IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

Civil Action File No.
1:12-CV-1996-TWT

BENJAMIN DANIEL DEHAAN and
LIGHTHOUSE FINANCIAL PARTNERS, LLC,
Defendants.

S. GREGORY HAYS, Receiver for
LIGHTHOUSE FINANCIAL PARTNERS, LLC,
Plaintiff,

v.

Ancillary Proceeding
No. 1:13-CV-03925-TWT

PAGE PERRY, LLC, ESTATE OF
J. BOYD PAGE, ALAN R. PERRY, JR.,
J. STEVEN PARKER, ROBERT D. TERRY,
and DANIEL I. MACINTYRE,
Defendants.

MOTION TO DISMISS PLAINTIFF'S COMPLAINT AGAINST ESTATE OF J. BOYD PAGE, ALAN R. PERRY, JR., AND DANIEL I. MACINTYRE

Defendants Estate of J. Boyd Page, Alan R. Perry, Jr., and Daniel I. MacIntyre move the Court to dismiss Plaintiff's Complaint against them pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim under the standards

set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). First, none of these three individual lawyer Defendants can be held liable as members of a limited liability company for acts of the employees of the company other than themselves. O.C.G.A. § 14-11-303; *see also Henderson v. HSI Fin. Servs., Inc.*, 266 Ga. 844 (1996). *Second*, Hays fails to set out "sufficient factual matter, accepted as true, to 'state a claim'" that MacIntyre violated Rule 1.7 of the Georgia Rules of Professional Conduct. *Third*, a legal malpractice claim cannot be based solely on a lawyer's alleged violation of a Rule of Professional Conduct. *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374 (1995). *Fourth*, lawyers have no obligation to supervise legal work performed by other experienced lawyers working for the Defendant law firm, and Plaintiff fails to allege any facts to render the alleged malpractice of other Defendant lawyers reasonably foreseeable to these Defendants based on any prior misconduct. *See Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861 (2004).[1]

[1] To the extent that grounds advanced in the Motion to Dismiss filed by Defendants Page Perry, LLC, J. Steven Parker and Robert Terry are also applicable to these Defendants, those grounds are adopted and incorporated herein.

For these reasons, and those more fully set forth in the accompanying Brief, these Defendants ask this Court to dismiss the Complaint against them.

This 24th day of January, 2014.

HAWKINS PARNELL THACKSTON & YOUNG LLP

/s/ Christine L. Mast

Christine L. Mast
Georgia Bar No. 461349
H. Lane Young
Georgia Bar No. 781950
Zachary Lewis
Georgia Bar No. 689146
Counsel for Defendants

4000 SunTrust Plaza
303 Peachtree Street
Atlanta, Georgia 30308-3243
(404) 614-7400 *(telephone)*
(404) 614-7500 *(facsimile)*
cmast@hptylaw.com
lyoung@hptylaw.com
zlewis@hptylaw.com

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CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the foregoing **MOTION TO DISMISS PLAINTIFF'S COMPLAINT AGAINST ESTATE OF J. BOYD PAGE, ALAN R. PERRY, JR., AND DANIEL I. MACINTYRE** with the

Clerk of Court using the CM/ECF system, which will automatically send e-mail documentation of such filing to the following attorneys of record for Plaintiff:

Allison S. Hines Ficken, Esq.
Edward Joseph Dovin, Esq.
Dovin Malkin & Ficken, LLC
Suite 2775
Five Concourse Parkway
Atlanta, Georgia 30328
ahficken@dmflawfirm.com
ejdovin@dmflawfirm.com

I also certify that, pursuant to LR 5.1B, ND Ga., the above document was prepared in Book Antiqua 13 pt. font.

This 24th day of January, 2014.

HAWKINS PARNELL THACKSTON & YOUNG LLP

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Counsel for Defendants

4000 SunTrust Plaza
303 Peachtree Street
Atlanta, Georgia 30308-3243
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(404) 614-7500 *(facsimile)*
cmast@hptylaw.com
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BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT AGAINST DEFENDANTS ESTATE OF J. BOYD PAGE, ALAN R. PERRY, JR., AND DANIEL I. MACINTYRE

Gregory Hays, as Lighthouse Financial Partners LLC's receiver, sued Defendants Daniel I. MacIntyre, Alan R. Perry, Jr., and J. Boyd Page for breaching legal duties they allegedly owed to Lighthouse. Wholly ignoring *Ashcroft v. Iq-*

bal's pleading requirements, Hays's 57-page Complaint does not detail (or even reference) any service provided by individual defendants Perry or Page. 556 U.S. 662, 677 (2009). As for MacIntyre, Hays alleges he performed a single legal service during the 42 months in which Page Perry LLC represented Lighthouse, but he does not detail how that service was negligent or that it damaged Lighthouse.

