, Burnham Securities, Inc., does not require a different result. Generally, Underwriter's counsel in a bond transaction does not owe a duty to the bondholders and, therefore, cannot be liable to them for malpractice. *Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1133 (5th Cir. 1988), *vacated on other grounds sub nom., Fryar v. Abell*, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989). *See also First Interstate Bank v. Chapman & Cutler*, 837 F.2d 775, 780 n. 4 (7th Cir.1988) (bond counsel not liable to bond purchaser for false opinion letter which was based on purportedly false assumption). Here, there is no basis to deviate from this general rule. *See* discussion at pp. 23-24, *infra*.

as third-party beneficiaries, through the Dilworth-Burnham Securities attorney-client relationship.

That said, even if Plaintiffs could pursue a claim against the DP Defendants for professional negligence/legal malpractice, Plaintiffs are bound by the limitations in the contract from which they allegedly derive their rights. *Johnson v. Pennsylvania National Insurance Cos.*, 594 A.2d 296, 298 (Pa. 1991). Here, the retention agreement between Dilworth and Burnham Securities, Inc. provides, in relevant part, as follows:

> "Any dispute involving the relationship between the client and this Firm will be arbitrated in Philadelphia… The arbitration shall be final, binding and not appealable. You understand and agree … that you will have no right to sue in court, and will have no right to a trial by jury."[13] Exhibit 2, paragraph 3.

Having claimed some unidentified type of beneficiary status of the retention agreement, Plaintiffs are bound by the limitations in the contract they seek to enforce and, therefore, are bound to arbitrate their professional negligence claim in Philadelphia.[14] *Johnson,* 594 A.2d at 299. *See also Pearson v. Hilton Head Hospital,* 400 S.C. 281, 733 S.E. 2d 597 (2012) (enforcing arbitration clause against a non-signatory who obtained benefits from the contract containing the arbitration clause). The Fourth Circuit Court of Appeals has recognized that "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001). Because Plaintiffs have no cognizable claim against the DP Defendants under ERISA, and because this Court cannot compel arbitration outside this District, to the extent this Court determines Plaintiffs have

[13] The retention agreement also provides that "[t]he prevailing party in the resolution of any dispute shall have the right to be reimbursed by the other party for all fees and expenses, including reasonable attorney's fees …" Exhibit 2, paragraph 3.

[14] Federal law favors the enforceability of arbitration agreements. *Akaoma v. Supershuttle Inter. Corp.*, 2011 WL 2466320, *1 (4th Cir. 2011) (citation omitted).

standing to pursue a claim for legal malpractice, the cause of action must be dismissed for improper venue under Federal Rule of Civil Procedure 12(b)(3). *Konecranes, Inc. v. Davis,* No. 1:12-CV-01700, 2013 WL 5701046, at *3-*4 (S.D. Ind. Oct. 18, 2013).

IV. PLAINTIFFS FAILED TO STATE A CLAIM AGAINST THE DP DEFENDANTS.

Finally, because Plaintiffs have failed to state a claim against the DP Defendants for either (1) a violation of ERISA or (2) professional negligence/legal malpractice, all claims against the DP Defendants should be dismissed, with prejudice.

In considering a motion to dismiss under Rule 12(b)(6), a court must "accept all well-pled facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *Callum*, 137 F. Supp. 3d at 833 (citation omitted). Despite the deference afforded the plaintiff, the complaint must still "state a plausible claim for relief to survive a 12(b)(6) motion" and must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* (citations omitted). If a "plaintiff's assertions amount to nothing more than a formulaic recitation of the elements of a cause of action," however, "the Court may deem such allegations conclusory and not entitled to an assumption of veracity." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (internal quotations marks omitted)). Stated differently, plaintiff's obligation to provide the grounds for his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555. (Citation omitted). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation omitted). While Rule 8 is a "generous departure" from the prior hyper-technical regime, "it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.*, 556 U.S. at 678-79.

A. The Second Cause of Action-ERISA.

As set forth above, ERISA permits a civil action for equitable damages against a non-fiduciary charged with knowing participation in a fiduciary breach. As previously noted, because Plaintiffs seek legal rather than equitable relief, their claims against the DP Defendants for damages are not cognizable and, therefore, must be dismissed. *See* pages 15-16, *supra*.

