IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ATLANTIC NWI, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2021-0944-SG
	)	
THE CARLYLE GROUP INC.,	)	
CRP 3625 1ST AVE OWNER, LLC, and	)	
CRP 1616 ROLLINS OWNER, LLC,	)	
	)	
Defendants.		

MEMORANDUM OPINION

Date Submitted: July 13, 2022
Date Decided: October 28, 2022

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GLASSCOCK, Vice Chancellor

This litigation is secondary to a dispute between two parties to a joint venture, reified via an LLC agreement as Atlantic REDCO Holdings (the "Joint Venture"). The parties to that venture were Plaintiff Atlantic NWI ("Atlantic") and nonparty REDCO Fund I Manager ("REDCO"), both Delaware LLCs. The purpose of the Joint Venture was for REDCO to identify and develop real estate opportunities for Atlantic's investment. Atlantic purportedly discovered that REDCO was competing with the Joint Venture by offering investment opportunities to another entity, the Carlyle Group, Inc. ("Carlyle"), in ways that breached REDCO's fiduciary and contractual duties. Atlantic sued REDCO in this court; that suit settled in 2021.

Here, Atlantic is seeking tort recovery against the third-party entity: having achieved the analog of a divorce settlement against REDCO, Atlantic seeks damages for alienation of affection against Carlyle.[1] The non-carnal analogs of the alienation claim here are that Carlyle aided and abetted REDCO's breach of fiduciary duty, and also tortiously interfered with a contract, the LLC agreement.

The case neatly illustrates the differences in the two related second-order torts. The tortious interference claim requires, *inter alia*, a defendant's knowing interference with a contractual right; I find this allegation is adequately pled in

[1] Also named as defendants are two Carlyle affiliates purportedly holding investment opportunities that REDCO should have offered to Atlantic via the Joint Venture.

light of the Plaintiff-friendly inferences available to Atlantic. The equitable tort, on the other hand, requires a defendant's knowing assistance in the breach of a fiduciary duty, with a specific pleading of facts indicating the required scienter. Here, I find that, even with all reasonable inferences drawn in Atlantic's favor, the complaint does not make sufficient non-conclusory allegations of fact from which I may infer Carlyle's knowledge of REDCO's fiduciary duties, breach of which Carlyle supported with scienter. Accordingly, the motion to dismiss the claim of aiding and abetting REDCO's breach of fiduciary duty is granted; the intentional interference claim survives. My rationale follows.

I. BACKGROUND

This action is before me on a motion to dismiss the amended complaint (the "Amended Complaint"), which contains two causes of action: aiding and abetting breach of fiduciary duties (Count I) and tortious interference with contract (Count II).[2]

A. Factual Background

1. The Parties and Relevant Non-Parties

Plaintiff Atlantic NWI is a Delaware LLC with principal place of business in Boston, Massachusetts. Atlantic is an affiliate of and is managed by Bain Capital

[2] Verified Am. Compl. ¶¶ 76-102, Dkt. No. 33 [the "Am. Compl."].

Real Estate LP ("Bain"), a private equity investor that manages funds investing in commercial real estate projects.[3]

The Carlyle Group is a Delaware corporation with principal place of business in Washington, D.C.[4] As a large private equity firm, Carlyle competes with Bain in the market for commercial real estate investments.[5]

Defendants CRP 3625 1st Ave ("CRP 1st Ave") and CRP 1616 Rollins ("CRP Rollins") are both Delaware LLCs sharing a principal place of business with Carlyle.[6] Plaintiff alleges that CRP 1st Ave and CRP Rollins are investment vehicles directly or indirectly owned and controlled by Carlyle.[7] Each of these entities holds title to a real estate asset at dispute in this suit.[8]

Non-party REDCO Fund I Manager is a Delaware LLC with principal place of business in San Francisco, California.[9]

Non-party Atlantic REDCO Holdings is a Delaware LLC formed as a joint venture by Atlantic and REDCO.[10]

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[3] *Id.* ¶ 5.
[4] *Id.* ¶ 6.
[5] *Id.*
[6] *Id.* ¶¶ 7-8.
[7] *Id.*
[8] *Id.* ¶¶ 49-50.
[9] Verified Compl. for Injunctive Relief ¶ 24, *Atlantic NWI, LLC, v. REDCO Fund I Manager LLC*, et al., C.A. No. 2021-0616-LWW (July 16, 2021), 2021 WL 3142125.
[10] Am. Compl. ¶ 1.

