PHILADELPHIA COURT OF COMMON PLEAS

PETITION/MOTION COVER SHEET

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ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE: 04/03/2018

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CONTROL NUMBER: 18032033

(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

April Term, 2017
Month *Year*

No. 02096

TOWERS WATSON DELAWARE, INC. VS MORGAN, LEWIS & BO

Name of Filing Party:
TOWERS WATSON DELAWARE, INC.-PLF

INDICATE NATURE OF DOCUMENT FILED:

☐ Petition *(Attach Rule to Show Cause)* ☒ Motion
☐ Answer to Petition ☐ Response to Motion

Has another petition/motion been decided in this case? ☒ Yes ☐ No
Is another petition/motion pending? ☐ Yes ☒ No

If the answer to either question is yes, you must identify the judge(s):
PATRICIA MCINERNEY

TYPE OF PETITION/MOTION (see list on reverse side)	PETITION/MOTION CODE (see list on reverse side)
MOTION-JUDGMENT ON PLEADINGS	MTJPL

ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):

I. CASE PROGRAM

COMMERCE PROGRAM

Name of Judicial Team Leader: JUDGE PATRICIA MCINERNEY
Applicable Petition/Motion Deadline: 07/02/2018
Has deadline been previously extended by the Court: NO

II. PARTIES *(required for proof of service)*
(Name, address and **telephone number** of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)

WILLIAM H TRASK
135 SOUTH 19TH STREET SUITE 400 ,
PHILADELPHIA PA 19103

MICHAEL L BANKS
MORGAN LEWIS & BOCKIUS 1701 MARKET ST , PHILADELPHIA PA 19103

III. OTHER

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

(Attorney Signature/Unrepresented Party)	March 13, 2018 *(Date)*	JOSEPH R. PODRAZA *(Print Name)*	*(Attorney I.D. No.)*

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date.
No extension of the Answer/Response Date will be granted even if the parties so stipulate.

TOWERS WATSON DELAWARE, INC.	:	
	:	COURT OF COMMON PLEAS
Plaintiff,	:	PHILADELPHIA COUNTY
	:	
v.	:	
	:	
MORGAN, LEWIS & BOCKIUS, LLP	:	April Term, 2017
	:	
- and -	:	No. 02096
	:	
JEREMY P. BLUMENFELD, ESQUIRE	:	
	:	
Defendants.	:	

ORDER

AND NOW, this_____day of_____, 2018, upon consideration of Plaintiff's Motion for Partial Judgment on the Pleadings as to Defendants' Liability, and any response thereto, it is hereby ORDERED and DECREED that the Motion is GRANTED, and JUDGMENT on the issue of liability shall enter in favor of Plaintiff and against Defendant Morgan Lewis & Bockius, LLP for breach of fiduciary duty and breach of contract and against Defendant Jeremy P. Blumenfeld, Esquire for breach of fiduciary duty.

BY THE COURT:

_____
PATRICIA A. McINERNEY, J.

SPRAGUE & SPRAGUE
By: Richard A. Sprague, Esquire (ID #04266)
Joseph R. Podraza, Jr., Esquire (ID #53612)
Brooke Spigler Cohen, Esquire (ID #204648)
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Counsel for Plaintiff
Towers Watson Delaware, Inc.

TOWERS WATSON DELAWARE, INC.	:	
	:	COURT OF COMMON PLEAS
Plaintiff,	:	PHILADELPHIA COUNTY
	:	
v.	:	
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MORGAN, LEWIS & BOCKIUS, LLP	:	April Term, 2017
	:	
- and -	:	No. 02096
	:	
JEREMY P. BLUMENFELD, ESQUIRE	:	
	:	
Defendants.	:	

PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS AS TO DEFENDANTS' LIABILITY

Plaintiff Towers Watson Delaware, Inc. (together with its predecessor and related entities, "Towers" or "Plaintiff"), by and through its undersigned counsel, hereby moves this Court to enter an Order granting Plaintiff's Motion for Partial Judgment on the Pleadings and directing judgment as to liability against Defendant Morgan Lewis & Bockius, LLP for breach of fiduciary duty and breach of contract and against Defendant Jeremy P. Blumenfeld, Esquire for breach of fiduciary duty. In support of its Motion, Plaintiff avers as follows:

1. This case arises from the cloaked treachery of Defendants Morgan Lewis & Bockius, LLP and Jeremy P. Blumenfeld, Esquire (collectively, "Morgan" or "Defendants") in breach of the duties they owed to their long-standing client Towers.

2. While continuing to represent Towers in various matters, Morgan represented another client, Meriter Health Services, Inc. ("Meriter"), in defending a class action suit (the "Class Action") related to Meriter's implementation and administration of its retirement plan. Towers was a third-party witness in the Class Action, having designed and for a period of time served as the enrolled actuary for Meriter's plan. But Towers was never brought into the case as a party, and prior to Morgan's disloyal conduct, neither plaintiffs nor defendants in the Class Action were critical of the work performed by Towers for Meriter or otherwise suggested any basis for Towers to be held liable in connection with it. Yet, immediately following settlement of the Class Action, Meriter, through other counsel ("Law Firm 2"), filed suit against Towers seeking millions of dollars in contribution toward the Class Action settlement amount paid by Meriter on the basis of contrived claims that, unbeknownst to Towers, Morgan had outrageously assisted with developing.

3. On August 4, 2017, Towers filed its Complaint in this action, asserting claims against both Defendants for breach of contract (Count I) and breach of fiduciary duty (Count II). (*See generally*, Ex. 1.)

4. On September 22, 2017, Defendants filed preliminary objections in the nature of a demurrer seeking dismissal of Plaintiff's claims on the basis that Plaintiff waived any conflict in Morgan's representation of Meriter by virtue of the broad, non-specific waiver language in Plaintiff's retainer agreements with Morgan. (Ex. 2 hereto.)

5. By Order dated November 8, 2017, this Court overruled Defendants' preliminary objections made on the basis of waiver. (Ex. 3 hereto.)[1]

6. On December 1, 2017, Defendants filed an Answer and New Matter to Towers' Complaint ("Answer"). (Ex. 4 hereto.)

7. On December 21, 2017, Plaintiff filed detailed preliminary objections to Defendants' Answer on the ground that the Answer failed to adequately respond to numerous factual averments, was replete with insufficient general denials, and in many cases simply asserted the same non-meritorious waiver defense this Court rejected in overruling Defendants' preliminary objections. (Ex. 5 hereto.)

8. In response, Defendants filed their Amended Answer and New Matter ("Amended Answer") on January 11, 2018. (Ex. 6 hereto.) Despite having been put on notice by Tower's preliminary objections detailing Defendants' numerous deficient denials, Defendants failed in their Amended Answer to correct them. Instead, Defendants merely swapped out one insufficient boilerplate response (that the document "speaks for itself") for another ("Defendants deny Plaintiff's characterization" of the document) and included some additional insufficient general denials—without any factual allegations in support—that are directly contradicted by Defendants' own undisputed documents and statements quoted and cited in the Complaint. (*See generally* Ex. 6.)

9. On January 19, 2018, Towers filed its Reply to New Matter (Ex. 7 hereto) in response to Defendants' Amended Answer, thus closing the relevant pleadings in this matter.

[1] The Court sustained only Defendants' preliminary objection to the breach of contract claim against Blumenfeld individually, finding that he was not a signatory to the retainer agreements between the two corporate parties. (Ex. 3.)

