IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE COOPER COMPANIES, INC.) CONSOLIDATED
SHAREHOLDERS DERIVATIVE LITIGATION) C.A. No. 12584

MEMORANDUM OPINION

Date Submitted: July 27, 2000
Date Decided: October 31, 2000

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JACOBS, VICE CHANCELLOR

These shareholder derivative actions, now consolidated, were brought on behalf of the Cooper Companies, Inc. ("Cooper" or "the company") beginning in 1992. Despite the eight year pendency of this litigation, the case has not advanced beyond the pleading stage. The three successive complaints were the subject of three separate motions to dismiss. The plaintiffs' response to each motion was to amend their complaint. The defendants have moved to dismiss the current complaint; i.e., the Consolidated and Amended Complaint, and the plaintiffs have responded by moving for leave to amend to file a proposed Second Consolidated and Amended Complaint (the "Complaint") to which was later added a proposed Supplement (the "Supplement"). The defendants oppose the motion to amend on the ground that even if allowed, the amended pleading would be dismissible for (i) failure to comply with the demand and pleading requirements of Court of Chancery Rule 23.1 and (ii) failure to state a cognizable claim under Rule 12 (b)(6). Thus, the defendants have moved to dismiss both the current complaint as well as the proposed amended complaint if the amendment is allowed.

Given the nature of the defendants' opposition to the amendment, I conclude that considerations of judicial efficiency favor granting the motion for leave to amend, leaving- for decision on the pending Motion to Dismiss the amended pleading. Accordingly, this Opinion addresses that dismissal motion

which, for the reasons next set forth, will be denied.

I. PROCEDURAL HISTORY AND RELEVANT PLEADED FACTS

A. Procedural History

This case, whose procedural history has been erratic, is one of the older matters on this Court's docket. In May 1992, three shareholders of Cooper filed separate derivative actions against certain members of Cooper's board of directors. Those actions were later consolidated, and a motion to dismiss the complaint, accompanied by a brief, was filed but never responded to.

For the next three years nothing was done to prosecute the case, until the spring of 1995, when the parties reached an agreement in principle to settle the matter. That agreement was later broadened to include a derivative action that had been filed separately in New York in June 1995 by plaintiff Bruce D. Sturman ("Sturman"). Thereafter, the case lay dormant until April 30, 1996, when the parties filed formal settlement papers. A settlement hearing was held on July 1, 1996, and thereafter, the parties made additional submissions in support of the settlement. After the Court informally advised counsel that it was not inclined to approve the settlement as then structured, counsel informed the Court, on January 10, 1997, that they had decided not to proceed with the settlement.

Thereafter, the plaintiffs filed a motion for partial summary judgment against defendant Gary A. Singer ("Gary Singer"), but they never prosecuted that motion. For another ten months the case lay dormant until December 1997, when the Court entered an order consolidating the Sturman action with the previously consolidated action, and the plaintiffs filed a Consolidated and Amended Complaint.

The defendants moved to dismiss that complaint in January 1998. Rather than respond to that motion, the plaintiffs moved for leave to file a Second Consolidated Amended Complaint on February 15, 1999. Thereafter, the plaintiffs once again put the case on the back shelf, not filing an opening brief in support of their Motion to Amend until January 24, 2000. At that time the plaintiffs also sought leave to file a "Supplement" to the Second Consolidated Amended Complaint.

Thereafter, all parties filed a Stipulation and Order providing for the dismissing all defendants other than Gary Singer, Steven G. Singer ("Steven Singer"), Brad C. Singer ("Brad Singer"), Romulus Holdings, Inc. ("Romulus"), and the nominal defendant Cooper. The individual defendants are the moving parties on the pending dismissal motion.

B. Pertinent Pleaded Facts

What follows are the nonconclusory facts asserted in the Complaint, including the Supplement.

