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| TOWERS WATSON DELAWARE, INC.,<br><br>Plaintiff,<br><br>v.<br><br>MORGAN, LEWIS & BOCKIUS LLP, et al.,<br><br>Defendants. | ) | COURT OF COMMON PLEAS<br>PHILADELPHIA COUNTY<br><br>COMMERCE COURT<br><br>April Term, 2017<br><br>No. 02096 |

**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO DEFENDANTS' LIABILITY**

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Defendants Morgan, Lewis & Bockius LLP ("Morgan Lewis") and Jeremy P. Blumenfeld, Esquire ("Mr. Blumenfeld") submit this Brief in Opposition to the Motion for Partial Judgment on the Pleadings as to Defendants' Liability filed by Plaintiff Towers Watson Delaware, Inc. ("Plaintiff" or "Towers").

## I. MATTER BEFORE THE COURT

Towers has moved for judgment on the pleadings, arguing that denials in Defendants' Answer and New Matter were insufficiently specific and that the "record" (including matters not attached to or quoted in the pleadings) is sufficiently developed as to obviate the need to resolve disputed factual questions. The Motion is nothing more than a transparent attempt to short-circuit the truth-seeking process based on purported (but, in reality, non-existent) pleading deficiencies. As this Court has already ruled, the case involves "disputed issues of fact" that can only be resolved after consideration of a complete record following discovery.

This case arises from Defendants' representation of Meriter Health Systems, Inc. ("Meriter") in a class action (the "Class Action") challenging the design and operation of Meriter's pension plan. The Class Action was filed in 2010 and settled in 2014. After the Class Action settlement was approved by the Court and Morgan Lewis's representation of Meriter was concluded, Meriter sued Towers, alleging that Towers was negligent in providing actuarial and benefit planning services that contributed to Meriter's losses. Meriter hired a different law firm to bring these claims against Towers, and Morgan Lewis had no role in the development or assertion of such claims. Indeed, Morgan Lewis advised Meriter from the outset that it represented Towers in unrelated matters and that Meriter should retain separate counsel if it wished to evaluate or assert claims against Towers. Meriter did exactly that.

Nevertheless, Towers is suing Morgan Lewis and one of its partners, Mr. Blumenfeld, claiming that Morgan Lewis assisted Meriter in developing claims against Towers, and that this

violated fiduciary and contractual duties owed to Towers. Towers also claims that Morgan Lewis and Mr. Blumenfeld are somehow responsible for Towers' decision to settle the lawsuit brought against it by Meriter.

In its Answer and New Matter, Defendants pointed out repeatedly and in considerable detail that: (1) Towers waived any conflict in a 2010 engagement letter signed a month before the Class Action was filed, and reaffirmed that waiver two years later when it was already aware that Meriter was considering claims against Towers and that Morgan Lewis was representing Meriter in the Class Action; (2) as early as 2010, Towers was aware that Meriter, through its separate counsel, was seeking a tolling agreement to preserve potential claims against Meriter; and (3) although it had a binding waiver of conflicts from Towers, Morgan Lewis consistently refused to be involved in the development or assertion of claims by Meriter against Towers. Based on these pleadings, and pending discovery that will augment a presently undeveloped record, there are factual disputes about the extent to which Towers gave informed consent when it waived conflicts in 2010 and 2012, about Plaintiff's allegation that Morgan Lewis actually assisted in the development of claims against Towers, and about whether Towers suffered any harm as a result of anything Defendants did.

Towers' Motion is built on the false premise that despite extensive denials and detailed factual averments in Defendants' Answer and New Matter, Defendants failed to satisfy the requirements of Pa. R.C.P. 1029 (requiring that denials be made "specifically or by necessary implication") and must be deemed to have admitted dozens of allegations from the Complaint. Specifically, Towers asks the Court to deem as admitted: (1) that Defendants were "conflicted and precluded from having anything to do with any claims or potential claims against Towers"; (2) that Defendants "took actions both in defending the [ERISA] Class Action and in communicating and coordinating with [Meriter's separate counsel] that were against Towers'



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interests and in furtherance of Meriter's interests in contriving claims against Towers"; and (3) that Defendants "did not advise Towers of these actions or of any conflict." Pl.'s Mot. at 8-9.

As to the first two purported admissions, the denials and factual allegations in Defendants' Answer and New Matter unquestionably satisfy Pa. R.C.P. 1029, regardless of whether the Answer and New Matter is considered as a whole (as required under Pennsylvania law) or whether each and every individual response in the pleading is considered separately. Indeed, Defendants have set forth affirmatively the reasons why their representation of Meriter in the Class Action did not pose a conflict or otherwise prejudice Towers, and have specifically denied each of the allegations to the contrary, pleading that:

- Defendants declined to participate in any direct adversity to Plaintiff. *See* New Matter ¶ 9; Answer ¶¶ 22, 27-29.
- Meriter retained separate counsel – independent of Defendants – to evaluate, develop, and assert claims against Towers. That separate counsel also was retained by Meriter to advise it on insurance coverage issues related to the Class Action and ongoing advice related to the Meriter pension plan. To the extent Defendants shared information with Meriter's separate counsel, they did so for specific and legitimate reasons that were wholly unrelated to Meriter's later assertion of claims against Towers. *See* New Matter ¶ 11; Answer ¶¶ 25, 27.
- Meriter ultimately asserted claims against Towers based on the independent judgment and strategic decisions of its separate counsel. Defendants did not provide any advice or substantive input to that separate counsel in the evaluation, development, and/or assertion of claims against Towers. *See* New Matter ¶¶ 10, 13-14; Answer ¶¶ 27, 33-40.



