2014 IL App (1st) 122350-U
No. 1-12-2350

THIRD DIVISION
DECEMBER 3, 2014



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| RHOMBUS ASSET MANAGEMENT, INC. an Illinois Corporation, and ALEXANDER HERGAN, | ) | Appeal from the Circuit Court of Cook County. |
| Plaintiffs-Appellants, | ) | No. 11 CH 18495 |
| v. | ) | The Honorable |
| PAWLAN LAW, LLC, MITCHELL D. PAWLAN, and GLENNA MO, | ) | Kathleen M. Pantle, Judge Presiding. |
| Defendants-Appellees. | ) | |

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PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justice Mason specially concurred, joined by Justice Neville.

## ORDER

¶ 1 *Held*: Except for one of ten counts, an amended complaint was properly dismissed with prejudice because there was no set of facts which could be alleged to give rise to relief on the claims asserted where the amended complaint contradicted the original verified complaint without any assertion that the original complaint was the result of mistake or inadvertence, and where the written agreement attached to and part of the amended complaint directly contradicted the allegations that defendant was hired by plaintiffs in any capacity. The count for aiding and abetting a breach of fiduciary duty was conclusory but, given the facts of the case, could possibly be amended to state this claim, and thus the dismissal of this claim with prejudice was reversed and the case was remanded to allow plaintiffs an opportunity to replead this claim.

¶ 2 BACKGROUND

¶ 3 Plaintiff Rhombus Asset Management, Inc. (Rhombus),[1] is a company which was formed for the purpose of multi-million dollar developments in Central and Eastern Europe as part of a joint venture comprised of various individual investors. Plaintiff Alexander Hergan is one of the partners in the joint venture and is a shareholder in Rhombus. Defendant Mitchell D. Pawlan is an attorney, who is the sole manager of defendant Pawlan Law, LLC (Pawlan Law).[2] Plaintiffs filed a verified complaint in chancery alleging claims against defendant based on defendant's alleged role in secretly representing another partner in the joint venture, Glenna Mo, as her attorney and misrepresenting the financial aspects of the parties' agreements, when defendant was allegedly hired by plaintiffs and the other partners as an agent to be "impartial" and simply draft agreements which accurately reflected the parties' agreements.

¶ 4 Plaintiffs' original verified complaint was dismissed in its entirety and plaintiffs subsequently filed a verified amended complaint, alleging the following 10 causes of action in 10 counts: (1) aiding and abetting a breach of fiduciary duty; (2) breach of fiduciary duty owed to plaintiff Rhombus Asset Management, Inc. (Rhombus); (3) breach of fiduciary duty owed to plaintiff Alexander Hergan (an individual and shareholder of Rhombus); (4) fraud toward Rhombus; (5) fraud toward Hergan; (6) breach of a contract with Rhombus; (7) breach of a contract with Hergan; (8) tortious interference with a prospective economic advantage; (9) accounting; and (10) negligence. The trial court granted defendant's section 2-615 motion to dismiss the first amended complaint with prejudice, finding that the amended complaint

[1] Rhombus is unaffiliated with Rhombus Partners, LLC in Illinois, which is a technology company.

[2] We will refer to Pawlan Law, LLC, and Mitchell D. Pawlan collectively as "defendant" because, according to public record with the State of Illinois, Mitchell Pawlan is the sole manager of Pawlan Law, LLC.

contradicted the original complaint, that the amended complaint was internally inconsistent, and that plaintiffs failed to plead facts necessary to state the alleged causes of action. We first set forth the relevant factual allegations.

¶ 5 Plaintiffs filed a verified complaint in the chancery division of the circuit court of Cook County on May 20, 2011, against defendant and Glenna Mo, another partner and investor. The complaint alleged that in 1998, Alexander Hergan, Mo, Mark Proskine, and Russell Wasendorf "entered into an agreement to form a venture to develop real estate" in Romania**.** Hergan, Mo, Proskine, and Wasendorf incorporated plaintiff Rhombus Asset Management, Inc., as well as many other companies, for the purpose of implementing that joint venture agreement. Each of the four investors was given an equal share of 85% of the outstanding common stock in Rhombus. The remaining 15% of the outstanding shares were to be issued to the four investors "based on future activities they agreed to perform." According to the complaint, Mo received "an additional 2% interest for agreeing to use her best efforts to raise funds from third parties in the form of high interest loans," while, according to plaintiff's brief on appeal, "Hergan received an additional 7% for agreeing to serve as the man on the ground in Romania." Over time, Hergan and Proskine made additional capital investments into Rhombus, and other investors bought shares of Rhombus' stock. Mo was appointed Secretary and Director of Rhombus and served in those capacities from 1998 to 2008.