Cooper is a Delaware corporation based in Pleasanton, California. At the time the initial complaints in these consolidated derivative actions were filed, Cooper's Board of Directors consisted of 10 members, three of whom were brothers, namely: (1) Gary Singer, who was a co-chairman of the Board, (2) Steven Singer, who was also an officer, and (3) Brad Singer. The other directors were (4) Joseph C. Feghali ("Feghali"), who was Steven Singer's father-in-law; (5) Arthur Bass ("Bass"); (6) Robert S. Weiss ("Weiss"), who was Cooper's Chief Financial Officer and Treasurer; (7) Robert S. Holcombe ("Holcombe"), who was Cooper's Vice President and General Counsel; (8) Warren J. Keegan ("Keegan"); (9) Michael H. Kalkstein ("Kalkstein") and (10) plaintiff Bruce Sturman ("Sturman"), who was a co-chairman of the Board in May 1992. Defendant Romulus is a Delaware corporation whose shareholders were the Singer brothers and other Singer family members.

1. The Allegations of Wrongful Conduct

The alleged wrongdoing involves a scheme by the Singers and others to profit from the purchase and sale of bonds based on inside information.

According to the Complaint, beginning in February 199 1, Gary Singer and G. Albert Griggs ("Griggs"), a bond analyst with Keystone Custodian Funds, **Inc.** ("Keystone") agreed that Gary Singer would cause Cooper to pay Griggs substantial funds in return for (a) informing Gary Singer in advance of the names, proposed prices, face amount, and intended purchase dates of the high-yield bonds Griggs was recommending that Keystone purchase; and then (b) causing Keystone to purchase those bonds from Cooper and the Singer family. This scheme (the "trading scheme") was perpetrated fifteen times between March 1991 and January 1992. As a result, Cooper and other Singer-controlled entities (including Romulus) purchased $78 million of high-yield bonds during that nine month period, from which Griggs and the Singers realized profits of $3,053,692. Of that amount the Singer interests received $1,757,286.

During this period, efforts were made to conceal the trading scheme. In June 199 1, Griggs recruited John D. Collins ("Collins") to act as an intermediary for the money and information passing between himself, and Gary Singer and Cooper. In late September 199 1, at a meeting at Gary Singer's home, Gary Singer, Steven Singer, Griggs, and Collins discussed the need to craft a written consulting agreement, and to receive written research reports from Collins relating to the high yield bonds that were subject to the trading scheme. The purpose was

to create a pretext for Cooper making the payments to Collins. After the meeting, Griggs asked Gary and Steven Singer to conduct all of their future discussions concerning monies to be paid in the trading scheme, with Collins.

In October 199 1, Collins incorporated Back Bay Capital, Inc. ("Back Bay"), a corporation of which Collins was identified as the President and sole shareholder. Gary Singer then caused Cooper to enter into a consulting agreement with Back Bay. That agreement provided for "incentive compensation" (to be determined by Cooper in its sole discretion) for bond investment recommendations that resulted in gains to Cooper. The consulting agreement also provided for a $420,000 "one time all inclusive fee" as purported compensation for all past services rendered by Collins and Back Bay, plus an annual $100,000 "base fee."

Between February 1991 and February 1992, Gary Singer caused Cooper to pay approximately $730,000 to Griggs, Collins and Back Bay as "consulting fees." The Complaint alleges that the Singer-controlled directors caused Cooper to fail to disclose these affiliated transactions, which involved the Singer family, in its annual report. Moreover, in press releases sent to Cooper's shareholders, those directors misrepresented information relating to the trading scheme.

The Complaint alleges that the Singer family and affiliates realized profits of not less than $1,757,286 from the fraud. Cooper itself realized net profits of about $500,000, but the cost of the trading scheme to Cooper far outweighed the benefits. The reason is that in January 1992, the United States Securities and Exchange Commission (the "SEC") began an investigation that embroiled the Company in civil and criminal lawsuits that ultimately cost Cooper millions of dollars in fines and restitution. In response to subpoenas issued to them to testify during the SEC investigation, Gary and Steven Singer refused to answer questions about the trading scheme, and asserted their Fifth Amendment privilege against self-incrimination. They also refused to be interviewed by Cooper's independent counsel in Cooper's own internal investigation.