10. Towers now moves for partial judgment on the pleadings because, as detailed in Towers' Memorandum of Law appended hereto and incorporated herein, Defendants' admissions and deemed admissions leave no dispute as to the operative facts, and Towers is entitled to judgment as to liability as a matter of law.

11. Rule 1034 of the Pennsylvania Rules of Civil Procedure provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a).

12. The timing of the instant motion is such that it will not unreasonably delay the trial of this matter.

13. "A court should grant a motion for judgment on the pleadings where the pleadings demonstrate that no genuine issue of fact exists, and that the moving party is entitled to judgment as a matter of law." *Fowkes v. Shoemaker*, 661 A.2d 877, 878 (Pa. Super. Ct. 1995).

14. In passing on a motion for judgment on the pleadings, the court accepts as true well-pleaded facts of the non-moving party's pleading "***unless their falsity is apparent from the record***." *Bykowski v. Chesed, Co.*, 625 A.2d 1256, 1258 (Pa. Super. Ct. 1993) (quoting Standard Pa. Practice 2d, § 31:18) (emphasis in original); *see also Gothier v. Regent Constr. Co.*, 24 Pa. D.&C.3d 744, 748 (Pa. C.P., Cumberland Cty. 1983) ("The court will not, however, accept as true, averments which can be readily determined to be false from an examination of the record." (internal citations omitted)). Unjustified inferences or conclusory allegations may not be taken into account. *Keystone Automated Equip. Co. v. Reliance Ins. Co.*, 535 A.2d 648, 650 (Pa. Super. Ct. 1988).

15. Pennsylvania law is well settled that a party may not simply avoid judgment on the pleadings with denials that do not directly respond to the well-pleaded factual averments of a

complaint. Rather, Pennsylvania Rule of Civil Procedure 1029(b) provides: "Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof … shall have the effect of an admission." Pa.R.C.P. 1029(b). And where such deemed admissions for failure to specifically deny result in the absence of material issues of fact as to a defendant's liability, partial judgment on the pleadings is properly granted to the plaintiff. *Swift v. Milner*, 538 A.2d 28, 31 (Pa. Super. Ct. 1988).

16. Towers' Complaint sets forth the material facts supporting its causes of action for breach of fiduciary duty and breach of contract in detailed, narrative, and chronological fashion, ***citing and/or quoting Morgan's own documents***. (*See generally* Ex. 1.)

17. Defendants do not deny that they authored, sent, or received (as the case may be) the documents cited or quoted in the Complaint. They do not allege any way that Towers misquoted or otherwise misrepresented the referenced documents.[2] Nor do Defendants allege any facts to suggest that the documents quoted and cited in the Complaint mean something other than what they say. Simply, Defendants do not—because they cannot—specifically deny that they made the statements or took the actions factually alleged in the Complaint as demonstrated through Defendants' own documents. (*See generally* Ex. 8 hereto[3].)

18. As more particularly shown in the accompanying Memorandum of Law, Defendants utterly failed to meet the requirements of the Pennsylvania Rules of Civil Procedure for specific denials, and thus the allegations to which they respond must be deemed admitted.

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[2] In a few instances, the Amended Answer denies that the quoted portion of a document "reflects" or "includes" or quotes "the entirety" of the document. (Ex. 6 at ¶¶ 42, 51-52, 54, 64.) However, in none of these instances do Defendants cite to or quote any additional portion of the referenced document or allege that any non-quoted portion of the document refutes, calls into question, or changes the meaning the quoted language.

[3] For ease of reference, Exhibit 8 shows the various cited allegations of the Complaint side-by-side with Defendants' insufficient responses.

Defendants' sham denials and purposefully evasive answers do not constitute or represent a valid defense to Tower's Complaint.

19. The effect of Morgan's admissions and deemed admissions is that there are no unresolved issues of material fact that would preclude this Court from finding Defendants liable as a matter of law on the pleadings. Defendants admit or must be deemed to admit that: (1) they knew Meriter had interests adverse to their existing client Towers and acknowledged Morgan was precluded by conflict from having anything to do with any claims against Towers; (2) Defendants never informed Towers of the conflict and neither sought nor obtained Towers' informed consent to the conflict by communicating the requisite information for such consent; and (3) despite their recognized conflict, Defendants, *inter alia*, provided Law Firm 2—the firm Morgan admits was expressly retained to pursue claims against Towers—with advance drafts of briefs, settlement documents, and expert reports as well as other work product; encouraged Law Firm 2 to pressure Towers to contribute to a class settlement; revised documents in accordance with Law Firm 2's instructions; supplied Law Firm 2 with potential arguments for contriving claims against Towers; and otherwise assisted Meriter and Law Firm 2 in preserving and developing such claims against Towers.

20. For the reasons in the accompanying Memorandum of Law, the facts admitted and deemed admitted by Defendants establish their liability as a matter of law for breach of fiduciary duty (both Defendants) and breach of contract (the Morgan firm) for engaging in an actionable, impermissible conflict of interest and breaching their duty of undivided loyalty to Towers. *See Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1283 (Pa. 1992); *Dougherty v. Pepper Hamilton LLP*, 133 A.3d 792, 796-97 (Pa. Super. Ct. 2016).

21. Furthermore, for the reasons in the accompanying Memorandum of Law, Defendants' asserted waiver defense—which contends that Towers waived a conflict that Defendants, themselves, represented to a court was "non-waivable"[4]—is legally deficient and cannot preclude judgment on the pleadings in favor of Towers. The same waiver argument that Defendants raise in their Amended Answer and New Matter was rejected by this Court in overruling Defendants' preliminary objections. The law provides that the concurrent conflict of interest precluding Morgan's involvement in any claims by Meriter against Towers was non-waivable. And, even if it were waivable, Morgan's Amended Answer and New Matter fails as a matter of law to plead sufficient facts to support a claim that any purported waiver by Towers was given with required informed consent.

22. Accordingly, for the reasons herein and as more particularly shown in the accompanying Memorandum of Law, Towers is entitled to judgment on the pleadings as to Defendants' liability because Defendants' admissions and deemed admissions to the Complaint's well-pleaded allegations demonstrate as a matter of law that Defendants breached their fiduciary and contractual duties to Towers; the law is clear that such breaches are actionable; and Defendants' Amended Answer and New Matter does not constitute or present a valid or meritorious defense.

[4] *See* Ex. 9 hereto. Exhibit 9 is a copy of Morgan's letter to the Wisconsin State Court in Meriter's action against Plaintiff herein that is cited and quoted in part in Paragraph 9 of Towers' Complaint in the instant action. As a publicly filed document in the Wisconsin court proceeding, Exhibit 9 may be considered by the Court for purposes of this Motion, including portions of the letter not expressly quoted in the Complaint. *See Bykowski v. Chesed, Co.*, 625 A.2d 1256, 1258 n.1 (Pa. Super. Ct. 1993) (the court has the right to take judicial notice of public documents when deciding a motion for judgment on the pleadings).

WHEREFORE, Plaintiff Towers Watson Delaware, Inc. respectfully requests that the Court grant its Motion and enter judgment on the pleadings as to liability against Defendant Morgan Lewis & Bockius, LLP for breach of fiduciary duty and breach of contract and against Defendant Jeremy P. Blumenfeld, Esquire for breach of fiduciary duty.

