

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

RICKY B. PERRITT, Individually; §
The Cupcakery, LLC, a Texas Limited §
Liability Company; Buster Baking, LLC, §
a Texas Limited Liability Company; and the §
Woodlands Baking, LLC, a Texas Limited §
Liability Company, §
§
Plaintiffs §
§
v. §
§
PAMELA F. JENKINS, Individually; and §
The Cupcakery, LLC, a Nevada Limited §
Liability Company, §
§
Defendants. §

CAUSE NO. 4:11-CV-23

**DEFENDANT PAMELA F. JENKINS AND DEFENDANT
THE CUPCAKERY, A NEVADA LIMITED LIABILITY COMPANY'S
MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**

Defendant Pamela F. Jenkins (“Jenkins”) and Defendant The Cupcakery, LLC, a Nevada Limited Liability Company (“Nevada Cupcakery”) (collectively, the “Defendants”) file this their Motion to Dismiss and Memorandum in Support seeking to dismiss the Third and Fourth Causes of Action in Plaintiffs Ricky B. Perritt (“Perritt”), The Cupcakery, LLC, a Texas Limited Liability Company (the “Texas Cupcakery”), Buster Baking, LLC, a Texas Limited Liability Company (“BLLC”), and the Woodlands Baking, LLC, a Texas Limited Liability Company (“WBLLC”) (collectively, Perritt, Texas Cupcakery, BLLC and WBLLC are the “Plaintiffs”) Original Complaint and Application for Temporary Restraining Order, Preliminary Injunction,

Permanent Injunction, Declaratory Judgment and Damages (Dkt. No. 1) (the “Complaint”), and would show unto the Court the following:

INTRODUCTION

Defendants move to dismiss Plaintiffs’ claims for breach of fiduciary duty and breach of loyalty as a matter of law because Plaintiffs have plead no facts to support such a relationship of extraordinary confidence and trust. The Plaintiffs’ Complaint is a partial, historical review of the contractual relationship between Jenkins and Perritt and a recitation of Plaintiffs’ interpretation of the terms and provisions of the various agreements executed by Jenkins and Perritt. Notably absent from the Complaint are factual allegations giving rise to a relationship between Jenkins and Perritt that is anything but contractual. Without more, Plaintiffs have failed to plead a claim for breach of fiduciary duty or breach of the duty of loyalty.¹

ARGUMENT AND AUTHORITIES

A. Plaintiffs’ Breach of Fiduciary Duty Claim Should be Dismissed for Failure to Plead a Claim.

Plaintiffs have failed to plead a claim for breach of fiduciary duty against Defendants. It is now well-established that, to survive a motion to dismiss, Plaintiffs must do more than just plead the labels and conclusions, or recite the elements of a cause of action. With respect to their claim for breach of fiduciary duty, though, that is all Plaintiffs have pleaded in the Complaint.

¹ Bare allegations and the use of pronouns and undefined terms in the Complaint’s third and fourth causes of action create confusion as to whether all Plaintiffs have brought claims for breach of the duty of loyalty and breach of fiduciary duty against all Defendants or whether only one plaintiff has brought claims against one or both defendants. Therefore, out of an abundance of caution, Defendants proceed with their Motion to Dismiss and this Memorandum in Support as if all Plaintiffs seek relief against all Defendants under theories of breach of the duty of loyalty and breach of fiduciary duty.

Plaintiffs cannot avoid dismissal sustain a claim for breach of fiduciary duty simply by declaring a defendant owes a fiduciary duty.

1. The Applicable Standard of Review-Plaintiff Must Plead More than Just the Recitation of the Elements of a Cause of Action.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the United States Supreme Court explained the plaintiff's burden to plead a claim that can survive a motion to dismiss under Rule 12(b)(6). The Court wrote: "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level..." *Id.* In its complaint, the plaintiff must make "a 'showing' rather than a blanket assertion of entitlement to relief." *Id.* at 556 n. 3; *see also Id.* at 557 (Rule 8(2)(a) requires "that the 'plain statement' possess enough heft to sho[w] that the pleader is entitled to relief."). This standard applies to all civil actions and proceedings pursuant to the application of Fed. R. Civ. P. 8. *Ashcroft v. Irbil*, 129 S. Ct. 1937, 1953 (2009).

Plaintiff is also required to plead more than facts that are merely consistent with defendant's liability and must plead facts sufficient to show its claim for relief is plausible. *Id.* at 1949-50. The Court is not required to accept as true legal conclusions, even those couched as factual allegations. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949.

When these standards are applied to Plaintiffs' allegations for breach of fiduciary duty, this Court should find that Plaintiffs have failed to plead a viable, non-speculative, non-conclusory claim for breach of fiduciary duty against Defendants.