Moreover, apart from an identification of Dilworth and Anderson in the introductory paragraphs, Plaintiffs advance only three substantive allegations in the body of a Complaint which relate to the DP Defendants:

> 48. In June 2014, Dilworth and Tim Anderson, as Burnham Securities' counsel, provided WLCC with a summary of a bond program that listed Wealth-Assurance as the annuity issuer and an independent management company as the portfolio manager.
>
> 54. … Dilworth, the counsel agent to placement agent Burnham Securities, forwarded email instructions from "jason galanos" [sic] (using a "burnhamequitypartners.com" email address) to the indenture trustee (US Bank), to send the Annuity Contract purchase price from the bond proceeds to a bank account at a Beverly Hills, California branch of JPMorgan Chase Bank, in the name of an identically named company WAPCC-Florida that had been incorporated by Dunkerley in Florida on July 7, 2014. The email from Dilworth to US Bank containing the instructions also forwarded a signed copy of the Annuity Contract….
>
> 72. The closing documents for the transactions included an investment letter dated August 21, 2014, from Hughes Capital to the bond issuer WLCC… On information and belief , the investment letter was prepared by Dilworth and Tim Anderson and was provided to, among others, the WLCC, Burnham Securities, Greenberg and US Bank.

Complaint, ¶¶48, 54, 72.[15] From those allegations, Plaintiffs summarily conclude, without basis, that the defendants, including the DP Defendants, "either had actual knowledge or constructive knowledge that the Plan fiduciaries planned to misappropriate the funds through the prohibited

[15] The Complaint has over 80 substantive allegations.

and self-dealing transaction." *Id.*, ¶134. Even assuming "knowledge" of the fiduciaries' plan would be sufficient to render the DP Defendants liable to Plaintiffs (which it would not), because Plaintiffs' cursory claim of "knowledge" is unsupported by a single allegation of contact between "fiduciaries" Morton, Hirst and Hughes (*id.*, ¶121) and the DP Defendants, Plaintiffs' claim of liability under ERISA fails.[16]

Plaintiffs' claim of "knowing participation" cannot save their ERISA claim. Plaintiffs allege nothing more than that "either directly or through their relationship to the named entities" the defendants, generally, "knowingly participated in this prohibited transaction." *Id.*, ¶135. To the extent Plaintiffs' claim sounds in "aiding and abetting" breach of fiduciary duty, none of the essential elements of such a claim are pled.[17]

In any event, naked allegations about the DP Defendants' supposed relationships with "named entities" (which are unidentified) fall woefully short of stating a claim for "knowing participation." To proceed on such a claim Plaintiffs must plead facts demonstrating that the DP Defendants "acted to cause the prohibited investment" or that it "affirmatively assisted, helped conceal, or by virtue of failing to act when required to do so enabled the fiduciary breach to proceed." *Trustees of Upstate New York Engineers Pension Fund v. Ivy Asset Management*, 131

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[16] For purposes of this Motion only, the DP Defendants accept Plaintiffs' characterization of these three defendants as "fiduciaries" under ERISA.

[17] In Pennsylvania, the elements of such a claim are (1) a breach of duty by a fiduciary (2) knowledge of the breach and (3) substantial assistance or encouragement in effecting the breach. *See Pierce v. Rossetta Corp.*, CIV. A. 88-5873, 1992 WL 165817, at *8 (E.D. Pa. June 12, 1992) (emphasis added). In South Carolina, the elements are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444, 448 (S.C. 2008). "The South Carolina Court of Appeals has interpreted 'knowing participation' as more than just mere tangential involvement, but actual encouragement or active procurement of the breach of fiduciary duty." *Simmons v. Danhauer & Associates, LLC*, No. 8:08-CV-03819, 2010 WL 4238856, at *4 (D.S.C. Oct. 21, 2010) (emphasis added).

F. Supp. 3d 103, 132 (S.D.N.Y. 2015). *See, also, Delphia Beta Fund v. Univest Bank & Trust Co.*, No. 14-2404, 2015 WL 1400838, at *9 (E.D. Pa. Mar. 27, 2015) (dismissal appropriate where the allegations amounted to nothing more than conclusory statements that defendants "had actual or constructive knowledge of all the circumstances" of the alleged ERISA violation.) Here, there are no allegations of contact between the DP Defendants and the "bad acting" fiduciaries (Morton, Hirst and Hughes), much less allegations that could support a conclusion that the DP Defendants caused an improper transfer of funds or otherwise enabled individuals with whom it had no contact to proceed to violate their fiduciary duties. Accordingly, Plaintiffs' Second Cause of Action against the DP Defendants must be dismissed, with prejudice.

B. The Tenth Cause of Action: Professional Negligence-Legal Malpractice.

Finally, Plaintiffs seek actual and punitive damages against the DP Defendants for Professional Negligence-Legal Malpractice.[18] Complaint, *ad damnum* clause, (h). To establish a claim for Professional Negligence-Legal Malpractice in Pennsylvania, Plaintiffs must plead the following three elements:

1. employment of the attorney or other basis for a duty;

2. the failure of the attorney to exercise ordinary skill and knowledge; and

3. that the attorney's negligence was the proximate cause of damage to the plaintiff.

Kituskie v. Corbman, 714 A.2d 1027, 1029 (Pa. 1998); *accord Steiner v. Markel*, 968 A.2d 1253, 1255 (Pa. 2009). The elements of a cause of action for legal malpractice in South Carolina are, essentially, the same as the elements under Pennsylvania law. *McNair v. Rainsford*, 330 S.C.