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With respect to the third purported admission – that Defendants never informed Towers of its representation of Meriter in the Class Action – Towers would have the Court infer that it could not have given informed consent to the representation. But such inferences are not permitted in favor of the moving party on a motion for judgment on the pleadings, especially when they are inconsistent with statements to the contrary in Defendants' pleadings.[1] On the contrary, all reasonable inferences must be drawn in favor of Defendants as the non-moving party. Towers cannot pretend that its consent was uninformed simply because its actual knowledge of the alleged conflict and surrounding circumstances was based on information that it learned from sources in addition to Defendants. The source of Towers' knowledge is immaterial to the question of whether it gave informed consent.

Just as there are disputes of material fact that must be resolved as to the conflict waiver granted by Towers, there are also factual disputes as to the elements of Towers' contract and fiduciary duty claims. Such disputes include:

- Whether Defendants actually advised or assisted Meriter in the development of claims that were eventually asserted against Towers by Meriter through separate counsel after the Class Action was settled;
- To what extent Meriter's separate legal counsel, which was hired to handle Meriter's actual claims against Towers, acted independently and without substantive input from Defendants as to the development of strategies and theories of Meriter's claims against Towers;
- Whether any of Defendants' alleged conduct was the legal and proximate cause of any alleged injury suffered by Towers; and

[1] *See* ¶¶ 4-8 of Defendants' New Matter, stating that Towers was aware of the Morgan Lewis representation of Meriter in the Class Action and also of Meriter's contemplation of claims against Towers as of 2012, when Towers reaffirmed the broad conflict waiver that it granted to Morgan Lewis.



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- Why Towers decided to settle the lawsuit brought against it by Meriter, and whether Defendants' alleged conduct played any role in that decision.

Each of these material factual disputes is obvious on the face of the pleadings, and can only be resolved after the development of a record in discovery.

Towers confuses the existence of evidence that it believes relates to its claims with the absence of a genuine dispute of material fact. Simply because Towers believes that inferences may be drawn in its favor from various pieces of evidence it has gathered based on a partial record, however, does not deprive Defendants of an opportunity to challenge those inferences or present contrary evidence. Indeed, the fact that Towers has already served discovery requests implies that Towers itself believes that it needs further evidence to prove its claims. And the simple fact is that there is abundant evidence to support the specific denials and additional factual averments set forth in Defendants' Answer and New Matter. The substance and sufficiency of Defendants' factual averments, as well as the gaps in Plaintiff's case at this early juncture, are discussed in greater detail below.

## II. QUESTION PRESENTED

Should the Court reject Plaintiff's attempt to have liability decided prematurely based on the face of the pleadings, without regard to factual disputes raised by Defendants' well-pled Answer and New Matter?

***Suggested Answer: Yes.***

## III. STATEMENT OF FACTS

On July 30, 2010, a class action lawsuit was brought against Meriter, a health system based in Wisconsin, under the Employee Retirement Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq*. Answer ¶¶ 15 and 16. Towers was not a party to the class action lawsuit.



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Meriter promptly retained Morgan Lewis to defend the Class Action, *id.* ¶ 16, which was ultimately settled in July 2014, *id.* ¶ 18. After that settlement was finalized, Meriter filed a lawsuit (the "Meriter Lawsuit") against Towers and a law firm that had previously represented Meriter on employee benefits matters. The Meriter Lawsuit alleged that negligence by Towers in the provision of actuarial and consulting services to Meriter in connection with the design, administration, and amendment of its pension plan caused or contributed to Meriter's liability. *Id.* ¶ 19.

Separately, as of 2009, Morgan Lewis represented Towers affiliates in several matters that were unrelated to the Class Action. *Id.* ¶¶ 8, 9, and 11. Towers (now known as Willis Towers Watson) is "a leading global advisory, broking and solutions Company"[2] with more than 40,000 employees, $8.2 billion of annual revenue, and a large and sophisticated legal department. Over the years, Morgan Lewis and Towers have entered into a series of engagement letters. The November 18, 2009 engagement letter between Morgan Lewis and Towers required that Towers consent to any representation in which the interests of another client were adverse to Towers. Compl. at Ex. A p. 1. That letter was superseded a year later when the scope of the Towers representation was expanded and the July 2010 engagement letter was signed.

The July 2010 engagement letter was executed by an in-house counsel at Towers before the Class Action was even filed. It did not require Towers' consent on a case-by-case basis for Morgan Lewis to represent a client in a position of adversity. On the contrary, it contained a broad consent and conflict waiver that expressly permitted Morgan Lewis to undertake representations, including litigation, that were adverse to Towers. The 2010 engagement letter from Morgan Lewis to Towers stated:

[2] *See Overview*, Willis Towers Watson, https://www.willistowerswatson.com/en-US/about-us/overview.



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> It is possible that some of our present or future clients will have disputes or other dealings with Towers Watson during the time that we are representing Towers Watson. Accordingly, ***as a condition of our undertaking this matter for you, you agree that this Firm may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for Towers Watson, even if the interests of such clients in those other matters are directly adverse to Towers Watson.*** Where ethically permissible to do so, we agree to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations shall not apply in any instance where, as the result of our representation of Towers Watson, we have obtained sensitive, proprietary or other confidential information of a non-public nature that, if known to another client of ours, could be used to the material disadvantage of Towers Watson in a matter in which we represent, or in the future are asked to undertake representation of, that client.

Compl. at Ex. A pp. 23-24, Letter from Morgan Lewis dated July 9, 2010 (emphasis added). The letter was signed on behalf of Towers by one of its in-house attorneys, Cynthia Boyle, whose title was "Managing Counsel – Employment."