The Complaint alleges that all of Cooper's directors were aware of the SEC's investigation by the end of January 1992, yet they continued to entrust Gary Singer with the authority to manage personally Cooper's multimillion dollar securities portfolio. Moreover, on February 11, 1992, only four days after Steven Singer had invoked his Fifth Amendment privilege, the Board formally elected Steven to the position of Chief Operating Officer.

In May 1992, the SEC and the United States Attorney for the Southern District of New York filed civil and criminal charges. On May 2 1, 1992, Collins

and Griggs entered guilty pleas in the United States District Court for the Southern District of New York to criminal charges arising out of the SEC and criminal investigations of the trading scheme. As part of the plea arrangement, Griggs identified Gary Singer as the person who had caused Cooper and the Singer family to enter into the trading scheme and to make the above-described payments. Also, the SEC began -- and later settled -- a civil action against Griggs and Collins arising out of the trading scheme. The plaintiffs allege that despite those developments, Steven Singer caused Cooper's public relations officer to disseminate a press release that falsely and misleadingly denied "any lmowledge of wrongdoing on the part of [Cooper's] officers or employees."

At the end of May 1992, Gary Singer agreed to take a "temporary leave of absence," but the Board continued to cause the Company to pay his compensation and all other benefits under his employment contract. Gary Singer was also allowed to serve out his term as a director and to participate in board meetings through the end of July 1992, when his salary was terminated. After (and despite) Gary Singer's termination, the Board determined that Cooper would continue to underwrite his medical and life insurance, and to provide him with office space, secretarial and support services and an automobile -- benefits worth approximately $80,000 per year. Gary Singer continued to receive those benefits until shortly

after he was convicted, on January 13, 1994, of twenty-one counts of money laundering, mail and wire fraud, and violating the Racketeer Influenced and Corrupt Organizations Act. Cooper was also convicted on six counts of mail fraud and one count of wire fraud, and was required to pay $1,3 19,166 in restitution to Keystone, plus a $1,831,568 fine.

On May 21, 1992, the day that Collins and Griggs pled guilty to the criminal charges, directors Sturman and Warren Keegan called an emergency special meeting of the Cooper board of directors for 12 noon on May 26, 1992. The purpose of the meeting was to consider the responses required by the Griggs and Collins guilty pleas, by the SEC action against Collins and Griggs, by Griggs' identification of Gary Singer as his co-conspirator, and the effect of these matters on Cooper. Also to be considered were potential remedial measures such as the discharge of those responsible and the filing of appropriate litigation.

On May 22, 1992, Brad Singer and director Holcombe responded to Sturman and Keegan, that a "majority of the Board will not be available," purportedly because of the need to attend previously scheduled management meetings on the West Coast. On May 26, 1992, only plaintiff Sturman and Mr. Keegan attended the telephonic board meeting; which failed for want of a

quorum.'

2. The Causes of Action

The Complaint alleges three derivative causes of action. The First Cause of Action charges defendants Gary, Steven, and Brad Singer with breaching their fiduciary duties to Cooper, by causing it to enter into illegal and imprudent transactions at Cooper's expense for the financial profit of the Singer family, including themselves. The Complaint also claims that Romulus was a "participant[] in, principal[] of, and beneficiar[y] of those fiduciary breaches, and [was] wrongfully enriched therefrom and thereby."

In their Second Cause of Action, plaintiffs claim that as a result of those fiduciary breaches, Gary, Steven, and Brad Singer, as well as Romulus, are jointly and severally liable to Cooper to account for, and disgorge to Cooper, all profits made by members of the Singer family and their affiliates.