In lieu of pleading these facts (as *Iqbal* requires), Hays premises MacIntyre's, Perry's, and Page's *individual* liability on allegedly-deficient regulatory legal work performed exclusively by the co-heads of Page Perry LLC's regulatory practice group: J. Steven Parker and Robert D. Terry. As such, MacIntyre, Perry, and Page move the Court to dismiss Hays's claims against them for four reasons:[1]

First, lawyers who are members of a limited liability company are not personally liable for the company's obligations—including obligations arising from "the acts or omissions of any . . . employee of the limited liability company." O.C.G.A. § 14-11-303; *see also Henderson v. HSI Fin. Servs., Inc.,* 266 Ga. 844 (1996)

[1] Defendants Page Perry, LLC, J. Steven Parker and Robert D. Terry separately move to dismiss the Complaint against them. In this motion, the Estate of J. Boyd Page, Alan R. Perry, Jr. and Daniel I. MacIntyre seek dismissal of the claims against these three named Defendants. To the extent that arguments pressed in the motion by Page Perry, LLC, Parker and Terry are also applicable to these Defendants, those arguments are adopted and incorporated herein.

(holding Georgia's limited liability laws apply to law firms). Thus, Hays's malpractice claims against Perry and Page should be dismissed because Hays fails to detail any legal service—faulty or otherwise—that Perry or Page provided to Lighthouse. *See Iqbal*, 556 U.S. at 677.

Second, Hays does not set out "sufficient **factual** matter, accepted as true, to 'state a claim'" that MacIntyre violated Rule 1.7 of the Georgia Rules of Professional Conduct. *Id.* (emphasis added) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Third, a legal malpractice action fails when it is premised entirely on a lawyer's alleged violation of the Rules of Professional Conduct. *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374 (1995). Here, Hays details a single service that MacIntyre provided to Lighthouse and alleges that service violated Rule 1.7 of the Georgia Rules of Professional Conduct. But Hays does not allege MacIntyre performed that legal service deficiently and does not allege that service proximately caused Lighthouse's damages. Consequently, the Complaint fails to create a reasonable inference that MacIntyre committed legal malpractice. *See Iqbal*, 556 U.S. at 677.

Fourth, no law supports Hays's counterintuitive theory that lawyers have an obligation to supervise legal work performed by experienced lawyers—let

alone a law firm's practice group leaders. Instead, a negligent supervision claim against an employer fails unless an employee's alleged misconduct was reasonably foreseeable based on the employee's prior misconduct. *See Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 863 (2004). Consequently, Hays's negligent supervision claims against Perry and Page should be dismissed because Hays pleads no facts suggesting Terry, Parker, or MacIntyre—three lawyers Hays pleads were firm partners—have ever even been previously accused of misconduct.

ALLEGATIONS OF THE COMPLAINT

Page Perry was an Atlanta law firm concentrating its practice in securities law. [*Id.* ¶ 29]. In 2005, the firm began providing securities compliance services and representing investment advisors. [*See Id.* ¶ 30]. Together, Page Perry partners Parker and Terry (who joined the firm in 2011) "headed the firm's 'Regulatory Practice Group,'" a leadership position they were especially qualified for, having each "formerly served as the Commissioner of Securities in the Securities Division of the Secretary of State, the highest securities industry regulatory position in the state of Georgia." [Compl. ¶ 31].

In December 2008, Benjamin DeHaan, president of Lighthouse, hired Page Perry as Lighthouse's counsel. [Compl. ¶¶ 34, 107, Ex. 2]. Despite hiring the en-

tire firm, Parker was the only Page Perry lawyer who provided any legal services to Lighthouse over the next three plus years. [*See generally* Compl.]. Indeed, Hays does not even allege that another Page Perry attorney spoke with a Lighthouse employee until March 2012.

In late March 2012, Parker brought in the co-head of Page Perry's regulatory practice group, Terry, to assist Lighthouse through an audit being conducted by the office of the Georgia Secretary of State. [*Id.* ¶ 83, Ex. 28]. Throughout the audit, Terry and Parker remained the only Page Perry attorneys who provided legal services or advice to Lighthouse. [*Id.* ¶ 86].