In 2012, a Morgan Lewis partner overseeing two other new matters for Towers sent an email to Towers confirming the terms under which those new matters would be handled. The email stated that it was "an addendum to the July 2010 Representation Letter currently in place," Compl. at Ex. A p. 28, Email from L. Pappadakis (on behalf of R. Johnson) to R. Miller dated Feb. 27, 2012. Towers' Managing Counsel for Risk and Litigation, Rian Miller, responded to the email saying, "This is fine." Compl. Ex. A p. 28. Thus, Towers expressly reaffirmed the broad waiver that it had granted in 2010. New Matter ¶¶ 1-4.

When Towers executed the waiver in 2010, its in-house attorneys understood that the waiver would permit Morgan Lewis to handle legal matters that were adverse to Towers. And when Towers reaffirmed that waiver in 2012, it did so with full knowledge that Defendants were representing Meriter in the Class Action and that Meriter was contemplating legal action against Towers in connection with that litigation. *Id.* ¶¶ 4-5. Significantly, though, at no time during the pendency of the Class Action did Towers or its attorneys question Defendants' involvement in



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the Class Action, attempt to rescind the waiver, or limit the scope of Defendants' representation of Meriter. *Id.* ¶ 8.

Even so, Defendants explicitly and repeatedly declined to participate in any direct adversity to Towers. *Id.* ¶ 9. Instead, Meriter retained separate counsel to evaluate, develop, and assert claims against Plaintiff, and Defendants did not provide any advice or substantive input in the development of these claims. *Id.* ¶ 10. To the extent that Defendants shared information with Meriter's separate counsel, they did so (1) in connection with matters relating to insurance coverage in the Class Action; (2) to assist Meriter's separate counsel in evaluating the defenses, exposure, and likelihood of success in the Class Action in that firm's capacity as insurance counsel; and/or (3) in connection with matters involving ongoing pension plan design and administration that Meriter's separate counsel was handling. *Id.* ¶ 11. In short, Defendants played no part in Meriter's assertion of claims against Towers, which were ultimately the result of independent judgments and strategic decisions made by Meriter's separate counsel. *Id.* ¶¶ 13-14.

Towers settled the Meriter Lawsuit in 2017, paying approximately $15 million to Meriter. After the settlement agreement was reached, Towers filed the instant lawsuit against Defendants seeking the disgorgement of all legal fees paid by Towers to Morgan Lewis (including in connection with matters unrelated to the Class Action), and "damages" Towers claims to have incurred as a result of its defense and settlement of the Meriter Lawsuit. Relying on the 2010 and 2012 waivers, Defendants filed Preliminary Objections seeking dismissal of all claims. The Court sustained in part and overruled in part Defendants' preliminary objections. Specifically, it dismissed the breach-of-contract claim against Mr. Blumenfeld because he was not a signatory to the contracts at issue, but it overruled the preliminary objections based on the conflict waiver granted by Towers, stating that "**[t]here are disputed issues involving, *inter alia,* notice that**



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**cannot be resolved at this stage in the proceedings**." Pl.'s Mot. at Ex. 3 n.2 (emphasis added). The Court, recognizing the need for discovery in this case, rejected Towers' argument that the waivers were ineffective as a matter of law and without any need to develop a factual record. *See* Pl.'s Opp. to POs at 11-14.

On December 1, 2017, Defendants filed an Answer and New Matter to the Complaint. After Towers filed Preliminary Objections to that pleading, Defendants filed an Amended Answer and New Matter. Plaintiff then filed a Reply to New Matter on January 19, 2018.

Now, rather than engaging in the discovery contemplated by the Court in its Order regarding Defendants' Preliminary Objections, Towers has moved for partial judgment on the pleadings based on a purported (but non-existent) pleading deficiency before full discovery or any depositions.

## IV. ARGUMENT

### A. Legal Standard

"After 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 motion for judgment on the pleadings should be granted only 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." *McAllister v. Millville Mut. Ins. Co.*, 640 A.2d 1283, 1285 (Pa. Super. Ct. 1994). Indeed, "[l]ike all summary judgments entered without a trial[,] judgment on the pleadings may be entered only in clear cases free from doubt where there are no issues of fact, and only where the cause is so clear that a trial would clearly be a fruitless exercise." *Beck v. Minestrella*, 401 A.2d 762, 763 (Pa. Super. Ct. 1979); *see Eberhart v. Nationwide Mut. Ins. Co.*, 362 A.2d 1094 (Pa. Super. Ct. 1976). "Where there are material issues of fact in dispute, judgment on the



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pleadings cannot be entered." *Pfister v. City of Philadelphia*, 963 A.2d 593 (Pa. Commw. Ct. 2009) (citing *Miami Nat'l Bank v. Willens*, 190 A.2d 438, 439 (Pa. 1963)).

In deciding a motion for judgment on the pleadings, it is axiomatic that only the pleadings may be considered. "[A] trial court must confine its consideration to the pleadings and relevant documents and accept as true all well pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed." *McAllister*, 640 A.2d at 1285. "[N]o factual material outside the pleadings may be considered." *Bensalem Twp. Sch. Dist. v. Commonweatlh*, 544 A.2d 1318, 1321 (Pa. 1988) (quoting Goodrich Amram 2d § 1035:1).