¶ 6 The four original investors also created various European corporations (the European companies) as part of their joint venture**,** including Central and Eastern European Investment, Ltd. (CEEIF), which is a Cyprus corporation. CEEIF and its subsidiaries and affiliates engaged in the development of real estate in Romania as part of the parties' joint venture. The subsidiaries and affiliates of CEEIF are sometimes referred to in the complaint as the "Romanian group of

companies," which we will refer to as the "European Companies." The parties each had the same percentage interest of shares in CEEIF as the parties originally had in Rhombus. As new real estate projects were developed, new Romanian companies were formed to hold each of the projects.

¶ 7 Hergan and Mo obtained high interest loans from third party lenders. The money from the loans solicited by Hergan was deposited in Rhombus' accounts, and Rhombus sent those funds to the European companies. The loans solicited by Mo were sometimes deposited in Rhombus' accounts, and on occasion, Mo deposited the funds into checking accounts controlled by her. Mo sent "some of the money" from these accounts to the European companies without identifying the source of the funds.

¶ 8 The parties eventually had a dispute as to their beneficial interests in CEEIF. In May, 2006, Mo retained the legal services of Pawlan for the purpose of persuading her fellow investors to give her a higher participation percentage in the European companies. The fee arrangement between Mo and Pawlan for his services "provided a lodestar based on superior performance."[3] Between June 6 and June 10, 2006, Mo and Pawlan met with Hergan, Proskine, and Dan Pascariu[4] in Romania. Neither Pawlan nor Mo disclosed their attorney-client relationship or the "lodestar" to any of the other shareholders, and Pawlan "represented to Hergan and the other stakeholders that he was in Romania acting as a neutral to facilitate discussions between Mo and the others." Pawlan asked Hergan if he would be willing to have Pawlan serve as an impartial scrivener, "drafting agreements solely to memorialize the understanding of the principals."

[3] The complaint does not define what a "lodestar" is. Plaintiffs' brief explains that the lodestar provision provided that the fee Mo paid to Pawlan would increase in direct proportion to the ownership percentage Pawlan secured for Mo. In other words, Pawlan would receive more money if Mo received a greater ownership percentage.

[4] All three individuals were shareholders in Rhombus and the European companies.

"Based on Pawlan's representations that he was *neutral*," Hergan permitted Pawlan to "*become an agent for all parties* and to fairly memorialize" agreements with Mo. (Emphasis added.) "Also based on Pawlan's representation that he was neutral and would memorialize only what the parties had agreed upon, Hergan and the [European] Companies *were not represented by counsel* during the sessions with Mo and Pawlan." (Emphasis added.) Plaintiffs allege that the shareholders of Rhombus and the European companies paid $70,000 to Pawlan for his services,[5] and that the agreement drafted by Pawlan provided that the shareholders would pay Mo $70,000 "as reimbursement for her expenses associated with Pawlan's services in [Romania]."[6]

¶ 9 Pawlan prepared accountings that he presented to the shareholders of Rhombus and the European companies, relying on Mo's representations of the financial documents without making his own independent investigation. Plaintiffs allege that Pawlan was motivated to support Mo's claims that she was entitled to a greater participation percentage because of the lodestar provision that would give him a larger fee, and as a result, Pawlan was neither neutral nor impartial when providing his services in Romania.

¶ 10 Pawlan's actions worked, and Hergan and the other shareholders agreed to grant Mo a greater participation percentage in Rhombus and the European companies. The agreement was conditioned upon Mo assuming responsibility for the repayment of the principal and interest on the loans she secured. Pawlan drafted the final agreement, and, "[r]elying on Pawlan's representations regarding the accuracy and validity of the accountings that he presented during the [Romania] negotiations, and based on Pawlan's assurances that the final agreement *** captured the terms of the understanding reached between Mo and the other shareholders of

[5] The $70,000 covered in part Pawlan's "lodestar."
[6] The terms of the agreement stated that the $70,000 would reimburse Mo for "legal fees" she incurred.