2. The Atlantic-REDCO Joint Venture

In May 2019, Atlantic entered into an LLC agreement governed by Delaware law that established a joint venture with REDCO (the "JV Agreement").[11] Under the JV Agreement, REDCO would identify commercial real estate investment opportunities, develop a business plan for the property in question, and pitch these plans exclusively to Atlantic.[12] In exchange for these exclusive projects and services, Atlantic would provide REDCO with periodic management fees.[13] Atlantic would also provide the lion's share of capital for any project investments it opted to move forward with.[14]

The JV Agreement also imposed certain exclusivity, confidentiality, and fiduciary obligations on REDCO.[15] Atlantic sought to prevent REDCO from competing with the joint venture, given the latter company's responsibility for identifying, developing, and managing projects.[16] Accordingly, Article 8.9(b) of the JV Agreement imposed two related restrictions on REDCO's ability to "participate in the purchase of, otherwise invest in, make available for lease, provide services to, or arrange debt or equity financing"[17] for either a competitive project (the "Anti-

[11] *Id*. ¶ 13; *see also* Am. Compl., Ex. A. Dkt. No. 33 [the "JV Agreement"].
[12] Am. Compl. ¶ 15-17.
[13] *Id*. ¶ 17.
[14] *Id*.
[15] *Id*. ¶¶ 18-25.
[16] *Id*. ¶ 18.
[17] JV Agreement Article 8.9(b).

Competition Restriction") or any other real estate project during the investment period (the "Exclusivity Restriction").[18] The JV Agreement defined a competitive project as a directly competing real estate project or asset in certain target markets, which included Seattle and Silicon Valley, located within five miles of an asset owned or being pursued by the Joint Venture.[19] The investment period was defined as starting on the effective date of the JV Agreement and terminating when one of a variety of conditions was met.[20] The investment period ended when Atlantic terminated the JV Agreement in June of 2021.[21] This two-layer arrangement was meant to keep REDCO from taking for itself or for Atlantic's competitors the opportunities it had developed for Atlantic.[22]

The JV Agreement further imposed confidentiality requirements on REDCO (the "Confidentiality Restriction"), "including information regarding current and prospective business plans[.]"[23] Article 8.5 also purported to impose both fiduciary duties and a duty of "good faith and fair dealing" on REDCO.[24] Conversely, Article 7.5 explicitly released Atlantic of its fiduciary duties to the fullest extent possible.[25]

[18] Am. Compl. ¶¶ 19-20.
[19] *Id*. ¶ 19.
[20] JV Agreement Article 1.1.
[21] Am. Compl. ¶ 20.
[22] *Id*. ¶ 21.
[23] *Id*. ¶ 23; JV Agreement Article 4.2(e).
[24] JV Agreement Article 8.5.
[25] JV Agreement Article 7.5.

Atlantic and REDCO actively publicized the formation of the Joint Venture, its geographic focus (including specific property investments), and programmatic nature.[26] Third-party websites also reported on some Joint Venture investments or publicly listed Bain and REDCO as owning certain properties.[27]

3. REDCO Offers Investment Opportunities to Carlyle

In 2020, the Joint Venture sought investors to participate in a recapitalization of two existing projects in the Pacific Northwest.[28] This would entail a new investor bringing in new funding, while REDCO and Bain continued to own a stake in the projects and REDCO continued to operate them.[29] Carlyle was one investor that considered the recapitalization opportunity.[30] It was sent materials relevant to this investment opportunity in or around September 2020, but ultimately chose not to participate.[31]

In the following months, unbeknownst to Atlantic, Carlyle began working with REDCO to participate in the purchase of various properties, including four around Seattle and in the San Francisco Bay Area (the "Disputed Properties").[32] The Disputed Properties are located at the following addresses:[33]

[26] Am. Compl. ¶¶ 26-29.
[27] *Id*. ¶¶ 30-31.
[28] *Id*. ¶ 32.
[29] *Id*.
[30] *Id*. ¶ 33.
[31] *Id*.
[32] *Id*. ¶ 34.
[33] *Id*.