In their Third Cause of Action, the plaintiffs claim that Gary Singer breached his fiduciary duty to Cooper by having the Singer family purchase high yield bonds based on investment advice that Cooper paid for, thereby enabling the Singer family to realize profits of not less than $1,757,286 on the purchase and

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'The complaint alleges that Brad Singer and Mr. Holcombe called a special meeting for two days later -- Thursday, May 28, 1992. The complaint does not disclose whether the May 28th meeting took place or, if so, what happened at that meeting.

resale of the bonds "recommended" to Cooper. The plaintiffs further claim that Steven and Brad Singer and Romulus were participants in, and beneficiaries of, Gary Singer's fiduciary breach and were wrongfully enriched thereby.

Lastly, the plaintiffs claim that a demand upon the Board would have been futile, because a majority of Cooper's board of directors were either interested in the wrongs complained of or lacked the requisite independence to consider a demand impartially. Plaintiffs allege that the futility of making a demand is further evidenced by the unwillingness of the Singer-dominated directors to attend the special board meeting that Sturman and Keegan attempted to convene, and by their refusal to acknowledge or address the serious problems caused by the Singer directors' self-dealing.

II. THE PARTIES' CONTENTIONS, THE APPLICABLE STANDARD, AND THE PERTINENT ISSUES

The defendants raise two separate grounds for dismissal. The first is that the Complaint should be dismissed in its entirety for failure to comply with the demand requirements of Court of Chancery Rule 23.1. The second is that the plaintiffs' claims, containedin both the Complaint and the Supplement, should be

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dismissed for failure to state a claim upon which relief can be granted.[2]

To have standing to maintain a derivative action under Rule 23.1, a plaintiff must first make a demand on the board to redress the wrong being complained of, or demonstrate that a demand should be excused as futile.[3] Because the plaintiffs did not make a demand upon the Cooper board, they must establish that a demand would have been futile.[4] To establish futility, the plaintiff must plead with particularity facts that create a reasonable doubt (i.e., a reason to doubt) that (i) a majority of the directors were disinterested and independent, or that (ii) the challenged action was otherwise the product of a valid business judgment. Demand futility is to be determined solely from the well-pled allegations of the Complaint.[5]

In this case, the plaintiffs claim that demand would have been futile because a majority of the directors were not disinterested or independent, and therefore could not have impartially considered a demand. Thus, the issue posed by the

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[2]The defendants also advance the separate argument that the Supplement should be dismissed because it is barred by the plaintiffs' undue delay.

'*Kaplan v. Peat, Mar-wick, Mitchell & Co.,* Del. Supr., 540 A.2d 726, 730 (1988).

[4]*Aronson v. Lewis,* Del. Supr., 473 A.2d 805,812 (1984).

[5]*Aronson,* 473 A.2d at 8 14-17. In this context, the term "reasonable doubt" means, "reason to doubt." *Grimes v. Donald,* Del. Supr., 673 A.2d 1207, 12 17 (1996).

Rule 23.1 motion is whether the particularized factual allegations of the Complaint create a reason to doubt that a majority of Cooper's board of directors were disinterested and independent. That issue is addressed in Part III A of this Opinion.

The defendants also move to dismiss the plaintiffs' claims against most of the defendants under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In considering a Rule 12(b)(6) motion to dismiss, the Court assumes the truth of the well-pled allegations of the complaint, giving the plaintiff the benefit of all reasonable inferences that can be drawn from the pleading. Conclusory statements without supporting factual averments will not be accepted as true for purposes of a motion to dismiss.[6]

Specifically, the defendants contend that (i) the First and Third Causes of Action should be dismissed as against Brad Singer and Romulus, (ii) the Second Cause of Action should be dismissed as against all of the individual defendants, and (iii) the proposed Supplement should be dismissed because the plaintiffs unduly delayed in filing it, and because the Supplement fails to state a claim against Romulus. These arguments are addressed in Part III B of this Opinion.

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[6] *Grimes v. Donald*, 673 A.2d at 1213-14.