Respectfully submitted,

SPRAGUE & SPRAGUE

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Dated: March 13, 2018

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Counsel for Plaintiff
Towers Watson Delaware, Inc.

TOWERS WATSON DELAWARE, INC.	:	
	:	COURT OF COMMON PLEAS
Plaintiff,	:	PHILADELPHIA COUNTY
	:	
v.	:	
	:	
MORGAN, LEWIS & BOCKIUS, LLP	:	April Term, 2017
	:	
- and -	:	No. 02096
	:	
JEREMY P. BLUMENFELD, ESQUIRE	:	
	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO DEFENDANTS' LIABILITY

Plaintiff Towers Watson Delaware, Inc. (together with its predecessor and related entities, "Towers" or "Plaintiff"), by and through its undersigned counsel, hereby submits this Memorandum of Law in Support of its Motion for Partial Judgment on the Pleadings as to Defendants Morgan Lewis & Bockius, LLP and Jeremy P. Blumenfeld, Esquire's (collectively, "Morgan" or "Defendants") Liability.

I. MATTER BEFORE THE COURT

Before the Court is Plaintiff Towers' Motion for Partial Judgment on the Pleadings as to Defendants' Liability pursuant to Pennsylvania Rule of Civil Procedure 1034.

This case arises from Defendants' cloaked treachery in breach of their fiduciary and contractual duties to their long-standing client Towers. While continuing to represent Towers in various matters, Morgan represented another client, Meriter Health Services, Inc. ("Meriter"), in defending a class action suit (the "Class Action") related to Meriter's implementation and administration of its retirement plan. Towers was a third-party witness in the Class Action, having designed and for a period of time served as the enrolled actuary for Meriter's plan. But Towers was never brought into the case as a party, and prior to Morgan's disloyal conduct, neither plaintiffs nor defendants in the Class Action were critical of the work performed by Towers for Meriter or otherwise suggested any basis for Towers to be held liable in connection with it. Yet, immediately following settlement of the Class Action, Meriter, through other counsel ("Law Firm 2"[1]), filed suit against Towers seeking millions of dollars in contribution toward the Class Action settlement amount on the basis of contrived claims that, unbeknownst to Towers, Morgan had outrageously assisted with developing.

Towers' Complaint avers in painstaking detail—using Defendants' own documents—facts demonstrating Defendants' egregious disloyalty to Towers by knowingly engaging in an undisclosed, impermissible conflict of interest and by secretly assisting Meriter with the development and preservation of contrived claims against Towers. (*See* Compl., attached as Ex. 1 hereto.) Even in their Amended Answer and New Matter, Defendants do not—because they cannot—specifically deny these material factual allegations. Towers thus moves for partial judgment on the pleadings because the well-pleaded facts that Defendants admit or must be

[1] Although referenced by name in Defendants' Amended Answer and New Matter, consistent with Plaintiff's Complaint, "Law Firm 2" is used herein to refer to the law firm retained by Meriter for the express purpose of pursuing claims against Towers in which Morgan Lewis was admittedly precluded from becoming involved. (Defendants' Am. Ans. and New Matter, attached as Ex. 6 hereto, at ¶ 27 & n.2.)

deemed to admit for failure to specifically deny establish Morgan's liability for breach of contract and breach of fiduciary duty as a matter of law.

Morgan was indisputably required by common law and the Rules of Professional Conduct—as well as by the terms of Morgan's own engagement letters—to timely advise Towers of the conflict created by Meriter's adverse interests. Moreover, the law required Morgan to cease its conflicted representation of Meriter in the Class Action absent obtaining a knowing and intelligent waiver by Towers made after full disclosure by Morgan of the relevant circumstances and explanation of the material risks. The admissions and deemed admissions by Defendants definitively establish that Morgan did neither. Instead, Morgan continued to represent Meriter, whose interests Morgan knew to be adverse to Towers, without giving Towers any indication of Morgan's divided loyalty. And Morgan did so not only while continuing to represent Towers in unrelated matters, but also while allowing Towers to entrust the Morgan attorneys with reviewing Towers' documents for privilege and preparing Towers' witnesses for deposition in the Class Action.

In fact, Morgan's admissions and deemed admissions demonstrate that Morgan was conflicted in their representation of Meriter, fully appreciated this conflict, and not only failed to disclose the conflict to Towers but deliberately hid it. Worse yet, the facts admitted or deemed admitted by Morgan show that despite repeatedly acknowledging that they were ***precluded by non-waivable conflict from having anything to do with claims or potential claims against Towers***, Morgan reprehensibly secretly collaborated with, coordinated with, exchanged work product with—and even supplied a manufactured basis for going after Towers to—counsel specifically retained by Meriter to devise and pursue claims against Towers. Simply, the pleadings demonstrate as a matter of law that Morgan violated its duty of undivided loyalty to

Towers, and Pennsylvania law is clear that such conduct is abhorrent and actionable. Towers is thus entitled to partial judgment on the pleadings as to liability in its favor.

II. QUESTION PRESENTED

Should the Court grant partial judgment on the pleadings as to liability in favor of Plaintiff Towers where Defendants either admit or, pursuant to Pa.R.C.P. 1029(b) must be deemed to admit, the material allegations of Tower's Complaint that demonstrate Defendants breached their fiduciary and contractual duties to Towers as a matter of law?

Suggested Answer*: *Yes.

III. STATEMENT OF FACTS

For many years, Morgan represented Towers in various legal matters, with a partner at the firm, Blumenfeld, serving as the lead Morgan attorney for Towers in at least one of those matters.[2] (Ex. 1 at Ex. A thereto; Ex. 8 at ¶¶ 7-10.)[3] While continuing to represent and to collect millions of dollars in legal fees from Towers, Morgan also accepted engagement as defense counsel in a class action (the "Class Action") for another client, Meriter, the interests of which Morgan immediately recognized were potentially adverse to Towers' interests. (Ex. 8 at ¶¶ 11,

[2] Plaintiff, Towers Watson Delaware, Inc., is the successor to entities Defendants admit they represented. (Ex. 1 at ¶¶ 7-8; Ex. 6 at ¶ 8.) While Defendants, purporting to lack sufficient knowledge of the relationship between Plaintiff and its predecessor Towers entities, deny in their Amended Answer that they represented the particular entity that is Plaintiff herein, in fact, Morgan affirmatively represented to the court presiding over Meriter's action against Towers Watson Delaware, Inc. that the Towers entity in that case—***admittedly the same entity as Plaintiff herein***—"was and remains a client of the Firm." (Ex. 1 at ¶¶ 7, 9; Ex. 6 at ¶¶ 7, 9; Ex. 9.) Moreover, the relationship between Plaintiff and the entities that Defendants admit they represented is a matter of public record. (*See, e.g.*, Articles of Merger-Business, Dec. 31, 2014, publicly available from the Pennsylvania Department of State.) Accordingly, Defendants do not lack sufficient information, and their denial is an insufficient general denial and/or should not be taken as true for purposes of this motion since its falsity is apparent from the record. *See Strank v. Mercy Hospital of Johnstown*, 102 A.2d 170, 171-72 (Pa. 1954) (averment of lack of knowledge is not sufficient denial where means of proof are matters of public record); *Bykowski v. Chesed, Co.*, 625 A.2d 1256, 1258 (Pa. Super. Ct. 1993) (court does not take as true non-moving party's averments where their falsity is apparent from the record).