In early April, DeHaan was subpoenaed to testify in front of the SEC in connection with its investigation of Lighthouse. [*See Id.* ¶ 87]. In preparation, DeHaan met with Terry. [*Id.* Ex. 31]. And on the date of his testimony, DeHaan was accompanied by both Terry and MacIntyre—who had been requested to assist at the hearing convened by the subpoena because of his experience representing clients in SEC proceedings. [*See Id.* ¶¶ 29, 33, 87]. That day, however, was the first and last time MacIntyre performed any legal services for Lighthouse. [*See generally Id.*]

Instead, Parker and Terry continued representing Lighthouse exclusively through June 2012. They withdrew as Lighthouse's lawyers on June 14, 2012—

after unravelling DeHaan's fraud and convincing him to transfer approximately $669,214.09 into a special trust account to be used for restitution to Lighthouse advisory clients. [*See* Compl. ¶¶ *88-95;* Diskin Decl. ¶ 17, *SEC v. Benjamin Daniel DeHaan et al.*, No. 1:12-cv-01996-TWT (N.D. GA. Jun. 29, 2012) ("SEC Action") (Doc. 9-7) (Joint Appx. Ex. 2); First Interim Report of Receiver, Ex. 2, SEC Action (Doc. 23) (Joint Appx. Ex. 3)]. Approximately two weeks later, Hays was appointed Lighthouse's receiver. [Compl. ¶ 93].[2]

ARGUMENT AND CITATION OF AUTHORITY

The burden is on Hays to set out "sufficient **factual** matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See Iqbal*, 556 U.S. at 677 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *Iqbal* and *Twombly* set forth a two-part analysis of plausibility: First, although a court must accept as true all of the allegations, the same is not true for legal conclusions. And threadbare recitals of a claim's elements, supported by mere conclusory statements, do not suffice. *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 677). Second, a plaintiff must plead factual allegations sufficient

[2] But for the single service provided by MacIntyre, nothing contained in Hays's Complaint supports his allegation that any one of the Movants was personally involved in providing the legal services to Lighthouse [Compl. ¶ 102]. Hays's repeated attempts to tether "Page Perry" to "the individual Defendants" throughout his Complaint is for naught. *Iqbal*, 556 U.S. at 677.

to allow a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Further, determining whether a complaint states a plausible claim is a context-specific task requiring the court to draw on its judicial experience and common sense. *Id.* at 679.

A. Counts I, II, And III Should Be Dismissed.

Counts I (Professional Malpractice); II (Breach of Fiduciary Duty); and III (Breach of Contract) assert claims based on an attorney's duties to his client. Those counts must be dismissed as to Defendants Perry and Page because Hays's Complaint fails to create a reasonable inference that they provided any legal services or advice to Lighthouse. These counts must also be dismissed against Defendant MacIntyre because the Complaint does not create a reasonable inference that he breached the standard of care in representing Lighthouse or that he proximately caused Lighthouse's damages.

1. Perry and Page never provided services or advice to Lighthouse.

Hays's threadbare allegation that Perry or Page committed legal malpractice fails as a matter of law. In Georgia, a plaintiff must prove three elements to maintain a legal malpractice claim: (i) employment of the named attorney, (ii) failure of the named attorney to exercise ordinary care, skill, and diligence, and (iii) damages proximately caused by that failure. *Tante v. Herring*, 264 Ga. 694

(1994). Because Georgia recognizes lawyers' right to organize their practice in the form of a limited liability company, however, attorney members of a limited liability company are not personally liable for another member's professional misconduct or for the company's liability. *See Henderson v. HSI Fin. Servs., Inc.*, 266 Ga. 844 (1996); O.C.G.A. § 14-11-303.

Hays asserts malpractice liability against all of the Defendants for failing to deduce Lighthouse's fraud from its securities compliance deficiencies. Even assuming *arguendo* that such a cause of action exists, Hays's Complaint does not detail a single fact showing that either Perry or Page was aware, or could have been aware, of Lighthouse's securities compliance concerns. Indeed, Hays's Complaint does not even create a reasonable inference that Perry or Page provided any legal advice or service to Lighthouse. Consequently, Hays's malpractice allegations against them should be dismissed because Perry and Page cannot be held personally liable for another Page Perry attorney's alleged malpractice.

2. The Complaint does not create a reasonable inference that MacIntyre committed malpractice.

Hays's malpractice claim against MacIntyre fails for two alternative reasons, each of which is a basis for dismissing Hays's claim against MacIntyre: (i) Hays does not create a reasonable inference that MacIntyre violated Rule 1.7 of

the Georgia Rules of Professional Conduct; and (ii) Hays cannot predicate malpractice liability against MacIntyre based solely on his alleged violation of Rule 1.7.