- 99 S. Spokane, Seattle, WA.
- 384 Foster City Blvd., Foster City, CA.
- 3625 1st Avenue South, Seattle, WA.
- 1616 Rollins Road, Burlingame, WA.

Each of these properties was located within five miles of an existing Joint Venture asset, making them subject to the JV Agreement's Anti-Competition Restriction.[34] Because these actions took place during the investment period stipulated in the JV Agreement, they were also at odds with the Exclusivity Restriction.[35] Accordingly, REDCO should have exclusively presented these opportunities to Atlantic and the Joint Venture.[36] Instead, REDCO either withheld key information or failed to inform Atlantic of these opportunities altogether, choosing instead to present them to Carlyle.[37] By sharing information and business plans belonging to the Joint Venture with Carlyle, per the Plaintiff, REDCO breached the Confidentiality Restriction.[38] REDCO's actions also purportedly ran afoul of fiduciary duties unilaterally imposed on it by the JV Agreement.[39]

[34] *Id*. ¶ 36.
[35] *Id*. ¶ 37.
[36] *Id*.
[37] *Id*.
[38] *Id*. ¶ 38.
[39] *Id*. ¶ 39.

In or around June 2021, Atlantic learned that REDCO was sourcing real estate opportunities to competitors of the Joint Venture in breach of the JV Agreement.[40] On June 30, 2021, Atlantic removed REDCO as manager under the JV Agreement, but did not authorize REDCO to share the Joint Venture's confidential information going forward.[41] REDCO continued to work with Carlyle on the investment opportunities at dispute.[42] For its part, Carlyle never publicized its partnership with REDCO, despite a history of publicizing joint ventures with other partners.[43]

That July, Atlantic sued REDCO for breach of contract and breach of fiduciary duties.[44] On or around the 14th of that month, Atlantic notified Carlyle of its relationship with REDCO and provided certain provisions of the JV Agreement, including the Anti-Competition, Exclusivity, and Confidentiality Restrictions.[45] On the 27th, Atlantic issued a subpoena to Carlyle and, thereafter, Carlyle was on notice of the Atlantic lawsuit against REDCO.[46] Nonetheless, Carlyle continued to pursue some of the Disputed Properties.[47]

[40] *Id*. ¶ 58.
[41] *Id*. ¶ 59.
[42] *Id*. ¶ 40.
[43] *Id*. ¶ 46.
[44] *Id*. ¶ 60.
[45] *Id*. ¶ 63.
[46] *Id*.
[47] *Id*.

In September 2021, Atlantic and REDCO settled their action, with REDCO agreeing not to contest that it had violated the JV Agreement.[48] In October, Atlantic reached out to Carlyle, specifically identified the Disputed Properties, and sought assurances that Carlyle would not be pursuing them.[49] When those assurances were not forthcoming, Atlantic sought equitable relief in this action.

B. Procedural History

The Plaintiff originally filed this action on November 2, 2021, naming Carlyle as the sole defendant.[50] In addition to the causes of action brought here, that complaint also sought additional relief in the form of a temporary restraining order and permanent injunction.[51] After having been served with the complaint, Carlyle notified Plaintiff on November 4th that it was closing on the Rollins Road property that day.[52] The Plaintiff amended its complaint on February 10, 2022, adding CRP 1st Ave and CRP Rollins as defendants.[53] A motion to dismiss quickly followed and, after oral argument, I took the matter under advisement in July 2022.[54]

[48] *Id*. ¶ 62.
[49] *Id*. ¶ 65.
[50] *Id*. ¶ 67.
[51] *Id*.
[52] *Id*. ¶ 68.
[53] *See* Am. Compl.
[54] Tr. of 7-13-2022 Oral Arg. on Defs.' Mot. to Dismiss – Held via Zoom, Dkt. No. 62.