[3] For the reasons discussed *infra*, Defendants must be deemed to admit for failure to specifically deny the cited allegations in the Complaint. For ease of reference, Exhibit 8 hereto shows the various cited allegations of the Complaint side-by-side with Defendants' insufficient responses.

15, 16, 20, 88.) Morgan acknowledged as early as 2010, in correspondence with Meriter and Meriter's insurer, that Morgan "cannot be adverse to Towers" and could not be involved in any discussions about any potential claims related to Towers—a statement Morgan reiterated throughout the Class Action to Meriter, Meriter's insurer, and Law Firm 2, a second law firm that was later retained by Meriter for the express purpose of pursuing claims against Towers. (*Id.* at ¶¶ 20-21, 23, 27, 29-31.)

Yet, ignoring its own advice and acknowledgement of conflict, Morgan participated in a years-long collaboration with Law Firm 2 for the benefit of its other client, Meriter, and contrary to Towers' interests. (*Id*. at ¶¶ 33-42, 44-45, 47, 49, 51-52, 54-55, 56, 58-64, 66-70.) Morgan kept Law Firm 2 fully apprised of issues potentially affecting future claims of Meriter against Towers, and Morgan coordinated with Law Firm 2 to ensure the preservation of these potential claims. (*Id*.) In addition, Morgan freely shared its work product with Law Firm 2, often soliciting input to avoid adopting arguments in the Class Action that could impact unfavorably on Meriter's developing claims against Towers. (*See, e.g., id*. at ¶¶ 36-37, 44.) Morgan even went so far as to provide Law Firm 2 with a manufactured argument to overcome a statute of limitations defense to Meriter's potential claims against Towers when Law Firm 2 viewed a ruling by the Class Action court as "absolving" Towers of liability. (*Id.* at ¶¶ 41-42.)

Unaware of Morgan's efforts on behalf of Meriter, Towers permitted Morgan to review its documents for privilege and to assist in preparing Towers witnesses for depositions in the Class Action. (*Id*. at ¶¶ 30-31, 46.) Morgan's internal emails reveal that Defendants in fact sought to solicit testimony from Towers that would lay the groundwork for "fault[ing]" Towers later. (*Id*. at ¶ 47.) And Morgan continued to assist Meriter at Towers' expense as the Class Action progressed, repeatedly suggesting that Meriter pursue contribution from Towers toward

settlement of the Class Action and even proposing that Law Firm 2 use threats to get it. (*Id*. at ¶¶ 51-52, 54-55.)

At no time did Morgan advise Towers of the ballooning conflict or seek Towers' informed consent to Morgan's conflicted representation. (*Id*. at ¶ 24.) Even when Towers contacted Morgan specifically to inquire about Morgan's role in representing Meriter with regard to claims against Towers, Defendants failed to inform Towers of their communications and coordination with and assistance to Law Firm 2. (*Id*. at ¶¶ 75-76.) The day after finalizing settlement of the Class Action, Meriter, through Law Firm 2, filed an action against Towers. (*Id*. at ¶¶ 77.)

On August 4, 2017, Towers filed its Complaint in this action, asserting claims against all Defendants for breach of contract (Count I) and breach of fiduciary duty (Count II). (*See generally*, Ex. 1.) ***Despite having previously represented to a court that Morgan's conflict in regards to Towers was non-waivable***,[4] Defendants filed preliminary objections seeking dismissal of Plaintiff's claims on the basis that Plaintiff waived any conflict in Morgan's representation of Meriter by virtue of the broad, non-specific waiver language in Plaintiff's retainer agreements with Morgan. (Ex. 2.) Rejecting Defendants' waiver argument, this Court entered an Order on November 8, 2017 overruling all of Defendants' preliminary objections with the exception of their demurrer to the breach of contract count against Defendant Blumenfeld individually.[5] (Ex. 3.)

[4] *See* Ex. 9. Exhibit 9 is a copy of Morgan's letter to the Wisconsin State Court in Meriter's action against Plaintiff herein that is cited and quoted in part in Paragraph 9 of Towers' Complaint in the instant action. As a publicly filed document in the Wisconsin court proceeding, the letter may be considered by this Court for purposes of this motion, including portions of the letter not expressly quoted in the Complaint. *See Bykowski v. Chesed, Co.*, 625 A.2d 1256, 1258 n.1 (Pa. Super. Ct. 1993) (the court has the right to take judicial notice of public documents when deciding a motion for judgment on the pleadings).

[5] This Court dismissed the breach of contract claim against Blumenfeld finding that he was not a signatory to the retainer agreements between Morgan and Towers. (Ex. 3.)

On December 1, 2017, Defendants filed their Answer and New Matter to Towers' Complaint ("Answer"). (Ex. 4.) Plaintiff filed Preliminary Objections to Defendants' Answer on the ground that the Answer failed to adequately respond to numerous factual averments, was replete with insufficient general denials, and, in many cases, simply asserted the same non-meritorious waiver defense this Court rejected in overruling Defendants' preliminary objections. (Ex. 5.) In response, Defendants filed their Amended Answer and New Matter ("Amended Answer") but failed to correct these numerous deficiencies. (Ex. 6.) Instead, Defendants merely swapped out one insufficient, boilerplate response (that the document "speaks for itself") for another ("Defendants deny Plaintiff's characterization" of the document) and included some additional insufficient general denials—without any factual allegations in support—that are directly contradicted by Defendants' own undisputed documents and statements quoted and cited in the Complaint. (*See generally id.*) On January 19, 2018, Towers filed its Reply to New Matter in response to Defendants' Amended Answer, thus closing the relevant pleadings. (Ex. 7.)

IV. ARGUMENT

A. Legal Standard

Rule 1034 of the Pennsylvania Rules of Civil Procedure provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). "A court should grant a motion for judgment on the pleadings where the pleadings demonstrate that no genuine issue of fact exists, and that the moving party is entitled to judgment as a matter of law." *Fowkes v. Shoemaker*, 661 A.2d 877, 878 (Pa. Super. Ct. 1995). In passing on a motion for judgment on the pleadings, the court accepts as true well-pleaded facts of the non-moving party's pleading "***unless their falsity is apparent from the record***." *Bykowski v. Chesed, Co.*, 625 A.2d 1256,

1258 (Pa. Super. Ct. 1993) (quoting Standard Pa. Practice 2d, § 31:18) (emphasis in original); *see also Gothier v. Regent Constr. Co.*, 24 Pa. D.&C.3d 744, 748 (Pa. C.P., Cumberland Cty. 1983) ("The court will not, however, accept as true, averments which can be readily determined to be false from an examination of the record"). Unjustified inferences or conclusory allegations may not be taken into account. *Keystone Automated Equip. Co. v. Reliance Ins. Co.*, 535 A.2d 648, 650 (Pa. Super. Ct. 1988).

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B. There Are No Disputed Issues of Material Fact That Would Preclude Judgment on the Pleadings in Plaintiff's Favor

Towers' Complaint sets forth the material facts supporting its causes of action for breach of fiduciary duty and breach of contract in detailed, narrative, and chronological fashion, ***citing and/or quoting Morgan's own documents***. These documents and averments show unequivocally that Morgan: 1) recognized and conveyed to Meriter, Meriter's insurer, and Meriter's other counsel (Law Firm 2) that Morgan was conflicted and precluded from having anything to do with any claims or potential claims against Towers[6]; 2) nonetheless took actions, both in defending the Class Action and in communicating and coordinating with Law Firm 2,

[6] (Ex. 1 at ¶¶ 21, 23, 27, 52.)

that were against Towers' interests and in furtherance of Meriter's interests in contriving claims against Towers[7]; and 3) did not advise Towers of these actions or of any conflict[8].