Critically, a motion for judgment on the pleadings "is in the nature of a demurrer; all of the opposing [parties' (here, Defendants')] well-pleaded allegations are viewed as true but only those facts specifically admitted by [them] may be considered against [them]." *Bata v. Central-Penn Nat'l Bank of Phila.*, 224 A.2d 174, 178 (Pa. 1966). In addition to "accept[ing] as true" the non-moving parties' well-pleaded allegations and denials, the Court must also view those facts "in the light most favorable to the non-moving party." *Peters Twp. v. Russell*, 121 A.3d 1147, 1150 (Pa. Commw. Ct. 2015) (citing *Karns v. Tony Vitale Fireworks Corp.*, 259 A.2d 687, 688 (Pa. 1969)). "Inferences and conclusions which are drawn from and erroneously interpret a written instrument which is part of the record are not admitted, nor are conclusions of law." *Eberhart*, 362 A.2d at 1094 n.6.

### B. There Are No Deemed Admissions Because Defendants' Pleading Satisfies Pa. R.C.P. 1029

Towers contends that Defendants must be deemed to have admitted Towers' allegations: (1) that Defendants were "conflicted and precluded from having anything to do with any claims or potential claims against Towers"; (2) that Defendants "took actions both in defending the



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[ERISA] Class Action and in communicating and coordinating with [Meriter's separate counsel] that were against Towers' interests and in furtherance of Meriter's interests in contriving claims against Towers"; and (3) that Defendants "did not advise Towers of these actions or of any conflict." Pl.'s Mot. at 8-9. But Towers' contention is belied by the plain text of Defendants' Answer and New Matter. Whether it is read as an entire pleading or on a paragraph-by-paragraph basis, the Answer and New Matter plainly satisfies the standards of Pa. R.C.P. 1029.

1. ***Defendants' Entire Pleading Satisfies Pa. R.C.P. 1029.***

"[I]n determining whether a party has admitted the material factual allegations of a complaint, the reviewing court should ***examine the pleading as a whole***." *McDermott v. Commonwealth Dep't of Health*, 519 A.2d 1088 (Pa. Commw. Ct. 1987) (emphasis added). Before it can deem any factual allegations admitted, the Court must "examine [Defendants'] ***entire pleading*** to see if [they] specifically denied [Plaintiff's] factual assertions ***at any time***." *Cercone v. Cercone*, 386 A.2d 1 (Pa. Super. Ct. 1978) (emphasis added); *see Rainbow Assocs.*, 587 A.2d at 360. This requirement arises from Pa. R.C.P. 1029(b) itself (which permits denials by "necessary implication") and from Pa. R.C.P. 126 (which requires that the Rules of Civil Procedure be "liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable"). *See Kappe Assocs., Inc. v. Aetna Cas. & Sur. Co.*, 341 A.2d 516, 519 (Pa. Super. Ct. 1975) ("[T]he rights of the litigants should not be made to depend upon the skill of the pleaders but rather on the justice of their claims."). Though Rule 1029 "ostensibly mandates" that denials in an answer refer specifically to particular paragraphs of a complaint, "to insist upon such technical adherence to the rules would violate the flexible spirit of Rule 126 which allows a court to disregard errors or procedural defects which do not substantially detract from the rights of an opposing party." *Cercone*, 386 A.2d at 6 n.5.



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In *Cercone v. Cercone*, the Superior Court reversed a grant of summary judgment that was premised on "deemed admissions" in pleadings, holding that it was error for the trial court to focus on particular denials in defendant's answer without "look[ing] to the [defendant]'s answer as a whole in order to determine whether she admitted all material factual allegations." *Id.* at 5. Put another way, although the plaintiff had focused on the defendant's insufficient denials in certain paragraphs of its answer, the *Cercone* Court concluded that those paragraphs could not be deemed admitted because the defendant had asserted its denials elsewhere in the pleading. *Id.* at 6. The Court explained that "paragraphs five through nine of [the] answer, read in conjunction with paragraph ten and the new matter," constituted sufficient denials such that there were no deemed admissions warranting summary judgment for plaintiff based on the pleadings. *Id.*

Here, as in *Cercone*, each of the facts that Towers asks the Court to deem admitted has been denied specifically by Defendants in the Answer and New Matter. Defendants' pleading states quite clearly that:

- "Morgan Lewis declined to be adverse to the Towers Entities in the firm's representation of Meriter." Answer ¶ 14; *see id.* ¶¶ 22, 27-29.
- "Morgan Lewis attorneys working on the [ERISA] Class Action declined to provide legal analysis or other assistance in connection with Meriter's development of claims against the Towers entities or Plaintiff, for which Meriter engaged a separate law firm." Answer ¶ 40 *see id.* ¶¶ 27, 33-39.
- "To the extent that Morgan Lewis attorneys working on the defense of Meriter shared information with Meriter's separate counsel about the status of or factual developments in the [ERISA] Class Action, they did so: (a) in connection with separate counsel's role as counsel for Meriter and the fiduciaries of the Meriter pension plan on matters relating to insurance coverage in the [ERISA] Class



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Action; (b) to assist Meriter's separate counsel in evaluating the defenses, exposure, and likelihood of success in the Class Action; and (c) in connection with the role of that separate counsel in advising Meriter on matters involving plan design and pension benefit plan administration." New Matter ¶ 11.

- "Morgan Lewis attorneys did not allow or induce any of the Towers Entities or Plaintiff to take positions that would be harmful to the Towers Entities or Plaintiff for the purpose of assisting Meriter in the development of claims against the Towers Entities or Plaintiff." Answer ¶ 48; *see id.* ¶ 47.
- "The Towers Entities and/or Plaintiff were aware in 2011 at the latest that Defendants were representing Meriter in the [ERISA] Class Action. If they did not know sooner, the Towers Entities and/or Plaintiff were put on notice that Defendants were representing Meriter in the Class Action by Meriter in April 2011." New Matter ¶ 6; *see id.* ¶ 4.