2. *Plaintiffs Have not Alleged any Relationship between Plaintiffs and Defendants that Would Give Rise to a Fiduciary Duty.*

“A fiduciary duty requires the fiduciary to place the interest of the other party above his own.” *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 439 (Tex. App.-Houston [14th Dist.] 2000, pet. denied).² Because the fiduciary relationship places a tremendous burden of loyalty on the fiduciary, it is “an extraordinary one and will not be lightly created.” *Id.* In Texas, two types of fiduciary duties exist: formal and informal.³ A formal fiduciary duty is one “in which a duty arises as a matter of law, including those between an attorney and client, a principal and agent, a trustee and beneficiary, and partners in a partnership.” *Id.* On the other hand, an “informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one.” *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997). However, a fiduciary relationship does not develop in every relationship that involves a high degree of trust and

² Regardless of whether Texas or Nevada law applies, Plaintiffs have failed to plead facts giving rise to a fiduciary relationship.

³ Like Texas Courts, Nevada recognizes duties arising from less formal or traditional fiduciary relationships. In Nevada, a confidential relationship exists “when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary relationship; it is particularly likely to exist when there is a family relationship or one of friendship.” *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335, 338 (Nev. 1995) (quoting *Kudokas v. Balkus*, 26 Cal. App. 3d 744, 103 Cal. Rptr. 318, 321 (1972)). Nevada also recognizes “special” relationships. “In order to prove the existence of a special relationship, a party must show that (1) the conditions would cause a reasonable person to impart special confidence and (2) the trusted party reasonably should have known of that confidence.” *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 881 (9th Cir.2007) (internal quotations omitted) (quoting *Mackintosh v. Cal. Fed. Sav. & Loan Ass'n*, 113 Nev. 393, 935 P.2d 1154, 1160 (Nev. 1997)). As discussed more fully herein, Plaintiffs have not plead that Plaintiffs stood in a relationship of confidence with Jenkins and/or the Nevada Cupcakery, which warrants dismissal of Plaintiffs' claims for breach of fiduciary duty under Nevada or Texas law.

confidence. *Id.* at 176-77. “[T]o impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit.” *Id.* at 177.

In their Complaint, Plaintiffs do not aver the existence of a formal or informal fiduciary relationship. Instead, the Complaint merely claims: “Plaintiff alleges that Defendant owes him a fiduciary duty to act in a manner of utmost good faith and trust. Her conduct aforesaid constitutes a breach of that duty.” Compl. ¶ 8.01. While the claim section attempts to incorporate “conduct aforesaid,” the preceding paragraphs of the Complaint only recite the details of business transactions between the parties, allegations that Jenkins was going to “pull down” the website, and allegations that Jenkins has not paid what Plaintiffs consider “her share” of legal and other expenses to protect the trademark. *See* Compl. ¶¶ 4.19, 4.22-23. Nowhere in the Complaint do Plaintiffs plead facts giving rise to a fiduciary relationship between themselves or any Defendant.

The finding of a fiduciary relationship requires allegations that a relationship of confidence existed between the parties “before, and apart from, the agreement made the basis of the suit.” *Schlumberger*, 959 S.W.2d at 177. Such allegations are not present in Plaintiffs’ Complaint. Plaintiffs have not alleged facts to show that that Defendants were in a relationship of confidence with Plaintiffs prior to the execution of the Settlement Agreement, such that Defendants’ alleged breach of the Settlement Agreement would constitute a breach of any fiduciary duty owed Plaintiffs. Accordingly, Plaintiffs’ breach of fiduciary duty claim should be dismissed for failure to state a claim.

B. Plaintiffs' Breach of Duty of Loyalty Claims Should be Dismissed for Failure to Plead a Claim.

For the reasons set forth above, Plaintiff's claim for breach of fiduciary duty should be dismissed, and as such, Plaintiffs' breach of the duty of loyalty should also be dismissed. The duty of loyalty is a duty that only exists in a fiduciary relationship, which Plaintiffs have failed to plead. *See Loy v. Harter*, 128 S.W.3d 397, 407 (Tex. App.-Texarkana 2004, pet. denied) ("Three broad duties stem from the fiduciary status of corporate officers and directors; namely, the duties of obedience, loyalty and due care"), *citing Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984).⁴

CONCLUSION AND PRAYER

For the foregoing reasons, Defendants pray that this Court grant their motion to dismiss, dismiss Plaintiffs' claims for breach of fiduciary duty and breach of the duty of loyalty and award Defendants such other and further relief to which they may be entitled.

⁴ *See also Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178 (Nev. 2006) (holding a fiduciary relationship imparts the duties of care and loyalty); *Horwitz v. Southwest Forest Indus., Inc.*, 604 F. Supp. 1130, 1134 (D. Nev. 1985).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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