Defendants do not deny that they authored, sent, or received (as the case may be) the documents cited or quoted in the Complaint. They do not allege any way that Towers misquoted or otherwise misrepresented the referenced documents.[9] Nor do Defendants allege any facts to suggest that the documents quoted and cited in the Complaint mean something other than what they say. Simply, Defendants do not—because they cannot—specifically deny that they made the statements or took the actions factually alleged in the Complaint as demonstrated through Defendants' own documents. (*See generally* Ex. 8.)

In a clear attempt to avoid the precise and uncomfortable truths of Towers' documented factual averments, Defendants simply ignore them and repeat the same general denials throughout ***without stating any basis for or alleging any facts in support of those denials***. Indeed, to the extent they do not explicitly admit the allegation, Defendants merely assert one or more of the following general denials: 1) Defendants "deny the characterization" of the referenced document, "deny" that the entirety of the document is quoted, or state that the document "speaks for itself"[10]; 2) Defendants deny that there was any conflict of interest or that

[7] (Ex. 1 at ¶¶ 33-37, 39, 41-42, 44-45, 47, 54-56, 58, 61-64, 66-70.)

[8] (Ex. 1 at ¶¶ 24, 75-76.)

[9] In a few instances, the Amended Answer denies that the quoted portion of a document "reflects" or "includes" or quotes "the entirety" of the document. (Ex. 6 at ¶¶ 42, 51-52, 54, 64.) However, in none of these instances do Defendants cite to or quote any additional portion of the referenced document or allege that any non-quoted portion of the document refutes, calls into question, or changes the meaning the quoted language.

[10] *See, e.g.*, Ex. 6 at ¶¶ 9, 21, 23, 27, 31, 36-39, 41-42, 45, 47, 49, 51-52, 54-56, 58-61, 63-64, 67-70, 75.

they were disloyal[11]; and/or 3) Defendants deny that they "assisted" or "played any role" in the "development, evaluation, and/or pursuit of claims" against Towers[12].

But Defendants' pleading gamesmanship is unavailing, as it is well-settled that such general and/or conclusory denials do not create genuine disputed issues of fact and cannot prevent judgment on the pleadings. *See* Pa.R.C.P. 1029(b) (general denials must be deemed admitted); *Swift*, 538 A.2d at 31 (holding partial judgment on the pleadings in favor of plaintiff was proper where, by failing to comply with Rule 1029(b), defendant's deemed admissions resulted in the absence of material issues of fact as to liability); *Keystone Automated Equip. Co.*, 535 A.2d at 650 (the court may not take into account conclusory denials on a motion for judgment on the pleadings). Specific denials require more than just denying the fact pleaded: the party must "provide some reason" for the denial. *Garden State Tile Distribs. v. Selvaggio Enters.*, C-0048-CV-2010-2166, 2010 Pa. Dist. & Cnty. Dec. LEXIS 761, at *7-8 (Pa. C.P., Northampton Cty. Apr. 10, 2010); *see also Gwinn v. Empire State Chair Co.*, 48 Pa. D.&C.4th 176, 180 (Pa. C.P., Lawrence Cty. 2000) (a specific denial "affirmatively avers that which did or did not occur instead of the fact averred"); *Martin v. Barfield*, 66 Pa. D. & C. 321 (Pa. C.P., Northumberland Cty. 1948) (denials by repeating in the negative the averment in the corresponding paragraph almost verbatim are insufficient). Defendants utterly failed to meet the requirements of the Pennsylvania Rules of Civil Procedure for specific denials, and thus the allegations to which they respond must be deemed admitted.

In particular, Morgan's general denials of the allegations that quote or reference Morgan's documents—which denials neither dispute the authenticity of the documents nor allege

[11] *See, e.g.*, Ex. 6 at ¶¶ 21, 27, 31, 33, 49, 55-56, 59.

[12] *See, e.g.*, Ex. 6 at ¶¶ 33-39, 44-45, 47, 59, 61-64, 66, 70, 75.

any way that Towers misquoted or misrepresented them—must be deemed admissions.[13] *See Beal Bank v. PIDC Fin. Corp.* No. 02522, 2002 Phila. Ct. Com. Pl. LEXIS 102, at *14-15 (Pa. C.P., Phila. Cty. Sept. 9, 2002) (Sheppard, J.) (holding answer that stated loan document was a writing that speaks for itself and that denied any characterization of the document constituted general denial and deemed admission of allegation that defendant was in default); *Garden State Tile*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 761, at *7-8 (denials that merely refer back to documents appended to complaint are insufficient under Rule 1029 and are properly deemed admissions). And, as discussed below, these documents and allegations that Defendants must be deemed to admit establish the essential elements of Towers' claims.

Defendants cannot escape this result by their conclusory denials that there was any conflict or disloyalty or by their denials that they "played any role" in preserving or developing Meriter's claims against Towers. To begin with, Morgan's assertions of no conflict of interest or disloyalty are conclusory and unjustified inferences, not factual allegations entitled to be accepted as true, and thus do not create a question of fact that would preclude judgment in Towers' favor. *See Keystone*, 535 A.2d at 650 (holding denial that insurance claim was excluded by insurance policy was conclusory and could not be accepted as true for purposes of judgment on the pleadings); *Kilmer v. Commonwealth, DOT*, 573 A.2d 659, 661 (Pa. Commw. Ct. 1990) (conclusory allegations cannot withstand a motion for judgment on the pleadings). Moreover, even assuming *arguendo* that they were factual, Morgan's denials are belied by their own documents quoted and cited in the Complaint and therefore need not be considered in deciding whether judgment on the pleadings is proper. *See Bykowski*, 625 A.2d at 1258 (holding trial

[13] This applies to Defendants' answers to the following paragraphs of the Complaint, which answers generally deny Plaintiff's "characterization" of the document, deny that the document is quoted in its entirety, or deny on the basis that the "document speaks for itself": ¶¶ 9, 21, 23, 27, 31, 36, 37, 38, 39, 41, 42, 45, 47, 49, 51, 52, 54, 55, 56, 58, 59, 60, 61, 63, 64, 67, 68, 69, 70, 75. (*See* Ex. 8.)

court properly granted judgment on the pleadings to defendant where it was apparent from the record that non-moving plaintiff's allegation that defendant owned the subject property was false and thus did not create disputed issue of fact); *Garden State Tile*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 761, at *7-8 (granting plaintiff's motion for judgment on the pleadings where documents appended to the complaint belied defendants' denials and established the essential elements of plaintiff's claim).

Defendants do not—and cannot—specifically deny that they repeatedly stated they could not be involved with or participate in any discussions relating to any actual or potential claims of Meriter against Towers because Towers was a current client of the firm:

- Morgan told Meriter's insurer that another law firm would try to get a tolling agreement from Towers because "[o]ur firm ***cannot be adverse to Towers***." (Ex. 8 at ¶ 21 (emphasis added).)

- Morgan told Meriter that Morgan should not be involved in discussions about any potential claims against Towers because of the conflict. (*Id.* at ¶ 23.)

- Morgan told Law Firm 2 that "Morgan Lewis ***can't be involved in any discussions involving Towers***" and could not "comment on third party or insurance issues for all the reasons previously discussed." (*Id.* at ¶¶ 27, 51.)