These specific denials and affirmative allegations demonstrate conclusively that Defendants' pleading as a whole conforms to Pa. R.C.P. 1029, and that Defendants have adequately denied the allegations at issue here.

2. ***Each and Every Denial in Defendants' Pleading Satisfies Pa. R.C.P. 1029***

Towers contends that there are three categories of allegations that were not denied by Defendants with specificity: (1) allegations that Defendants had a conflict of interest and were disloyal; (2) allegations that Defendants assisted in the "development, evaluation, and/or pursuit of claims" against Towers; and (3) allegations in which Towers attempts to characterize emails and other documents that were quoted or referenced in part in the Complaint. Mot. at 9-10.



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Each of these arguments is belied by the plain language of the responsive pleading, which specifically and emphatically denied these allegations.

As an initial matter, Towers is wrong in suggesting that Defendants must state repetitively and in painstaking detail all of the relevant facts that would support their denials. Pennsylvania courts are "mindful that assertions as to non-existence cannot normally evoke much detail." *Commonwealth by Preate v. Rainbow Assocs., Inc.*, 587 A.2d 357, 360 n.4 (Pa. Commw. Ct. 1991). Consequently, Pa. R.C.P. 1029 does not require an affirmative explanation of "what in fact occurred" after "a responding party has denied incriminating allegations." *Id.* Indeed, "[r]equiring this practice would be contrary to the fundamental principle that the plaintiff has the obligation of proving the defendant's liability, and that the defendant does not become liable by failing to deny in exculpating detail the plaintiff's incriminating allegations." *Id.* So, for example, when Towers alleges simplistically (and incorrectly) that Defendants secretly assisted Meriter in developing claims against its former actuaries, there is little to be said in response but to deny the false statement. Nothing is gained by adding superfluous verbiage.

Nevertheless, Defendants responded to Towers' "incriminating allegations" with specific denials of those incriminating allegations that said as much as could reasonably be expected. *See, e.g.*, Answer ¶ 33 ("It is specifically denied that Morgan Lewis worked with Nixon Peabody to preserve and develop Meriter's claims against the Towers Entities or Plaintiff or that there was a conflict in the representation of Meriter. Morgan Lewis did not have a conflict with the Towers Entities or Plaintiff as a result of its representation of Meriter in the Class Action, and it did not assist Meriter or Nixon Peabody in the development of claims against the Towers Entities or Plaintiff."). In many instances, Defendants specifically stated affirmative facts in addition to denying the allegations of particular paragraphs of the Complaint – a reality that Towers largely ignores in its Motion. *See, e.g.*, Answer ¶ 24 ("On the contrary, as noted above, the Towers



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Entities specifically waived conflicts, thus permitting Morgan Lewis to be adverse in litigation matters, and they did so with knowledge of both the Morgan Lewis representation of Meriter in the Class Action and the likelihood that Meriter would be asserting claims against Towers Entities or Plaintiff arising from or related to the Class Action.").

Still, Towers attempts to characterize the well-pled denials as "conclusory." But many of Defendants' purportedly "conclusory" denials actually came in response to "conclusory" affirmative allegations in the Complaint. *See, e.g.*, Answer ¶¶ 31, 33 (denying "specifically" that "any conflict of interest existed as a result of the Morgan Lewis['s] representation of Meriter in the [ERISA] Class Action" and stating that "Morgan Lewis did not have a conflict with the Towers Entities or Plaintiff as a result of its representation of Meriter in the Class Action," in response to conclusory allegations that Defendants had an "obvious conflict of interest" and were "clearly conflicted"). Denying conclusory allegations in somewhat conclusory terms does not run afoul of Pa. R.C.P. 1029(b), and does not result in the conclusory allegations being deemed admitted. *See Keystone Automated Equip. Co. v. Reliance Ins. Co.*, 535 A.2d 648, 650 (Pa. Super. Ct. 1988) (refusing to deem admitted conclusory denial of a conclusory allegation).[3]

Towers also argues that Defendants' denials must be deemed admitted because they are "belied by their own documents quoted and cited in the Complaint." Mot. at 11. This tactic is patently improper in a motion for judgment on the pleadings, as it asks the Court to weigh the evidence and draw inferences that are unfavorable to the non-moving party despite the fact that Plaintiff bears the burden of proof on each element of its claim. For example:

- Towers points to communications in which Defendants state that they "cannot be adverse to Towers" and asks the Court to deem admitted that there was a conflict

[3] Towers misleadingly cites this case for the proposition that a conclusory denial cannot be accepted as true for purposes of judgment on the pleadings. It actually stands for the proposition that neither conclusory allegations nor conclusory denials may be accepted as true.



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of interest. That inference is not warranted at this stage, particularly in light of Defendants' well-pleaded denials and allegations that there was no conflict of interest in light of Meriter's retention of a separate law firm to handle all issues relating to potential claims against Towers. *See, e.g.* Answer ¶¶ 25, 27. Defendants have explained that they "declined" to be adverse to Towers, and they must be afforded the reason to explain why they made that decision.[4]

- Towers points to communications between Defendants and Meriter's separate law firm and urges the Court to deem admitted that those communications constituted "assistance to Meriter at Tower[s]'s expense." Mot. at 14-15. But, as explained above, Plaintiff's assertion is factually incorrect, and any such inference is unwarranted at this stage. As Defendants explain in their Answer and New Matter and as the record will establish after discovery and an opportunity for the parties to elaborate on their positions, Morgan Lewis communicated with Meriter and its separate counsel to advise on the strengths and weaknesses of Meriter's position in the Class Action, to evaluate settlement opportunities, and to address issues related to insurance coverage that the other firm was handling. Those communications were not made at Towers' expense, nor did they cause any injury to Towers. *See, e.g.*, Answer ¶¶ 27, 33-38. In fact, Defendants specifically denied the inferences Towers purported to draw from certain documents in the Complaint. *See, e.g., id.*

In sum, Towers is asking the Court to do precisely what it is ***not*** permitted to do at this stage: draw inferences from disputed facts in favor of Towers, the moving party on this motion

[4] It is neither improper nor uncommon for a law firm to decline to be adverse to another client even if it has a fully enforceable conflict waiver that would permit such adversity. Firms routinely make such business decisions.