II. ANALYSIS

Carlyle, CRP 1st Ave, and CRP Rollins (together "Defendants") have moved to dismiss the Amended Complaint for failure to state a claim under Court of Chancery Rule 12(b)(6).[55] Under 12(b)(6), I accept all well-pled allegations as true, including even vague allegations when they provide the opposing party notice of the claim.[56] I must also "draw all reasonable inferences in favor of the non-moving party[,]" where these inferences logically flow from particularized facts alleged, dismissing a claim only where the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances."[57] As explained below, I find that the Plaintiff's pleadings, buoyed by this standard, state a claim for tortious interference. However, the claim for aiding and abetting a breach of fiduciary duty fails due to insufficient allegations that the Defendants had knowledge of the duties in question.

A. Plaintiff States a Claim for Tortious Interference (Count II)

Under Delaware law, a cause of action for tortious interference involves five well-established elements: (1) the existence of a contract, (2) that the defendant knew about, (3) an intentional act by defendant that is a significant factor in causing

[55] Defs.' Mot. to Dismiss, Dkt. No. 38.
[56] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011).
[57] *Id.*; *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008).

the breach of that contract, (4) without justification, (5) which causes injury.[58] Other than the existence of a contract (here, the JV Agreement), Defendants attack each element with vigor.

1. The Amended Complaint Adequately Alleges Knowledge of the Contract

At the pleadings stage, a plaintiff's allegations that the defendant acted with a specific state of mind, such as knowledge, need only be averred generally.[59] This is because a requirement of specificity at such an early stage would be unworkable and undesirable, presenting plaintiffs with a virtually insurmountable hurdle.[60] Here, the Plaintiff presents specific facts that allow for a reasonable inference of Defendants' knowledge under this standard.

Plaintiffs plead five sources from which they invite me to infer Defendants' knowledge of the Joint Venture and its accompanying exclusivity, anti-competition, and confidentiality provisions.[61] These sources can be summarized as follows: (i) Defendants' monitoring of information on Bain (and Atlantic) as competitors; (ii) exclusivity, anti-competition, and confidentiality restrictions among joint venturers as industry common practice; (iii) information obtained when Carlyle considered the recapitalization opportunity; (iv) Carlyle's due diligence prior to working with

[58] *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1266-67 (Del. 2004).
[59] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993); *see generally* Del. Ct. Ch. R. 9(b) (providing pleading standard for condition of mind).
[60] *Desert Equities*, 624 A.2d at 1208.
[61] Am. Compl. ¶¶ 42-46.

REDCO to pursue the properties at dispute here; and, (v) Carlyle's failure to publicize its partnership with REDCO, which broke with past practice.[62]

I find that (i), (ii), and (iii), taken together, support a reasonable inference that Defendants knew of the partnership between Atlantic and REDCO, including the associated restrictions.[63] Starting with (ii), Plaintiff first alleges that the type of restrictions at issue here are common practice in the commercial real estate market and that it is "widely known in the industry that [Bain] employs such restrictions" with its partners.[64] Plaintiff further alleges that Defendants had specific knowledge of Bain's practices from a previous arrangement where the parties enjoyed alternating periods of exclusivity with the same agent.[65] This supports a reasonable inference that Defendants knew Bain and its affiliates, including Plaintiff, utilized these types of restrictions in their dealings with partners and agents. Plaintiff's allegations in (i) and (iii) support an additional inference that Defendants knew Atlantic and REDCO were partners, either through general monitoring of competitors' strategic moves, evaluation of the recapitalization opportunity, or both. Combined with the inference drawn from (ii), this is sufficient to satisfy the knowledge element at this pleading stage.

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[62] *Id.*
[63] As a result, I do not consider the sufficiency or credibility of the allegations made in (iv) or (v).
[64] Am. Compl. ¶ 43.
[65] *Id.*

2. The Complaint Alleges Defendants' Actions Were a Significant Factor in REDCO's Breach

Defendants argue that the Amended Complaint "contains no facts suggesting that Defendants' actions were even a factor—let alone a 'significant factor'—in *causing* any breach of contract."[66] Not so. The Amended Complaint alleges that Carlyle entered into agreements with REDCO to participate in the purchase of properties that, at a minimum, included the real estate assets now owned by Defendants CRP 1st Ave and CRP Rollins.[67] The restrictions in the JV Agreement barred REDCO from sourcing these opportunities to any party other than Plaintiff, making this a breach.[68] Plaintiff further alleges that Carlyle provided material consideration to REDCO in exchange for these opportunities.[69] The fact that Defendants successfully acquired two of the Disputed Properties allows me to reasonably infer that this consideration, together with Defendants' capital contributions, was a significant factor behind the breach.