(*See also* Ex. 8 at ¶ 82.) Any suggestion by Defendants that they did not view assisting with or participating in discussions related to any potential claims against or attempts to cast blame upon Towers as a conflict of interest is directly contradicted by these admitted statements as well as by other record documents cited in the Complaint. Indeed, Morgan represented in a letter, filed of record, to the Wisconsin state court presiding over the suit Meriter ultimately filed against Towers that "***Attorney Blumenfeld has a non-waivable conflict of interest***" that "results from the fact that Towers was and remains a client of the Firm." (*Id.* at ¶ 9; Ex. 9 (emphasis added).) And Law Firm 2 asked Morgan to confirm "whether [Morgan's] conflict issue [was] resolved" or

whether they needed to "dance around that issue" with respect to any questions Law Firm 2 would want Morgan to ask Towers employee Enderle. (Ex. 8 at ¶ 58.)

Equally unavailing are Defendants' general denials that they acted against Tower's interests or played any role in preserving or developing Meriter's contrived claims against Towers, when the Complaint is replete with concrete examples of their assistance to and collaboration with Law Firm 2 with respect to such claims—examples that Defendants do not (and cannot) specifically deny. Perhaps the most egregious example is when Morgan disabused Law Firm 2, who was responsible for developing claims against Towers, of the conclusion that Towers was "absolved" by a ruling in the Class Action regarding the statute of limitations. (Ex. 8 at ¶¶ 41-42.) Asked whether Morgan agreed with Law Firm 2's analysis that the court ruling precluded Tower's liability, Morgan answered "No," and then ***supplied Law Firm 2 with a manufactured legal basis for asserting Tower's liability*** "for breaches of fiduciary [sic] and damages" in spite of the court's statute of limitations ruling. (*Id.*)[14] The pleadings detail,

[14] The Complaint quotes the email exchange between Nixon Peabody and Morgan on this issue. Nixon Peabody asks Morgan:

> Would you agree with the following analysis. Let me know please.
>
> ***
>
> ***The Court has found in our [Meriter's] favor on statute of limitations grounds*** as to most of plaintiffs' claims, including the 2003 amendment issue; the wear away and whipsaw issues; and the 417(e) issue. ***What this means is that individual errors by Godfrey & Kahn and Towers are absolved by this ruling, should it stand***.

(Ex. 1 at ¶ 41.) And Morgan responds:

> No. For a couple of reasons. ***If Godfrey and Towers facilitated fraudulent concealment of 417(e)'s application to the pre-2002 lump summers, they are on the hook***. Also, now that wearaway and the sufficiency of the 204(h) notice are back in the case, Godfrey and ***Towers may be liable for both breaches of fiduciary [sic] and damages flowing from a defective 203(h) [sic] notice***.

(*Id.* at ¶ 42.)

through Morgan's own documents, myriad other examples of Morgan's assistance to Meriter at Tower's expense, including by, *inter alia*:

- regularly communicating with, coordinating with, and updating Law Firm 2 with developments in the Class Action that impacted any potential claims against Towers (Ex. 8 at ¶¶ 33-35, 45, 58);

- identifying and providing Law Firm 2 with select documents from the Class Action and even alerting Law Firm 2 to a document that Defendant Blumenfeld was concerned might present a statute of limitations problem for Meriter in bringing claims against Towers (*id.* at ¶¶ 38-39);

- sharing drafts of briefs and expert reports with Law Firm 2 and inviting their comments and questions (*id.* at ¶¶ 37, 44);

- providing Law Firm 2 with detailed deposition summaries of Towers witnesses, highlighting testimony that Defendants believed would support claims by Meriter against Towers (*id.* at ¶ 36);

- planning, in preparing Towers witnesses to testify at deposition, to get Towers to endorse Meriter's position and then to "fault" Towers for Meriter's actions (*id.* at ¶ 47);

- suggesting that Meriter and Law Firm 2 attempt to pressure Towers to contribute toward any settlement payment to resolve Meriter's liability, including by using the not-so-veiled threat that Towers "will pay more if you have to chase them down later ***after it is established at trial that they were the cause of Meriter's liability***" (*id.* at ¶¶ 51-52, 54-55 (emphasis added));

- taking work product and suggestions from Law Firm 2 for Defendants to use in settlement negotiations in the Class Action geared toward shifting blame to Towers for the Meriter Plan's failings (*id.* at ¶¶ 56, 58);

- offering to review the work that Law Firm 2 was doing in gathering "ammunition to rebut" a Towers' employee's testimony and assuring Law Firm 2 that Morgan was "***doing the same thing on our end***" (*id.* at ¶ 59 (emphasis added));

- sharing a trial examination outline with Law Firm 2 and taking comments from Law Firm 2 pointing the finger at Towers (*id.* at ¶¶ 60(a)-(k));

- drafting an outline for trial that cast Towers as the responsible party for the Meriter Plan's failings and intending to establish at trial that Towers was the cause of Meriter's liability (*id.* at ¶¶ 61-64); and

- supplying Law Firm 2 with draft settlement agreements and class notices, inviting Law Firm 2 to request modifications/edits to address claims against Towers, seeking to make sure that the public communications/class notices did not "include anything that could be construed as contrary to ***our positions***" in the claims that Meriter would be pressing against Towers and other third parties, and removing language from the settlement notice that Law Firm 2 requested be removed in the interest of Meriter's claims against Towers (*id.* at ¶¶ 66-70 (emphasis added)).

Against these allegations—which Defendants either admit or must be deemed to admit for the reasons above—Defendants' vague and mechanical denial that they provided any assistance in the preservation, development, evaluation, or pursuit of claims against Towers is patently false. (*See* Ex. 8 (showing the Complaint's allegations side-by-side with Defendants' answers).) Thus, even assuming *arguendo* this repeated contention in Defendants' Amended Answer met the requirements of Rule 1029(b), it still would not create a disputed issue of fact. *See Bykowski*, 625 A.2d at 1258 (in considering motions for judgment on the pleadings, averments of relevant fact in the opposing party's pleadings need not be deemed to be true where the record shows those facts to be false).

Finally, Defendants do not specifically deny, and thus must be deemed to admit, that they never informed Towers of the conflict. (Ex. 8 at ¶ 24.) Defendants' indirect response to this allegation, that Towers "specifically waived conflicts" fails for several reasons. (*Id.*) First, Defendants' claim of waiver is an issue of law and not a factual allegation entitled to be accepted as true. *See Columbia Gas v. Carl E. Baker, Inc.*, 667 A.2d 404, 407 (Pa. Super. Ct. 1995) ("A party cannot be deemed to admit either conclusions of law or unjustified inferences."). Second, Defendants' claim of waiver was already presented to and rejected by this Court when it denied their preliminary objections in the nature of demurrer asserting the same argument. Finally, Defendants' answer that Towers "specifically waived conflicts" "with knowledge" of Morgan's

representation of Meriter in the Class Action and of "the likelihood that Meriter would be asserting claims against [it]" does not directly respond to Tower's allegations that ***Defendants never informed Towers*** of any conflict—a fact that Defendants do not deny. (*See* Ex. 8 at ¶ 24.) The answer therefore constitutes a general denial and deemed admission of that allegation. *See Beal Bank*, 2002 Phila. Ct. Com. Pl. LEXIS 102, at *15-17 (denial that any amounts are due and owing on loan constituted general denial and deemed admission to allegations that non-moving party was in default of loan obligations and had failed to pay interest since denial failed to directly respond to those allegations).