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and the party who ultimately bears the burden of proof at trial, while disregarding competing facts and alternative inferences that Defendants, the non-moving party in favor of whom all inferences must be made, have identified in their pleading. There will be a time for a factfinder to resolve factual disputes and perhaps draw inferences from emails and other documents as part of a broader review of the evidence in its entirety, but that exercise is only appropriate later in this case.

### C. Disputed Issues of Material Fact Preclude Judgment on the Pleadings.

Ultimately, Towers' Motion must be denied because the pleadings demonstrate disputes of material fact that cannot be resolved on the pleadings alone,[5] as to Towers' claims and as to Defendants' waiver defenses as well. This Court recognized as much in denying Defendants' preliminary objections to Plaintiff's breach of fiduciary duty claim on the basis that "[t]here are disputed issues involving, *inter alia*, notice" that cannot be resolved prior to discovery. *See* Pl.'s Mot. at Ex. 3 n.2. "[A] motion for judgment on the pleadings should be granted only 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." *McAllister v. Millville Mut. Ins. Co.*, 640 A.2d 1283, 1285 (Pa. Super. Ct. 1994). "Where there are material issues of fact in dispute, judgment on the pleadings cannot be entered." *Pfister v. City of Philadelphia*, 963 A.2d 593 (Pa. Commw. Ct. 2009) (citing *Miami Nat'l Bank v. Willens*, 190 A.2d 438, 439 (Pa. 1963)).

#### 1. *Disputes of Material Fact as to Defendants' Waiver Defense Preclude Judgment on the Pleadings.*

Taking the specific denials and allegations of Defendants' Answer and New Matter as true and drawing all reasonable inferences in favor of Defendants (as required at this stage of the

[5] Defendants expect that after the development of a more complete record in discovery, there will be abundant grounds for a grant of summary judgment and the dismissal of Towers' claims. Based on the state of the pleadings, however, there are still unresolved factual questions.



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litigation), it is apparent that there are disputes of material fact as to the extent to which Towers gave informed consent to Defendants' representation of Meriter in the Class Action.

In the Answer and New Matter, Defendants state that Towers first waived any actual or potential conflict in 2010. New Matter ¶ 3. Then in 2012, with full knowledge both that Defendants were representing Meriter in the Class Action and that Meriter was contemplating the assertion of claims against Plaintiff, Towers reaffirmed this broad waiver of conflicts. *Id.* ¶¶ 4-7. Notwithstanding this knowledge, neither Towers nor its attorneys rescinded its waiver or objected to Defendants' involvement in the representation of Meriter. *Id.* ¶ 8.

These are but some of the many issues that bear directly on the adequacy of Towers' informed consent. Indeed, under the plain terms of the Pennsylvania Rules of Professional Conduct, disputed issues of fact such as notice (as this Court recognized in its November 8, 2017 Order), knowledge, sophistication, and representation by counsel are each material, and such disputes preclude judgment on the pleadings as to Defendants' waiver defense. *See, e.g.*, Pa. R.P.C. 1.0, cmt. 22 (describing factual issues that factor into whether a prospective conflicts waiver was made with informed consent, including "the extent which the client reasonably understands the material risks that the waiver entails," whether the consent was as "to a particular type of conflict with which the client is already familiar," whether "the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise," and whether "the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation"). Indeed, as Towers admitted in its opposition to Defendants' Preliminary Objections, "a finding that Towers was afforded information of sufficient quality and specificity in order for Towers to have provided the requisite consent . . . requires close scrutiny of the facts and circumstances informing Towers' understanding of the conflict as well as the risks and



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advantages incumbent in waiving it." Pl.'s Opp. to POs at 13-14 (citing *Lasavage v. Smith*, 2011 WL 2853697, at *7 (Com. Pl. Lackawanna Cnty. June 16, 2011) ("whether counsel has satisfied the 'informed consent' mandate of Comment 22 [to Pa. R.P.C. 1.7] is a fact-specific determination to be addressed on a case-by-case basis.")).

Despite these obvious disputed issues of material fact evident from Defendants' well-pleaded denials and allegations, Towers advances three meritless arguments in an attempt to obscure the disputed facts and distort the legal issues.

***First***, Towers grossly mischaracterizes the Court's November 8, 2017 Order overruling Defendants' Preliminary Objections. The Court expressly stated that "[t]here are disputed issues involving, *inter alia*, notice that cannot be resolved at this stage in the proceedings." Mot. Ex. 3 at n.2. Towers contends that the Court "rejected" Defendants' waiver argument because "the waiver language in the engagement agreements was [in]sufficient to effect a waiver of [Defendants'] conflict at issue in this case." Mot. at 21. Plainly, the Court's Order did no such thing. Indeed, the Court overruled Defendants' Preliminary Objections on the basis of disputed facts rather than as a matter of law, thus requiring a full consideration of all of the relevant facts establishing informed consent that will be more completely identified after discovery. Pl.'s Mot. Ex. 3 at n.2. As noted above, to what extent Towers was on notice of Defendants' involvement in the Class Action before agreeing to waive conflicts is a critical and disputed issue that will be the subject of significant discovery.