III. ANALYSIS

A. The Rule 23.1 Motion

I turn first to the Rule 23. l-related question of whether the Complaint must be dismissed for failure to plead demand futility. That question reduces to the issue of whether the Complaint's particularized allegations create a reason to doubt that a majority of Cooper's directors, at the time these suits were filed, were disinterested and independent. Of the ten directors on Cooper's Board, the plaintiffs concede that three -- Messrs. Keegan, Kalkstein, and Sturman -- were disinterested and independent. Thus, to establish demand futility, the plaintiffs must show a reason to doubt the disinterestedness and independence of at least five of the remaining seven directors.

In the case of Gary, Steven, and Brad Singer, that showing is made because the Complaint 'alleges with sufficient particularity that each of them profited, directly or indirectly, from the wrongful scheme, and that Gary and Steven Singer directly participated in the wrongdoing. Similarly, the Complaint alleges that director Feghali was interested and/or lacked independence because he was' Steven Singer's father in law. That family relationship is sufficient to create a reason to

doubt Mr. Feghali's ability to impartially consider a demand.[7] That leaves in issue the status of the three remaining directors, Messrs. Weiss, Holcombe, and Bass.

To resolve this motion I need consider only Messrs. Weiss and Holcombe, both of whom were members of senior management. Mr. Weiss was Cooper's Chief Financial Officer and Treasurer; Mr. Holcombe was Vice President and General Counsel. The Complaint alleges that they "owed their positions and their livelihood to maintaining the good will of the Singer directors."

The defendants argue that these facts are insufficient to create a reasonable doubt as to these two directors' disinterest and independence, because there is no allegation that the Singers, either individually or collectively, had the corporate authority unilaterally to terminate the their employment or otherwise cause Cooper to do so. I cannot agree. To be sure, an allegation that the Singers had the authority to discharge Holcombe and Weiss would have been amply sufficient to create the requisite reasonable doubt. But, that level of specificity is not, at least in these circumstances, indispensable, because it is reasonable to infer from the fact that Gary Singer was Messrs. Weiss's and Holcombe's corporate superior,

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[7] *See Mizel v. Connelly*, Del. Ch., C.A. 16638, Strine, V.C., Mem. Op. at 9-11 (July 22, 1999); *Harbor Finance Partners v. Huizenga*, Del. Ch., C.A. No. 14933, Strine, V.C., Mem. Op. at 21-22 (Nov. 17, 1999). In their brief the defendants assume arguendo, and thus do not contest, that the Singers and Mr. Feghali cannot be deemed disinterested and/or independent. (Individual Def. Ans. Br. at 15).

that he (Gary) was in a position to exercise "considerable influence" over them.[8] That inference, coupled with the allegation that Messrs. Weiss and Holcombe were among the directors who (along with the Singers) absented themselves from the emergency meeting called by Sturman and Keegan, creates reason to doubt that Weiss and Holcombe could have responded impartially to a demand.

Because the Complaint creates a reason to doubt the disinterest and/or independence of a majority of Cooper's board, the plaintiffs have demonstrated demand futility. Accordingly, the motion to dismiss under Rule 23.1 will be denied.

Having determined that this lawsuit may proceed as a derivative action, I next turn to the issue of whether the plaintiffs have stated cognizable claims for relief.

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[8] *Mizel v. Connelly, supra*; *Rales v. Blasband*, Del. Supr., 634 A.2d 927,937 (1993); see also *Steiner v. Meyerson*, Del. Ch., C.A. No. 13 139, Allen, C., Mem. Op. at 4, 22-23 (July 18, 1995) (Chairman and CEO who, although not a controlling stockholder, "was in a position to exert 'considerable influence"' over a director who was the company's President, Chief Operating Officer and Chief Financial Officer, thereby disabling the subordinate from impartially considering a demand adverse to the CEO's interests).