In sum, the effect of Morgan's admissions and deemed admissions is that there are no unresolved issues of material fact that would preclude this Court from finding Defendants liable as a matter of law on the pleadings. Defendants admit or must be deemed to admit that: (1) they knew Meriter had interests adverse to their existing client Towers and acknowledged Morgan was precluded by conflict from having anything to do with any claims against Towers; (2) Defendants never informed Towers of the conflict and neither sought nor obtained Towers' informed consent to the conflict by communicating the requisite information for such consent; and (3) despite their recognized conflict, Defendants, *inter alia*, provided Law Firm 2—the firm Morgan admits was expressly retained to pursue claims against Morgan's client Towers—with advance drafts of briefs, settlement documents, and expert reports as well as other work product; encouraged Law Firm 2 to pressure Towers to contribute to a class settlement; revised documents in accordance with Law Firm 2's instructions; supplied Law Firm 2 with potential arguments for contriving claims against Towers; and otherwise assisted Meriter and Law Firm 2 in preserving and developing such claims. Defendants' sham denials and purposefully evasive answers do not constitute or represent a valid defense to Tower's Complaint.

C. The Well-Pleaded, Undisputed Facts Show as a Matter of Law Morgan Breached Fiduciary and Contractual Duties to Towers

Towers asserts claims for breach of fiduciary duty (against both Defendants) and breach of contract (against the Morgan firm) for Defendants' engaging in an actionable, impermissible conflict of interest and breach of their duty of undivided loyalty. Under binding case law, the facts admitted and deemed admitted by Defendants establish their liability to their client Towers for these claims as a matter of law.

1. Towers is entitled to judgment on the pleadings against Defendants for breach of fiduciary duty

"[Pennsylvania] common law imposes on attorneys the status of fiduciaries *vis a vis* their clients . . . ." *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1283 (Pa. 1992); *see also Dougherty v. Pepper Hamilton LLP*, 133 A.3d 792, 796-97 (Pa. Super. Ct. 2016) ("With respect to a breach of fiduciary duty claim, a confidential relationship and the resulting fiduciary duty may attach wherever one occupies toward another such a position of advisor or counsellor as reasonably to inspire confidence that he will act in good faith for the other's interest." (internal quotations omitted)). In *Maritrans*, the leading case addressing breach of an attorney's fiduciary duty of loyalty, the Pennsylvania Supreme Court stated the following guiding principle:

> At common law, an attorney owes a fiduciary duty to his client; ***such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable***.

Maritrans, 602 A.2d at 1283 (emphasis added). As the Pennsylvania Supreme Court further explained, an attorney's engaging in conflicts of interest is conduct that "has been condemned from time immemorial":

> There are few of the business relations of life involving a higher trust and confidence than those of attorney and client or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

Maritrans, 602 A.2d at 1283 (quoting *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850)).[15]

Morgan's own words and actions documented by the emails and other writings quoted and cited in the Complaint—which allegations are either admitted or deemed admitted—permit but one conclusion: Morgan understood that Meriter's interests were adverse to Towers' and nonetheless proceeded to advance the interests of Meriter at the expense of their client Towers, without so much as notifying Towers of the conflict.[16] Morgan's admissions of communicating and sharing documents, drafts, and other work product with the attorneys retained to assert claims against Towers, alone, establish a violation of Morgan's duty of undivided loyalty to Towers. (*See* Ex. 8 at ¶¶ 33-38, 66.) *A fortiori*, Morgan's admissions and deemed admissions of the many documented examples of Morgan's undisclosed assistance to Law Firm 2 with preserving and developing Meriter's claims against Towers—including suggesting legal theories in support of Towers' liability—unquestionably demonstrate prohibited divided loyalty. (*See id.* at ¶¶ 33-39, 41-42, 44-45, 47, 49, 51-52, 54-56, 58, 60-64, 66-70; *see also id.* at ¶¶ 71-72 (admission to preparing presentation for Meriter that, as deemed admitted, identified key dates and events that would figure prominently into Meriter's claims against Towers).) Towers had a right to expect that its own attorneys ***would not*** be coordinating with, feeding information to,

[15] The common law duty of undivided loyalty creates actionable liability even apart from the ethics rules prohibiting concurrent conflicts of interest, which Morgan also violated here. *See Maritrans*, 602 A.2d at 1284.

[16] (*See* Ex. 8 at ¶ 20, 24, 27, 33-37.)

exchanging work product with, and advising the counsel hired to sue Towers. And Defendants not only took these impermissible actions, they did so behind Towers' back.

Even Morgan's actions in the Class Action itself created a conflict of interest and violated Morgan's duty of undivided loyalty to Towers. For example, unbeknownst to Towers, who had trusted Morgan to prepare its witnesses for deposition, Morgan was planning to "get [Towers] to endorse our interpretation and then fault [Towers] for not forcing Meriter to come compliance earlier." (Ex. 8 at ¶ 47.) This and other admitted or deemed admitted examples of Morgan's willingness to shift blame to or criticize Towers for the Meriter Plan's failings constitute breaches of Morgan's duty of loyalty.[17] *See Mun. Revenue Servs., Inc. v. Xspand, Inc.*, 537 F. Supp. 2d 740, 747 (M.D. Pa. 2008) (duty of loyalty "is ostensibly breached" when an attorney "seeks to drag" the client "through the proverbial mud," regardless of whether the matter is unrelated to the attorney's representation of that client). Added to that are Morgan's advocating for applying pressure to Towers to contribute to the Class Action settlement and seeking Law Firm 2's input and then complying with Law Firm 2's request to modify the Class Action settlement notice to avoid a possible inference unfavorable to potential claims against Towers.[18]

The admitted and deemed admitted allegations of the Complaint require a finding that Morgan engaged in a prohibited conflict of interest in its concurrent representation of Towers and Meriter. Pennsylvania law dictates that these clear breaches of Defendants' duty of undivided loyalty to Towers entitle Towers to relief. *See Maritrans*, 602 A.2d at 1283; *Meyers v. Sudfeld*, Civ. A. No. 05-2970, 2006 U.S. Dist. LEXIS 6421, at *16-17 (E.D. Pa. Feb. 21, 2006) (holding, under Pennsylvania law, that complaint alleging attorney concurrently represented plaintiff and another party with conflicting interests sufficiently pleaded claim for relief for

[17] (*See, e.g.,* Ex. 8 at ¶¶ 47, 59, 60-64.)

[18] (*See* Ex. 8 at ¶¶ 51-52, 54-55, 66-70.)

breach of the fiduciary duty of loyalty). Accordingly, partial judgment on the pleadings as to liability should be entered against Defendants for Towers' breach of fiduciary duty claim.