***Second***, Towers argues that Defendants' involvement in the Class Action posed a conflict of interest that Towers could not possibly waive – even with informed consent – based on the tortured reading of a letter written by Morgan Lewis partner Glen Stuart and a misreading of the Pennsylvania Rules of Professional Conduct. Towers quotes a December 2016 letter from Mr. Stuart to a Wisconsin court, written in connection with ***Meriter's lawsuit against Towers***, for the



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proposition that the alleged conflict arising from Defendants' representation of Meriter in the ***Class Action*** was "non-waivable." Pl.'s Mot. Ex. 9. As an initial matter, the letter was not attached to the Complaint and the "non-waivable" language was not quoted in the Complaint, so the Court cannot deem anything about the "non-waivable" language to be admitted when such language was entirely absent from the pleading to which Defendants were responding. *See* Pa. R.C.P. 1029(a)-(b) (requiring denial only of allegations contained in pleading to which party is responding). Beyond that fundamental flaw in Towers' argument, discovery will show that the letter did not address Defendants' involvement in the Class Action at all. Rather, it was sent two years after the Class Action had ended, and well after the Morgan Lewis representation of Meriter in that case had concluded. The letter addressed Meriter's attempt to compel Mr. Blumenfeld to serve as an expert witness in its lawsuit against Towers, a separate lawsuit in which Defendants did not represent Meriter and in connection with which Defendants did not act adversely to Towers. Discovery will also show (and Mr. Stuart will testify) that when the letter referred to the conflict as "non-waivable," it was in the specific context of Meriter's attempt to compel Mr. Blumenfeld to offer expert testimony where Towers had expressly objected to Mr. Blumenfeld's service as an expert against Towers. Mr. Stuart's letter explains that ***Defendants*** were incapable of waiving the conflict that would result from voluntarily agreeing to serve as an expert witness adverse to Towers in the Meriter action against Towers.[6]

***Third***, as a matter of law, Towers' argument that it could not have given informed consent unless Defendants communicated to them the factual background of their involvement in

[6] The context on this issue is established, in part, by the time line. While the Class Action was pending and with knowledge of the operative facts, Towers reaffirmed the broad conflict waiver it had given to Morgan Lewis. More than four years later, after the Class Action had been settled and the Morgan Lewis representation of Meriter had concluded, an entirely different matter arose – Meriter's attempt to use Mr. Blumenfeld as an expert witness in its lawsuit against Towers. At that time, Towers expressly objected to Morgan Lewis and Mr. Blumenfeld undertaking such a role. Morgan Lewis and Mr. Stuart were not in a position to ignore the objection from Towers or waive the conflict unilaterally.



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the Class Action is baseless. The Pennsylvania Rules of Professional Conduct plainly state, "***A lawyer need not inform a client or other person of facts or implications already known to the client or other person.***" Pa. R.P.C. 1.0 cmt. 6. Rather, "[c]onsent may be inferred . . . from the conduct of a client or other person who has reasonably adequate information about the matter." Pa. R.P.C. 1.0 cmt. 7. Towers' quotations from non-binding authority do not change the fact that Towers waived conflicts knowing full well that Defendants represented Meriter in the Class Action and that Meriter was contemplating claims against Towers in connection with the Class Action. In fact, Towers was on notice ***two years*** prior to its re-affirmation of the conflict waiver in 2012 that Meriter, through its separate counsel, was seeking a tolling agreement against Towers. As will be demonstrated once the parties move beyond the pleading stage and evidence is addressed, the Towers waiver was fully informed and effective, regardless of how Towers learned of the relevant facts.

2. ***Disputed Issues of Material Fact as to the Claims for Breach of Contract and Breach of Fiduciary Duty Preclude Judgment on the Pleadings.***

At least three disputed issues of material fact permeate Towers' claims for breach of contract and breach of fiduciary duty, and preclude judgment on the pleadings.

***First***, Towers' claims turn on whether Defendants violated duties owed to Towers.[7] Defendants' Answer and New Matter contains well-pleaded denials and allegations disputing the

[7] Under Pennsylvania law, to establish a breach of contract, "the plaintiff must establish: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." *Hart v. Arnold*, 884 A.2d 316, 332 (Pa. 2005). To establish a breach of fiduciary duty, the plaintiff must establish the existence of a fiduciary or confidential relationship between plaintiff and defendants, and "(1) That the defendant negligently or intentionally failed to act in good faith and solely for the benefit of plaintiff in all matters for which he or she was employed; (2) That the plaintiff suffered injury; and (3) The defendant's failure to act solely for the plaintiff's benefit was a real factor bringing about plaintiff's injuries." *Nordetek Envtl., Inc. v. RDP Techs., Inc.*, 862 F. Supp. 2d 406, 423-24 (E.D. Pa. 2012) (citing *Baker v. Family Credit Counseling Corp.*, 440 F. Supp. 392, 414 (E.D. Pa. 2006 (quoting Pa. S.S.J.I. 4.16))).