B. The Rule 12(b)(6) Motion

In support of their Rule 12(b)(6) motion, the defendants first contend that the First and Third Causes of Action should be dismissed as against Brad Singer and Romulus. In their First Cause of Action the plaintiffs claim that the individual defendants caused Cooper to enter into the trading scheme at Cooper's expense for the financial profit of the Singer family, including themselves. In their Third Cause of Action the plaintiffs claim that (i) Gary Singer breached his fiduciary duty to Cooper by having the Singer family purchase high yield bonds based on investment advice that Cooper had paid for, and that (ii) Steven Singer, Brad Singer, and Romulus participated in and benefited from Gary Singer's breach and were wrongfully enriched thereby. The defendants argue that those Causes of Action state no claims against Brad Singer, because the Complaint fails to allege that Brad Singer played any role in, or even knew of, the illegal securities transactions. They also contend that those Causes of Action must be dismissed as against Romulus, because (in defendants' words) "they do not plead any comprehensible claim."

The defendants also seek the dismissal of the Second Cause of Action, as against all of the individual defendants. That Cause of Action alleges that the Singers and Romulus are jointly and severally liable to Cooper to account for, and

disgorge to Cooper, all profits made by the Singer family and their affiliates as a result of their fiduciary breaches. The defendants argue that the Second Cause of Action does not state a claim because "joint and several liability is a theory of damages recovery, not a cause of action."[9]

Lastly, the defendants argue that the Supplement must be dismissed because (i) the defendants unduly delayed in filing it, and because in any event, (ii) the Supplement fails to state a claim against Romulus.

These arguments are addressed in reverse order.

1. The Supplement

The defendants object to the Supplement on the ground that it fails to state a claim against Romulus and that its inclusion in the Complaint is untimely and would unfairly prejudice them. The short answer is that the Supplement does not purport to state a new claim against Romulus, and the inclusion of its contents would not be prejudicial.

The Supplement adds to the Complaint one paragraph (¶ 14(a)) that fleshes out the factual allegations specific to Romulus. The plaintiffs concede that the Supplement does not state a new cause of action against Romulus or otherwise

[9] Individual Def. Ans. Br. at 36.

change the essential thrust of the (first) Consolidated and Amended Complaint, which alleges that Romulus was used as a vehicle to conduct the trading scheme and receive the illicit profits therefrom.

Given that concession, the motion to dismiss the Supplement is without merit.

2. **The First and Third Causes of Action**

(a) Claims Against Romulus

The Complaint alleges that at the time of the discussions among Gary Singer, Griggs, and Collins concerning the fictitious "consulting agreement," Steven Singer reconstituted his wholly-owned corporation, Romulus. Steven did that to facilitate the trading scheme and funnel the illicit profits to family members. Initially, Steven was Romulus's sole stockholder and director, but after he reconstituted Romulus, Steven distributed blocks of its stock to various Singer family members. Thereafter, from September 1991 to February 1992, Romulus became the principal vehicle for trades made in the trading scheme and realized illicit profits of over $1 million.

Based on these allegations, the plaintiffs argue that the Complaint states a claim against Romulus because it alleges that Steven Singer reconstituted Romulus, and then used that entity to engage in the trading scheme, rather than

have Steven himself directly participate, receive the profits, and then write checks to his family members under his own name.

I agree. To the extent Steven's alleged participation in the trading scheme would constitute a breach of his fiduciary duty as a Cooper director,[10] Steven could not escape liability for that conduct by interposing a newly-created corporate vehicle to engage in the same conduct and, as a consequence, conceal Steven's personal involvement. Moreover, to the extent the profits from the wrongful scheme were diverted to that corporate vehicle, that entity would be liable to the same extent as the individual fiduciary who controlled and hid behind it. To achieve that result, in such circumstances the fiduciary obligations of the person who forms and controls the entity are deemed to be attributed to the entity itself. [11]

I conclude, therefore, that the Complaint states cognizable claims against Romulus.

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[10]The defendants do not contend that the Complaint fails to state a claim against Steven Singer.