Rule 1.7 provides that "[a] lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's . . . duties to another client . . . will materially and adversely affect the representation of the client . . . ." The rule's second comment explains that "loyalty to a client is impaired when a lawyer cannot consider, recommend, or carryout an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests."

The only act that Hays pleads MacIntyre undertook during Page Perry's representation of Lighthouse is appearing with DeHaan when he gave allegedly (unspecified) false testimony during the SEC's investigation of Lighthouse. [Compl. ¶ 87]. Regardless of whether MacIntyre also represented Lighthouse at that time, however, he could have and did only provide one piece of advice to DeHaan: testify truthfully. This is precisely what Page Perry advised DeHaan to do and its advice—had DeHaan followed it— would have protected the best interests of both DeHaan and Lighthouse. [*See* Compl. Ex. 32]. Consequently, Hays does not create a reasonable inference that MacIntyre's loyalty to Lighthouse was divided merely by appearing with DeHaan when he gave testimony

under subpoena. *See Thomas v. Carlisle*, 179 Ga. App. 315, 316 (1986) (rejecting plaintiff's conflict of interest claim where there was no evidence attorney was conflicted).

Hays's legal malpractice claim also fails because an alleged ethical rule violation, standing alone, cannot serve as a legal basis for a legal malpractice action. *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374 (1995) ("the duties imposed by the Bar Rules cannot provide the *sole* basis for the standard of care applied in a legal malpractice action"). *Id.* at 374 (emphasis in original).

Therefore, there is not "sufficient **factual** matter" alleged to "state a claim to relief that is plausible on its face" because Hays does not plead any additional facts, beyond MacIntyre's alleged violation of Rule 1.7, demonstrating his alleged actions or inactions breached the standard of care he owed Lighthouse. *See Iqbal*, 556 U.S. at 677 (emphasis added) (quoting *Twombly*, 550 U.S. at 570). While Hays alleges that DeHaan "gave false testimony" at the SEC examination, Hays does not allege what false testimony DeHaan gave; that MacIntyre knew, had reason to know, or could have known that DeHaan's testimony was false; or that MacIntyre advised DeHaan to testify less than truthfully. To the contrary, as discussed, Hays's Complaint demonstrates that Page Perry repeatedly advised DeHaan to testify truthfully—which was the obligation imposed on it by Georgia

law. [*See* Compl. Ex. 32; *see also* Ga. Rules of Prof'l Conduct Rule 1.13(b) and (c); *see also* Argument, A.1 of Page Perry LLC, J. Steven Parker, and Robert D. Terry's Brief In Support of their Motion to Dismiss Plaintiff's Complaint].

Similarly, Hays pleads no facts (and cannot plead facts) demonstrating that MacIntyre's appearance proximately caused Lighthouse's damages. Indeed, the month after MacIntyre's appearance, Page Perry uncovered key elements of DeHaan's fraud, convinced DeHaan to turn himself in to regulators, and to segregate hundreds of thousands of dollars of purloined assets for the defrauded investors'—and receiver's—benefit. [Diskin Decl. ¶¶ 8-17 (Joint Appx. Ex. 2)]. Thus, the malpractice claims against MacIntyre should be dismissed. *See De La Maria v. Powell, Goldstein, Frazer & Murphy*, 612 F. Supp. 1507, 1518 (N.D. Ga. 1985) (rejecting a legal malpractice claim where attorney's alleged conflict of interest did not proximately cause any of the plaintiff's injuries).

3. Counts II and III are duplicative of Hays's legal malpractice claim.

Hays's Complaint improperly attempts to multiply a legal malpractice claim into three separate causes of action. Georgia law prohibits that duplication where, as here, Hays's breach-of-fiduciary-duty and breach-of-contract claims arise exclusively from the same professional services forming the basis for his

malpractice claim. *Oehlerich v. Llewellyn*, 285 Ga. App. 738, 741 (2007); *see also McMann v. Mockler*, 233 Ga. App. 279, 282 (1998).

Hays asserts that the Page Perry attorneys breached fiduciary duties "by treating DeHaan as their client and putting his interest above that of Lighthouse." [Compl. ¶ 125]. Hays advances that same allegation against Page Perry's attorneys in his malpractice allegation: "Page Perry and the individual Defendants also violated GRPC 1.7 when they agreed to represent DeHaan and Lighthouse in the SEC investigation, since DeHaan was being investigated for misappropriating funds from Lighthouse." [Compl. ¶115; *see also* Compl. ¶¶108, 113].