3. The Complaint Alleges Defendants Acted without Justification

Defendants argue that their actions were justified by a legitimate business purpose and that a holding to the contrary would "chill[] third parties from vigorously competing for business in any marketplace in which existing contracts

[66] Defs.' Opening Br. in Supp. of their Mot. to Dismiss Pl.'s Am. Compl. 17, Dkt. No. 42 [the "OB"].
[67] Am. Compl. ¶¶ 34, 48.
[68] *Id*. ¶¶ 36-37.
[69] *Id*. ¶ 48.

obtain."[70] Plaintiff contends that these same actions were in bad faith, driven by a "desire[] to interfere with the Joint Venture's business operations and to wrongfully obtain properties."[71] These dramatically differing narratives illustrate that whether an action is justified is a fact-intensive determination "not readily amenable to assessment by way of a motion to dismiss."[72] Here, Plaintiff's allegations that Defendant acted in bad faith to gain advantage over a competitor are sufficient to establish a lack of justification, pending a more developed record.

4. The Complaint Alleges that Plaintiff Suffered an Injury

The Amended Complaint alleges an injury in the form of lost opportunities to purchase unique real estate. Specifically, it alleges that REDCO diverted opportunities to Carlyle that should have been exclusive to Plaintiff under the JV Agreement, some of which Carlyle went on to purchase.[73] Defendants counter that the acquisition of the properties now held by CRP 1st Ave and CRP Rollins caused no injury, because Plaintiff had previously turned these opportunities down.[74] However, the Amended Complaint alleges that REDCO "withheld key information from Atlantic"[75] and that "[i]f Atlantic had known about the full scope of these

[70] OB at 18 (quoting *Shearin v. E.F. Hutton Grp.*, 652 A.2d 578, 589 (Del. Ch. 1994)).
[71] Am. Compl ¶ 56.
[72] *WaveDivision Holdings, LLC v. Highland Cap. Mgmt. L.P.*, 2010 WL 1267126, at *7 (Del. Super. Ct. Mar. 31, 2010) (quoting *Grunstein v. Silva*, 2009 WL 4698541, at *16 (Del. Ch. Dec. 8, 2009)).
[73] Am. Compl. ¶¶ 71, 73.
[74] OB at 19-22.
[75] Am. Compl. ¶ 37.

opportunities" it would have acquired them.[76] Accepting the Plaintiff's well-pled allegations as true, I find that there is a cognizable injury here.

While it is certainly possible that the Defendants may prevail on a developed record, I find that, based on the standard appropriate at a motion to dismiss, the Plaintiff has stated a claim for tortious interference with contract.

B. Plaintiff Fails to State a Claim for Aiding and Abetting a Breach of Fiduciary Duty (Count I)

If an aiding and abetting claim is to survive a motion to dismiss, the plaintiff must plead that: (1) a fiduciary relationship existed, (2) the fiduciary breached its duty, (3) the non-fiduciary defendant knowingly participated in that breach, and (4) damages to the plaintiff resulted from the concerted actions of the defendant and the fiduciary.[77]

As an initial matter, it is worth noting here that the Amended Complaint pleads that REDCO breached its fiduciary duties "including, but not limited to, the duties of loyalty and care[.]"[78] However, as Defendants rightly point out, the Amended Complaint does not allege any facts "to support a breach of the duty of care."[79] Plaintiff appears to concede this in their answering brief, choosing instead to focus

[76] *Id*. ¶ 72.
[77] *Largo Legacy Grp., LLC v. Charles*, 2021 WL 2692426, at *18 (Del. Ch. June 30, 2021) (citation omitted).
[78] Am. Compl. ¶ 78.
[79] OB at 23-24.

on the alleged breach of the duty of loyalty.[80] I therefore limit my analysis to the duty of loyalty.