[plaintiff] and [the European companies] and nothing more," Hergan and the other shareholders signed the agreement.

¶ 11 Plaintiffs allege that Pawlan drafted the June 9, 2006 agreement with "intentional ambiguity in order to both obfuscate Mo's obligations and to conceal the extraneous provisions he added which inured to the benefit of Mo and the detriment of the other shareholders and stakeholders (including Hergan)." Plaintiffs alleged that Pawlan inserted provisions not agreed to by the shareholders, such as a *nunc pro tunc* provision allowing Mo to claim an increased interest in all prior distributions made by the European companies.

¶ 12 Plaintiffs allege that Mo informed Pawlan that she wished to renege on the agreement and force Rhombus to pay her obligations to the lenders. Plaintiffs further allege that Pawlan agreed to assist Mo in her plan. Pawlan continued to aid Mo by preparing documents to support claims that Mo was entitled to more money from the European companies, even though Pawlan knew that the new claims were contrary to the agreement executed in Romania or were based on provisions added to the agreement by Pawlan without plaintiffs' knowledge.

¶ 13 Pawlan also drafted a June 10, 2006, promissory note as a loan repayment agreement between Hergan and Mo. When Pawlan presented Hergan with a draft of the loan repayment agreement, Hergan pointed out that not all of the information was correct. Specifically, Hergan stated that Pawlan had included financial obligations that belonged to Rhombus rather than to Hergan personally. Pawlan removed the objected to information and presented Hergan with a new draft. Pawlan informed Hergan that he was preparing to leave Romania and that Mo needed Hergan to sign the agreement before Pawlan departed. Pawlan informed Hergan that he would send the supporting documentation after returning to Chicago. Pawlan stated that, if after reviewing the documents, Hergan was unsatisfied with any of the proof of any financial

obligation, Hergan could reject the obligation and it would be stricken from the agreement. After Hergan reviewed the documents, he determined that several of the listed financial obligations were not supported by the documents. Hergan also discovered that Pawlan had inserted provisions that favored Mo without informing Hergan that he had done so. Pawlan "assured Hergan that all of the debts had been verified" and that the supporting documents were in Chicago, not Romania, and Pawlan therefore could not present them to Hergan at that time. However, unbeknownst to Hergan, Pawlan did in fact have access to the documents on his computer.

¶ 14 Plaintiffs filed this action in the circuit court of Cook County. Mo filed a separate lawsuit in the circuit court of Cook County, 07 CH 3966, seeking declaratory judgment and specific performance, and plaintiffs and Mo filed various other lawsuits against each other in the circuit court of Cook County, all arising from the same set of facts as those at issue in the case at bar. We do not discuss these other lawsuits, as they are irrelevant to our review of the dismissal of the first amended complaint in this case.

¶ 15 Plaintiffs filed a confusing original complaint and then, after dismissal, an even more confusing first amended complaint which again resulted in dismissal. The allegations in the first amended complaint are mostly a repetition of the allegations of the original complaint, but with newly added allegations concerning the role of defendant as an attorney which are internally inconsistent and contradictory to the original verified complaint, as well as the agreement attached to the first amended complaint. Plaintiffs still allege that defendant breached his fiduciary duty as agent to plaintiffs and the other partners as well as the partnership itself due to his alleged actions as Mo's undisclosed attorney. Plaintiffs attempt to now also allege an attorney-client relationship between themselves and defendant. We set forth and compare the

allegations in both the original verified complaint and the first amended complaint because, as explained below, allegations which contradict a verified complaint cannot stand.

¶ 16 I. The Original Complaint

¶ 17 The original verified complaint, in relevant part, alleged the following:

"13. In May 2006, Mo retained the services of Pawlan Law and Pawlan in an attempt to obtain an increased participation percentage in the companies based on her purported 'contributions' to them. Any increase in Mo's percentage would necessarily result in a decrease in the percentages of the other shareholders, including that of Hergan. The fee agreement between Mo and Pawlan provided a lodestar based on superior performance.