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assertions underlying Towers' claims. For example, Towers' primary contention is that Defendants assisted in developing Meriter's claims against Towers, but Defendants expressly deny that they participated in any direct adversity to Plaintiff. *See, e.g.*, Answer ¶¶ 22, 27-29; New Matter ¶ 9. Further, Defendants state specifically that Meriter retained separate counsel to evaluate, develop, and assert claims against Plaintiff, which that separate counsel did independent of Defendants. *See, e.g.*, Answer ¶¶ 25, 27, 33-40; New Matter ¶¶ 10-11. Defendants also state that they did not provide any advice or substantive input in the evaluation, development, and/or assertion of claims against Plaintiff. *See, e.g.*, Answer ¶¶ 27, 33-40; New Matter ¶¶ 10, 13-14. To the extent that Defendants shared information with Meriter's separate counsel, they did so in connection with matters relating to insurance coverage in the Class Action, to assist Meriter's separate counsel in evaluating the defenses, exposure, and likelihood of success in the Class Action, and in connection with matters involving ongoing plan design and administration. New Matter ¶ 11. Finally, Defendants state that they played no part in Meriter's claims against Plaintiff, which were ultimately asserted based on the independent judgment and strategic decisions made by Meriter's separate counsel without substantive input from Defendants. *See, e.g.*, Answer ¶¶ 27, 33-40; New Matter ¶¶ 13-14.

***Second***, with respect to the claim for breach of fiduciary duty, Towers must prove that Defendants acted negligently or intentionally. *See Nordetek Envtl., Inc. v. RDP Techs., Inc.*, 862 F. Supp. 2d 406, 423-24 (E.D. Pa. 2012) (citing *Baker v. Family Credit Counseling Corp.*, 440 F. Supp. 392, 414 (E.D. Pa. 2006 (quoting Pa. S.S.J.I. 4.16))). But to find that Defendants did anything negligently or intentionally would be to draw an unwarranted inference against the Defendants (here, the non-moving party) based on an incomplete record of disparate communications unilaterally chosen and selectively quoted by Plaintiff and in contravention of the standard on a motion for judgment on the pleadings. *See Emerich v. Philadelphia Ctr. for*



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*Human Dev., Inc.*, 720 A.2d 1032, 1047 (Pa. 1998) (noting that "the pleadings and the inferences therefrom are viewed in the light most favorable to the party opposing the motion," and that . "[a]ll of the opposing party's well-pleaded allegations are viewed as true but only those facts specifically admitted by him may be considered against him"); *Beck v. Minestrella*, 401 A.2d 762, 763 (Pa. Super. Ct. 1979) ("[J]udgment on the pleadings may be entered only in clear cases free from doubt where there are no issues of fact, and only where the cause is so clear that a trial would clearly be a fruitless exercise."). Defendants have alleged sufficient facts to establish that their conduct was neither negligent nor intentional, creating yet another disputed issue of fact that cannot be resolved on this partial record prior to discovery.

***Third***, Towers has not established a critical element of its claims: that it was harmed by Defendants' alleged conduct. On both of Towers' claims, judgment on liability cannot be entered without a finding that the alleged breach of contract or fiduciary duty was the actual and legal cause of Towers' alleged injury. *See Nordetek*, 862 F. Supp. 2d at 423-24 (requiring that breach of fiduciary duty be a "real factor bringing about plaintiff's injuries" for there to be liability); *Hart*, 884 A.2d at 332 (requiring that damages be "resultant" from the breach of contract for there to be liability); *see also Busy Bee, Inc. v. Wachovia Bank, N.A.*, 2006 WL 723487 (Com. Pl. Lackawanna Cnty. Feb. 28, 2006) (noting that liability jury in bifurcated trial for breach of contract and breach of fiduciary duty was charged with determining whether any wrongful actions were "the legal cause of some harm"). Here, Defendants specifically allege that their conduct did ***not*** cause any injury to Plaintiff and, in support of that conclusion, have alleged that Meriter's litigation against Towers was handled exclusively and independently by a separate law firm without substantive contributions from Defendants. *See, e.g.*, Answer ¶¶ 27, 33-40; New Matter ¶¶ 10, 13-14. Further, Towers, and Towers alone, chose to settle Meriter's claim against it, and Defendants cannot be saddled with liability based on that unilateral



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decision. Drawing all reasonable inferences in Defendants' favor, the Court cannot grant judgment on the pleadings because the issue of causation remains disputed. *See Reis v. Phillips Prod. Co.*, 341 A.2d 180, 183 (Pa. Super. Ct. 1975) (reversing the trial court's granting of the plaintiff's motion for judgment on the pleadings because "the pleadings are devoid of any proof of proximate cause").

### D. Alternatively, Leave Should Be Granted to File a Second Amended Answer and New Matter.

If the Court were to conclude that Defendants' specific denials did not comply with Pa. R.C.P. 1029, Defendants respectfully request that they be given leave to amend their pleading. Parties should be given leave to amend pleadings and elaborate on their denials before the Court deems any allegations to be admitted. *See Mellon Bank, N.A. v. Joseph*, 406 A.2d 1055, 1058 (Pa. Super. Ct. 1979) ("inartfully pleaded" falling short of the requirements of Pa. R.C.P. 1029 should be subject to amendment). Moreover, Towers would not be prejudiced from allowing Defendants to perfect any purportedly inadequate denials. Defendants' positions on the merits and facts of this case have been abundantly clear throughout this litigation, and Towers has been on notice of those positions by virtue of Defendants' pleadings to date. No depositions have been taken yet, and the parties are still in the process of gathering and producing documents. Accordingly, if the Court were to decide that the denials in Defendants' Answer and New Matter are deficient in any way, leave should be granted to amend the responsive pleading.

## V. RELIEF

For the reasons stated above, Defendants respectfully request that the Court deny Plaintiffs' Motion for Partial Judgment on the Pleadings as to Defendants' Liability and permit the parties to proceed with discovery on the claims and defenses in this case.



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Dated: April 13, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 13, 2018, the foregoing Brief in Opposition to the Motion for Partial Judgment on the Pleadings as to Defendants' Liability filed by Plaintiff Towers Watson Delaware, Inc. was electronically served upon each of the counsel below and a copy of same was served on counsel via email:

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