[18] Alternatively, Plaintiffs pray that this Court compel certain other defendants, none of whom was Dilworth's client, "to pursue this claim" for the benefit of Michelin and those similarly situated. Complaint, ¶215. There is no basis in law, nor any procedural mechanism, for this alternative remedy and, therefore, this portion of the Complaint should be ignored.

332, 499 S.E.2d 488, 493-94 (S.C. Ct. App. 1998) (the elements are: (1) existence of an attorney-client relationship, (2) breach of duty by the attorney, (3) damage to the client and (4) proximate cause of plaintiff's damages).

Plaintiffs have failed to allege that they employed the DP Defendants or that the DP Defendants otherwise had a duty towards them sufficient to satisfy the first requisite element. To the contrary, Plaintiffs readily identify Burnham Securities, Inc., and only Burnham Securities, Inc., as the DP Defendants' client. Complaint, ¶16. It is equally clear that the Plaintiffs were not third-party beneficiaries of the DP Defendants relationship with Burnham Securities, Inc. applying either Pennsylvania or South Carolina law. *See* discussion pages 16-17, *supra*.

Plaintiffs' insinuation that "legal opinions" issued by the DP Defendants create such a relationship is also unsupported. Complaint, ¶210. In truth, the DP Defendants' "opinions" addressed the legality of the bonds and were limited to the following:

> 1. [Wakpamni Lake Community Corporation] is a body corporate and politic validly existing under the laws of the Tribe and has the power and authority to execute and deliver the Indenture and to issue and deliver the Bonds.
>
> 2. The Indenture has been duly authorized, executed and delivered by [Wakpamni Lake Community Corporation] and the obligations of [Wakpamni Lake Community Corporation] under the Indenture constitute binding obligations of [Wakpamni Lake Community Corporation], enforceable against [Wakpamni Lake Community Corporation] in accordance with its terms.
>
> 3. The Bonds have been duly authorized, executed, issued and delivered by [Wakpamni Lake Community Corporation] and are the binding limited obligations of [Wakpamni Lake Community Corporation] and are enforceable against [Wakpamni Lake Community Corporation] in accordance with their terms.
>
> 4. [Wakpamni Lake Community Corporation] has properly waived its sovereign immunity as it related to the enforcement of its obligations under the Bond Documents.

> 5. The Bonds are exempt from registration pursuant to the Securities Act of 1933, as amended and the Indenture is exempt from qualification pursuant to the Trust Indenture Act of 1939, as amended.

See Exhibit 7 attached hereto, pp. 2-3. The Opinion clearly states that it is limited to the five opinions itemized. *Id.*, p. 3. Plaintiffs do not allege any facts to demonstrate that these opinions were false, much less how these true opinions could have led to the diversion of bond proceeds about which they complain.[19] In fact, none of the DP Defendants' opinions addressed the bond proceeds or how they were to be invested.

Dismissal is also required with respect to the Tenth Cause of Action because there is no factual basis provided for Plaintiffs' conclusory statement that the DP Defendants' actions represented a lapse in the professional care due here. Complaint, ¶211. Notably, Plaintiffs failed to secure the required Certificate of Merit attesting to the efficacy of their Legal Malpractice claim. Pennsylvania Rules provide that "[i]n any action based upon an allegation that a licensed professional deviated from an acceptable professional standard" the attorney for the plaintiff "shall file" with the complaint or within sixty days after the filing of the complaint:

> (a) … a certificate of merit signed by the attorney or party that either
>
> (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
>
> * * *
>
> (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

[19] For the reasons set forth in footnote 17, Plaintiffs cannot proceed on an aiding and abetting theory either.

* * *

> (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

Pa.R.C.P. 1042.3(a). The certificate of merit requirement in Pennsylvania is substantive, not procedural and, therefore, the DP Defendants believe its provisions are applicable here. *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 264-65 (3d Cir. 2011). That said, the result is the same under South Carolina law which requires a similar certification in actions for damages alleging professional negligence. S.C. Code Ann. §15-36-100. Simply put, without the required Pennsylvania Certificate of Merit, or South Carolina Certification, the Tenth Cause of Action must be dismissed as to the DP Defendants.

Finally, there is no fact alleged from which this Court could conclude that the DP Defendants, who are not alleged to have any contact with the fiduciaries here, could possibly be the "but for," or proximate cause, of Plaintiffs' alleged damages. Absent facts supporting any of the three elements of their cause of action for Professional Negligence-Legal Malpractice, the Tenth Cause of Action as to the DP Defendants must be dismissed under Rule 12(b)(6) as well.

CONCLUSION

For the reasons set forth herein, Defendants Dilworth Paxson LLP and Timothy B. Anderson respectfully submit that their Motion to Dismiss should be granted.

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