15. While they were in Romania, neither Pawlan nor Mo disclosed Pawlan's lodestar.

16. From June 6 through June 10, 2006, Pawlan represented to Hergan and the other stakeholders that he was in Romania acting as a neutral to facilitate discussions between Mo and the others. He also represented that he had verified the accuracy of all of the numbers in the transactions between Mo and her investors and between them and the companies. *** Using his alleged neutrality and knowledge of the transactions, Pawlan asked Hergan if Hergan would be willing to have Pawlan serve as an impartial scrivener, drafting agreements solely to memorialize the understanding of the principals.

17. Based on Pawlan's representations that he was neutral and had verified the accuracy of the numbers that he presented to Hergan and the shareholders/stakeholders, Hergan permitted Pawlan to become an agent for all parties and to fairly memorialize what Pawlan thereafter represented to Hergan as their agreements with Mo.

18. Also based on Pawlan's representation that he was neutral and would memorialize only what the parties had agreed upon, Hergan and the Companies were not represented by counsel during the sessions with Mo and Pawlan and, in fact, Pawlan was paid $70,000 by the shareholders of Rhombus and the stakeholders of the Romanian Group of Companies, including Hergan, for Pawlan's services to them in Romania. (Unbeknownst to the shareholders, stakeholders and Hergan, the $70,000 payment included Pawlan's lodestar.)

20. Despite his representation to the contrary, Pawlan did not verify the accuracy of many material entries in the accountings that he presented to the shareholders and stakeholders during the Bucharest discussions. In fact, Pawlan prepared spreadsheets and accounting schedules often based solely on Mo's representations, notwithstanding the fact that Pawlan represented to Hergan and the other shareholders and stakeholders that he had independently verified all of them through bank records and the like.

21. Between June 6th and June 10th, 2006, Pawlan's motive for presenting original source numbers to the shareholders/stakeholders was for the purpose of supporting Mo's claims for an a [sic] greater participation percentage. Pawlan was not as a [sic] neutral or impartial party."

¶ 18 Plaintiffs attached the June 9, 2006 written agreement prepared by Pawlan to the original verified complaint. Paragraph 12 of the agreement reads as follows: "The parties acknowledge that Mitchell D. Pawlan is an advisor *to Glenna Mo only* and is not acting as legal counsel to her or to any other party." (Emphasis added.) The agreement also provided for payment of Mo's legal fees from Rhombus' funds before equitable distribution to the partners, as follows: "Glenna Mo

(expense reimbursement only, including but not limited to legal fees she incurred in an amount not to exceed $70,000)."

¶ 19 The original complaint alleged five counts: (1) Count I alleged a claim for an accounting from Pawlan and Mo regarding the debt owed to third party lenders arising from their loans to Mo; (2) Count II sought indemnification and was based on fraudulent misrepresentation; (3) Count III alleged a claim for fraud based on the false representations about Pawlan's role; (4) Count IV alleged that the defendant breached his fiduciary duty; and (5) Count V alleged breach of an oral contract against Pawlan to operate as a neutral facilitator and scrivener because he was in fact representing Mo's interests.

¶ 20 On July 26, 2011, defendants filed a motion to dismiss the complaint, pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)). Section 2-619.1 allows parties to file a combined section 2-615 and 2-619 motion in a single document so long as the motions are partitioned within the document. Pawlan included a motion to dismiss pursuant to section 2-615 and a motion to dismiss pursuant to section 2-619.

¶ 21 On January 25, 2012, the trial court granted Pawlan's section 2-615 motion and denied his section 2-619 motion, and dismissed the case without prejudice as to the initial verified complaint. The trial court made the following findings. To plead a cause of action for an accounting, plaintiffs must allege that no adequate remedy at law exists. The trial court found that plaintiffs failed to allege that no adequate remedy at law existed and struck Count I.

¶ 22 As to Count II, the trial court found that plaintiffs' allegations did not show that Pawlan agreed to indemnify plaintiffs and that he had no common law duty to do so. Without an express agreement of indemnification, plaintiffs would have to prove a theory of implied indemnity. Plaintiffs sought indemnity arising from a contract, and the law does not allow for implied

indemnity arising from another party's failure to uphold his or her contractual obligations. As a result, the trial court found that plaintiffs failed to allege sufficient facts to sustain a cause of action for indemnity.