[11]*See Barbieri v. Swing-N-Slide Corp.,* Del. Ch., C.A. No. 14239, Steele, V.C., Mem. Op. at 7-8 (Jan. 29, 1997). Although Steven.Singer is alleged to have parceled out interests in Romulus to his family members instead of owning 100% of Romulus himself, that does not preclude the existence of a claim against Romulus, because the inference from the alleged facts is that Steven controlled Romulus and determined how its business would be conducted and who would reap the rewards from the trading scheme.

(b) Claims Against Brad Singer

Lastly, the defendants contend that the First and Third Causes of Action should be dismissed against Brad Singer, because the Complaint fails to allege any facts from which it can reasonably be inferred that Brad Singer participated in, or even knew about, the transactions complained of. I cannot agree.

The Complaint alleges that in September 199 1, Steven Singer (i) transferred to Brad Singer ten shares (of seventy shares outstanding) of Romulus, which until February 1992 was the principal vehicle for trades made in the scheme and (ii) realized over $1 million in illicit profits. Thus, the Complaint may fairly be read to allege that Brad Singer was an indirect recipient of the illegal diversions to Romulus, and that he wrongfully participated in the trading scheme (First Cause of Action), for which he, as a Cooper fiduciary, must account to Cooper for his profits (Second Cause of Action) and for his unjust enrichment (Third Cause of Action).

The defendants' argument that the Complaint does not allege that Brad Singer knew of the scheme or that he was benefiting from it, ignores the fact that Brad's knowledge may be inferred from the facts that are alleged. Brad Singer was a brother of Gary and Steven Singer, who are charged with having engineered the scheme. Brad, like his brothers, was also a director of Cooper. To accept the

defendants' position, the Court would have to conclude from the Complaint as a matter of law that either (i) Brad Singer never spoke with his brothers at family gatherings about Romulus and its (alleged) role in the scheme to enrich the Singer family, or (ii) that information was concealed from Brad by his brothers, who in so doing made Brad an unwitting accomplice. On a fully developed record, either scenario may turn out to be the fact, but at this procedural stage the Court is not required to assume such improbable conclusions. On the contrary, because all reasonable inferences must be resolved in plaintiffs' favor, it may be inferred that Brad Singer discussed Romulus's activities and finances with his brothers and informed himself of Romulus's (and his) newly-found sources of cash.

Accordingly, I conclude that the plaintiffs have stated cognizable claims against Brad Singer for having knowingly participated in the trading scheme, and/or for having knowingly received illicit profits from a wrongful scheme that harmed Cooper, of which Brad Singer was a fiduciary.

3. **Second Cause of Action**

Lastly, the defendants contend that the Second Cause of Action should be dismissed as against all of the individual defendants, because the claim it asserts -- that the Singers and Romulus are jointly and severally liable to account for and disgorge to Cooper all profits made by the Singers and their affiliates from the

trading scheme -- is a theory of damages recovery, not a cause of action.

The difficulty in assessing this argument is that the plaintiffs do not frontally respond to it. The only reference in their brief to their Second Cause of Action is found on page 6 of their Reply Brief, where they contend that Brad Singer, while a fiduciary, "benefitted, directly or indirectly, from the [trading] scheme and should account to Cooper for its profits (Second Cause of Action)."

From this I infer that the primary thrust of the claim being advanced in the Second Cause of Action is restitution; i.e., that the defendants have a duty to account to Cooper for their unjustly received profits. As thus viewed, the Second Cause of Action states a cognizable claim. Insofar as the Second Cause of Action also alleges that the individual defendants are jointly and severally liable, that does (as the defendants argue) plead a theory of damages recovery, but even so, it does not make the primary claim dismissible.

The Second Cause of Action states a cognizable claim and will not be dismissed.

IV. CONCLUSION

For the reasons discussed, the defendants' Motions to Dismiss are denied. **IT IS SO ORDERED.** Given the procedural history of this case, plaintiffs' counsel are directed to prosecute it with prompt diligence.