2. Towers is entitled to judgment on the pleadings against the Morgan firm for breach of contract

Towers is likewise entitled to partial judgment on the pleadings in its favor on the breach of contract claim against the Morgan firm. The elements of a breach of contract claim are: (1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages. *Dougherty*, 133 A.3d at 796. Morgan's admissions (or deemed admission for failure to specifically deny) establish that Morgan represented Towers over a period of years—including during Morgan's representation of Meriter—pursuant to the engagement agreements attached as Exhibit A to the Complaint, thus satisfying the first element of Towers' claim. (Ex. 8 at ¶¶ 7-12, 84.)[19]

The second element is satisfied by the same undisputed facts that establish Defendants' breach of their fiduciary duties, which also demonstrate as a matter of law Morgan's breach of contract. "[W]hen an attorney enters into a contract to provide legal services, there automatically arises a contractual duty on the part of the attorney to render those legal services in a manner that comports with the profession at large. Hence, a breach of contract claim may properly be premised on an attorney's failure to fulfill his or her contractual duty to provide the agreed upon legal services in a manner consistent with the profession at large." *Gorski v. Smith*, 812 A.2d 683, 694 (Pa. Super. Ct. 2002); *see also Dougherty*, 133 A.3d at 797. Engaging in an impermissible conflict of interest in violation of the fiduciary duty of undivided loyalty imposed upon attorneys by common law and the Rules of Professional Conduct is, by definition,

[19] For the reasons discussed in footnote 2 *supra*, Morgan's denials that the firm represented Plaintiff—despite Morgan's directly contrary representation to a court and admissions that the firm represented Plaintiff's predecessor entities—are insufficient denials and deemed admissions.

inconsistent with the legal services expected of the profession at large. *See Maritrans*, 602 A.2d at 1283 (in Pennsylvania, "attorneys are bound, at law, to perform their fiduciary duties properly"). Moreover, Morgan's failure to advise Towers of any conflict further constitutes a breach of explicit provisions in the engagement agreements requiring Morgan to notify Towers of conflicting representations as they arise. (Ex. 1 at Ex. A thereto.)

Finally, Towers was, at the very least, damaged by and is entitled to disgorgement of the millions of dollars in legal fees that Morgan admits it received for its representation of Towers.[20] As the Pennsylvania Supreme Court explained:

> A fiduciary . . . may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries at a level higher than that trodden by the crowd.

Maritrans, 602 A.2d at 1286 (quoting *Woods v. City Nat'l. Bank & Trust Co.*, 312 U.S. 262, 269 (1941)). The pleadings thus establish Morgan's breach of contract as a matter of a law.

D. Morgan's Waiver Defense Fails as a Matter of Law

Defendants' asserted waiver defense in their New Matter and in response to certain allegations of the Complaint is legally deficient and cannot preclude judgment on the pleadings in favor of Towers for several reasons. First, Defendants' pleading presents the same wavier argument based on the same broad, non-specific, prospective waiver language in the engagement agreements that was the basis for Defendants' preliminary objection in the nature of a demurrer. In overruling that preliminary objection, this Court rejected Defendants' argument that the waiver language in the engagement agreements was sufficient to effect a waiver of Morgan's conflict at issue in this case.

[20] (*See* Ex. 8 at ¶¶ 11, 88.)

Second, even if this Court's ruling on Defendants' preliminary objections were not determinative of this motion, the law is. A concurrent conflict of interest involving "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal" may not be waived regardless of the quality of the client's informed consent. Pa. R.P.C. 1.7(b)(3). Indeed, Morgan affirmatively represented to the court presiding over the litigation between Meriter and Towers that Morgan had a non-waivable conflict of interest that precluded Morgan's involvement adverse to Towers. (*See* Ex. 9 ("Attorney Blumenfeld has a ***non-waivable conflict of interest***. That conflict of interest results from the fact that Towers was and remains a client of the Firm . . . . The conflict of interest prevents Attorney Blumenfeld from providing expert testimony adverse to Towers in this action." (emphasis added)); *see also* Ex. 8 at ¶ 27 ("Morgan Lewis ***can't*** be involved in any discussions involving Towers." (emphasis added)); ¶ 21 ("Our firm ***cannot be*** adverse to Towers . . . ." (emphasis added)). And although Morgan never entered its appearance in that action, the magnitude of its participation in preparing that lawsuit put Morgan in a position of conflict that Towers could not have waived under the Rules, whether it wanted to or not. The same non-waivable conflict of interest that Morgan understood and represented to the court precluded a Morgan attorney from providing expert testimony adverse to Towers in the Meriter action against Towers likewise precluded Morgan's assistance with preserving and developing Meriter's claims against Towers.

Finally, even assuming *arguendo* the conflict were waivable, and even if the Court's basis for overruling Morgan's preliminary objections was that there were unresolved issues of fact as to informed consent at the Complaint stage, no such unresolved issues remain. Morgan's Amended Answer and New Matter fails as a matter of law to plead sufficient facts to support a

claim that any waiver by Towers was given with informed consent. A conflict waiver is effective only upon obtaining informed consent, which is defined as consent "***after the lawyer has communicated adequate information and explanation*** about the material risks of and reasonably available alternatives to the proposed course of conduct," and which requires that the client "be aware of the ***relevant circumstances*** and of the ***material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client***." Pa.R.P.C. 1.0(e) (emphasis added); Pa.R.P.C. 1.7, cmt. 18; *see also* Pa.R.P.C. 1.7, cmt. 2 (providing that resolution of a conflict of interest, assuming the conflict is consentable, "requires the lawyer" to "consult with the clients affected" and "obtain their informed consent").

Nowhere in their Amended Answer and New Matter do Defendants allege that ***they communicated anything to Towers*** regarding a conflict of interest arising from Morgan's representation of Meriter, let alone allege that Defendants consulted with and communicated the requisite adequate information and explanation of the risks and alternatives to Towers and ***thereafter*** obtained Towers' consent. Nor do Defendants allege that Towers knew anything about Morgan's assistance to Meriter and/or Law Firm 2 in preserving and developing claims against Towers, or that Towers even knew Morgan was communicating and sharing work product with Law Firm 2. These undisclosed facts are unquestionably "relevant circumstances" and presented "material and reasonably foreseeable ways that the conflict could have adverse effects" on Towers, which are required to be communicated for consent to be informed. Pa.R.P.C. 1.0(e); *see also Dougherty v. Phila. Newspapers, LLC*, 85 A.3d 1082, 1094 (Pa. Super. Ct. 2014) (Donohue, J., concurring) (stating that the Rules of Professional Conduct "unquestionably" place the "onus" on the attorney to obtain informed consent "after providing all reasonable and necessary disclosures"); *Malibu Media, LLC v. Doe*, Civ. A. No. 4:15-CV-

2281, 2016 U.S. Dist. LEXIS 147294, at *9 (M.D. Pa. Oct. 25, 2016) (finding express waiver of "any and all conflicts" in client affidavit ineffective where there was no indication that the attorney "actually obtained informed consent as defined by the [Pennsylvania] Rules [of Professional Conduct]"). Simply, there are no facts alleged in the pleadings that could support a finding that Towers waived Morgan's conflict of interest, and thus the defense fails as a matter of law.

V. REQUESTED RELIEF

For all the above reasons, Plaintiff Towers Watson Delaware, Inc. respectfully requests that the Court grant its Motion and enter judgment on the pleadings as to liability against Defendant Morgan Lewis & Bockius, LLP for breach of fiduciary duty and breach of contract and against Defendant Jeremy P. Blumenfeld, Esquire for breach of fiduciary duty.

Respectfully submitted,

SPRAGUE & SPRAGUE

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Dated: March 13, 2018

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CERTIFICATE OF SERVICE

I, Joseph R. Podraza, Jr., Esquire, hereby certify that on March 13, 2018 a true and correct copy of Plaintiff's Motion for Partial Judgment on the Pleadings as to Defendants' Liability was served on the following counsel by the electronic court filing system:

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