1. REDCO Owed and Breached a Duty of Loyalty to the Joint Venture

The JV Agreement provides that REDCO "will always act as a fiduciary for the benefit of" the Joint Venture.[81] I assume for purposes of this Motion to Dismiss that the parties intended by this language that the common-law duties of loyalty and care would apply to REDCO. Secretly taking the type of corporate opportunities contemplated by the Joint Venture and pursuing them with Defendants constitutes a breach of the duty of loyalty.[82]

2. The Amended Complaint Fails to Allege Knowing Participation

The third element of an aiding and abetting claim, knowing participation, requires a pleading of scienter.[83] This stringent standard places the burden on plaintiff to plead "specific facts from which [the] court could reasonably infer"[84] that the defendant had "actual or constructive knowledge" of their participation in the specified breach.[85]

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[80] Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss Am. Compl. 39-40, Dkt. No. 44 [the "AB"].
[81] JV Agreement Article 8.5.
[82] *See generally Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154 (Del. 1996) (describing corporate opportunity doctrine).
[83] *RCS Creditor Tr. v. Schorsch*, 2018 WL 1640169, at *5 (Del. Ch. Apr. 5, 2018).
[84] *Jacobs v. Meghji*, 2020 WL 5951410, at *8 (Del. Ch. Oct. 8, 2020) (quoting *McGowan v. Ferro*, 2002 WL 77712, at *2 (Del. Ch. Jan. 11, 2002)).
[85] *Id*. at 7 (quoting *Schorsch*, 2018 WL 1640169, at *5).

These requirements are more rigorous than for the tortious interference claim sustained above, where the Plaintiff successfully pled Carlyle's knowledge of the contract rights at issue based on a series of inferences. This difference is not random. In a tortious interference with contract claim, the liberal knowledge pleading standard under 9(b) is balanced by the additional requirement that plaintiff prove the defendant's actions were not justified. This prevents an overly broad framing from "chilling third parties from vigorously competing for business in any marketplace in which existing contracts obtain."[86] The resulting analysis strikes a compromise between protection of bargained-for contract provisions and healthy market competition.

Aiding and abetting claims lack an analog to this justification element. Fiduciary duties are strict, and liability for aiding and abetting breach is joint and several with the fiduciary.[87] Moreover, the scope and requirements of fiduciary obligations are based on common-law relationships. In the case of interference with contractual duties, the interferer is (necessarily) aware of the duty pursuant to the terms of the contract. He has the same ability to avoid contributing to a breach as does the party to the contract itself. Unlike contractual duties, fiduciary duties are measured by considerations of equity, dependent upon the relationship between

[86] *Shearin v. E.F. Hutton Grp., Inc.*, 652 A.2d 578, 589 (Del. Ch. 1994).
[87] *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 220 (Del. Ch. 2014).

fiduciary and beneficiary,[88] and thus the fiduciary is almost always the party who may most efficiently avoid its own breach of duty. Imposing liability on those who happen to abet wrongful actions without scienter would inevitably chill the ability of fiduciaries to interact and contract with third parties.[89] For the reasons explained above, liability for a fiduciary breach should fall principally on the fiduciary, and should generally be extended jointly to a third party only where that party's involvement in the breach was itself done with wrongful intent. The scienter requirement accomplishes this goal by insulating third parties whose actions don't meet this standard from liability for others' breaches of fiduciary duties.[90]

In the bespoke world of LLC fiduciary duties, a pleading of scienter requires specific facts that support an inference that Defendants knew of REDCO's specific fiduciary duties and participated in their breach. I find that the pleadings in the Amended Complaint fall short of this requirement.

i. Pre-July 2021

Ignoring those allegations that are wholly conclusory,[91] Plaintiff's argument that Defendants knew about REDCO's fiduciary duties in the pre-July 2021 period

[88] I use the term broadly here to encompass those to whom fiduciary duties run.
[89] As would a pleading standard that did not require pleading of specific facts implying scienter.
[90] *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 875 (Del. 2015).
[91] Am. Compl. ¶¶ 3, 4, 41, 55, 57.

boils down to a relatively simple syllogism. Through evaluation of the recapitalization opportunity or due diligence prior to working with REDCO on the disputed opportunities, Defendants learned that REDCO was in a joint venture LLC with a Bain affiliate.[92] Plaintiff contends that this meant Defendants knew REDCO owed contractual *and* fiduciary duties to Atlantic, because "[a]ny industry professional learning about a joint-venture relationship like the Atlantic-REDCO relationship would know that[.]"[93]

Plaintiff attempts to bridge this logical leap in its answering brief, arguing that "these facts create a reasonable inference that [Defendants] knew that REDCO owed its joint venture partner *standard common law fiduciary duties, including the duty of loyalty to the partnership*."[94] But this is not a sustainable inference—the parties to the joint venture specifically contracted away Plaintiff's fiduciary duties, and REDCO's duties were bespoke, as well.