Similarly, Hays's breach-of-contract allegation relies on the same allegations he advances in the malpractice count: failing to advise Lighthouse properly with respect to the numerous regulatory violations by DeHaan, failing to address the material regulatory deficiencies it discovered or should have discovered in the mock audits, and failing to act in Lighthouse's best interest with respect to known regulatory violations and other misconduct by DeHaan, all to Lighthouse's detriment." [*Id.* ¶ 133 and *generally* ¶¶ 101- 122 and Ex. 36].

Underlying all of these claims is the allegation that Page Perry's attorneys breached the duty of care and loyalty owed Lighthouse. As a result, Hays's

breach-of-fiduciary-duty claim and breach-of-contract claim should be dismissed because they duplicate his malpractice claim.

B. The Respondeat Superior/Negligent Supervision Claim (Count IV) Against Perry And Page Fails As A Matter Of Law.

Count IV asserts two especially specious claims against Perry and Page. First, Hays alleges that Perry and Page are vicariously liable for the alleged negligence of Page Perry's employees. Second, he alleges they negligently supervised three senior lawyers—including the co-heads of Page Perry's regulatory practice group. [Compl. ¶¶135-139].

While the respondeat-superior doctrine provides that an employer itself is vicariously liable for its employees' torts, no authority extends that vicarious liability to the *members* of an LLC employer. O.C.G.A. § 51-2-2. In fact, Georgia's LLC statute specifically precludes that extension:

> A person who is a member . . . of a limited liability company is not liable, solely by reason of being a member . . . of the limited liability company . . . for a debt, obligation, or liability of the limited liability company, including liabilities and obligations of the limited liability company to any member or assignee, whether arising in contract, tort, or otherwise, **or for the acts or omissions** of any other member, manager, agent, **or employee of the limited liability company**, whether arising in contract, tort, or otherwise.

O.C.G.A. § 14-11-303 (emphasis added).

Consequently, Perry and Page cannot be vicariously liable for acts committed by Page Perry LLC's employees. [*See* Compl. ¶ 2 (stating Page Perry is a limited liability company)]. *See, e.g., Milk v. Total Pay & HR Solutions, Inc.*, 280 Ga. App. 449, 453 (2006) (holding LLC members have separate existences from the company); *see also Henderson, supra.*

Hays's negligent supervision claim is equally meritless. No Georgia case holds that law firm shareholders have an affirmative duty to supervise other partners or senior lawyers—let alone a law firm's practice group leaders. And at least one other court has rejected the notion outright. *Cecala v. Newman*, 532 F. Supp. 2d 1118, 1141 (D. Ariz. 2007) ("Cecala has cited *no* authority in support of the proposition that [the defendant law firm] owed her an affirmative duty of supervision [over the firm partner accused of wrongdoing] on the facts of this case, nor has she provided any insight as to what that duty might command."). In Georgia, an employer's duty is to exercise ordinary care not to hire or retain an employee the employer knew or should have known posed a risk of harm to others where it is reasonably foreseeable that the employee's tendencies could cause the type of harm sustained by the plaintiff. *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 863 (2004).

Here, Hays's negligent supervision claim is nothing more than an attempt to circumvent O.C.G.A. § 14-11-303. Hays's Complaint does not allege Parker, Terry or MacIntyre have ever been accused previously of misconduct and goes to great lengths to highlight their eminent qualifications. [Compl. ¶¶ 31, 33, 87].[3] Thus, Hays's negligent supervision claim should be dismissed because even assuming *arguendo* that Parker, Terry, or MacIntyre somehow committed malpractice, such actions were unforeseeable.

CONCLUSION

For the foregoing reasons, Alan R. Perry, Jr., Estate of J. Boyd Page, and Daniel I. MacIntyre should be dismissed from this lawsuit.

[3] It is illogical that Perry or Page would have supervised Parker and Terry's regulatory work since they were Page Perry's regulatory practice group leaders—inherently suggesting they had the most regulatory law experience in the firm. Likewise, it is illogical that Perry or Page would supervise MacIntyre, recognized as a securities partner in the Complaint, when he appeared with a client testifying in front of the SEC. Indeed, Hays's claims, if successful, would undermine a law firm's ability to maintain multiple practice groups.

This 24th day of January, 2014.

HAWKINS PARNELL THACKSTON & YOUNG LLP

/s/ Christine L. Mast

Christine L. Mast
Georgia Bar No. 461349
H. Lane Young
Georgia Bar No. 781950
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Edward Joseph Dovin, Esq.
Dovin Malkin & Ficken, LLC
Suite 2775
Five Concourse Parkway
Atlanta, Georgia 30328
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