Plaintiff cites *Park Lawn Corp. v. PlotBox Inc.*,[95] which involved a court rejecting the defendant's argument that it was unaware a CEO owed fiduciary duties to the company he oversaw, since CEOs always have fiduciary duties to their company.[96] However, Plaintiff's reliance is misplaced. *Park Lawn* involved a

[92] *Id*. ¶¶ 44-45.
[93] *Id*. ¶ 45.
[94] AB at 41 (emphasis added).
[95] *Park Lawn Corp. v. PlotBox Inc.*, 2021 WL 5038751, at *3 (D. Del. Oct. 29, 2021).
[96] *Id*.

corporation, where the duty of loyalty cannot be modified.[97] Here, the entity at issue is an *LLC*, where the default fiduciary duties can be modified or even removed.[98] Again, the JV Agreement relieved Atlantic of its own fiduciary duties to the fullest extent possible.[99] Provided only with a conclusory allegation that "any industry professional… would know[,]"[100] supported by inapplicable caselaw, I am unable to infer that Defendants knew the scope of REDCO's fiduciary duties pre-July 2021.

ii. Post-July 2021

In July 2021, Plaintiff notified Carlyle of its joint venture with REDCO and sent Carlyle JV Agreement provisions including the Non-Competition, Exclusivity, and Confidentiality Restrictions.[101] Per Plaintiff, Carlyle was aware from at least this point onward of the extent of REDCO's fiduciary duties.[102] Notably absent, however, is any allegation that Plaintiff provided Carlyle with the relevant provisions governing REDCO's fiduciary obligation.[103] Instead, relying once again on *Park Lawn*, Plaintiff reasons that, because Atlantic and REDCO were partners to a joint venture, "[b]y definition, [Defendants] therefore knew that REDCO, as a

[97] 8 *Del. C.* § 102(b)(7).
[98] *See 77 Charters, Inc. v. Gould*, 2020 WL 2520272, at *8-9 (Del. Ch. May 18, 2020); *see also* 6 *Del. C.* § 18-1101 (governing fiduciary duties in LLCs).
[99] JV Agreement Article 7.5.
[100] Am. Compl. ¶ 45.
[101] *Id*. ¶ 63.
[102] AB at 44.
[103] Plaintiff claims Defendants had notice through a subpoena issued to Defendants in the previous suit against REDCO. However, it was never explained how this constituted notice, nor was it addressed in briefing. *See* Am. Compl. ¶ 63.

partner, owed Atlantic and the Joint Venture fiduciary duties."[104] This argument fails for the same reasons as it did for the pre-July 2021 period. Without more than an unwarranted inference that Carlyle must have known its activities with REDCO were causing the latter to breach a fiduciary duty, I cannot infer that Carlyle acted with scienter regarding the breach. The Plaintiff, of course, could have provided Carlyle with the relevant portion of the LLC Agreement together with the other contractual details but, apparently, it failed to do so. As a result, Plaintiff has not shown that the events of July 2021 augmented Defendants' knowledge of REDCO's fiduciary duties. It has failed to plead with specificity a knowing participation in a breach of duty, I conclude.

Because the Amended Complaint does not adequately plead Defendants had knowledge of the fiduciary duties in question, the claim for aiding and abetting breach of fiduciary duties fails.[105]

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss under 12(b)(6) is GRANTED as to Count I and DENIED as to Count II. The parties should submit a form of order consistent with this Memorandum Opinion.

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[104] AB at 46.

[105] Because I find that the aiding and abetting claim is not sufficiently pled, I need not address the issue of whether that claim, as alleged, was duplicative of the tortious interference claim.