¶ 23 Regarding Count III, the trial court found that plaintiffs failed to plead their fraud cause of action with particularity and specificity because, in their response to Pawlan's motions, plaintiffs asked the trial court to consider depositions not included in the complaint to support their fraud cause of action. The trial court found that such a request was an "improper response," and found that if plaintiffs needed the trial court to consider outside materials to determine whether the complaint was proper, then the complaint is factually deficient. The trial court also found some of plaintiffs' fraud allegations to be conclusory. The trial court therefore dismissed Count III.

¶ 24 With regard to Count IV, plaintiffs' claim that Pawlan breached a fiduciary duty, the trial court found that if plaintiffs believed that Pawlan was a neutral third party and impartial facilitator, as plaintiffs repeatedly alleged, then plaintiffs could not reasonably rely upon Pawlan to provide them with legal or accounting advice. Furthermore, plaintiffs did not allege that Pawlan exerted dominance or influence over them, which the trial court held is "essential to a cause of action based on a fiduciary duty regardless of the level of trust between the parties." Therefore, the trial court dismissed Count IV.

¶ 25 Finally, with regard to Count V, plaintiffs' breach of contract cause of action, the trial court found that plaintiffs did not allege the existence of a written contract and did not allege "any facts to show that their unilateral decision not to seek independent advice or counsel was in any way bargained for, requested, or discussed. If Plaintiffs chose to sign an agreement without counsel, this choice does not constitute bargained-for consideration as to Pawlan." The trial court

therefore dismissed Count V. The trial court granted plaintiffs 28 days to file an amended complaint.

¶ 26 II. The First Amended Complaint

¶ 27 On February 22, 2012, plaintiffs filed a verified first amended complaint which did not name Mo as a defendant, only Pawlan and Pawlan Law. The first amended complaint contained many of the same factual allegations as the original complaint that defendant was retained as plaintiffs' agent as an "impartial" party to draft the parties' agreements, but it also included new and different factual allegations that defendant was hired as an attorney and that plaintiffs trusted him because he was an attorney. The new factual allegations in the first amended complaint which differed from the original verified complaint include the following:

> "16. Pawlan offered that if Plaintiffs would permit him to facilitate the discussions and prepare the documents reflecting all agreements reached that he would be impartial in the preparation of those documents and would draft documents that: were legally enforceable; contained all terms agreed upon and nothing more; and, were drafted in a manner designed not to subject the parties to subsequent litigation.
>
> 17. Plaintiffs considered the fact that Pawlan had expertise as a lawyer, was familiar with the background and documents, had spent time investigating and verifying transactions and prepared schedules and transactional reports reflecting the verified transactions, that he was going to attend all meetings, and that he was going to be impartial in facilitating and drafting documents that reflected agreements reached. After considering the foregoing, Plaintiffs accepted Pawlan's offer and retained him as a lawyer for purposes of facilitating and drafting an impartial agreement.

18. In consideration for Pawlan's retention including the work he had done prior to June 6, 2006 including investigation, review, and preparation of schedules and transactional reports, and his agreement to serve in facilitating and drafting the agreements reached, Plaintiffs agreed to pay Pawlan $70,000 for his services as an attorney.

19. *** It was Plaintiffs' intent to hire Pawlan as the lawyer for purposes of putting together an impartial agreement and they hired him for that purpose.

***

22. Pawlan requested and Hergan and the other shareholders agreed to place their trust and confidence in Pawlan and his representations regarding the accuracy of the schedules of transactions between Mo and her investors and between them and the Companies. Plaintiffs' reliance on Pawlan's written and oral representations were based on: Pawlan's claimed superior knowledge of these transactions arising from his purported review of the underlying source documents and verification of the transactions; his superior knowledge, skill, and training as an attorney; and his agreement to impartially serve their interests in facilitating an agreement.

***

27. Hergan and the other shareholders of Rhombus relied on Pawlan for the explanation of the meaning and effect of provisions Pawlan drafted ***.

33. *** Pawlan drafted Paragraph 12 of Exhibit 1, and told Hergan and the other shareholders that he was not licensed to practice law in Romania and that this provision was necessary only to protect him from challenges to his professional licensure for the

practice of law without a license, but that this provision in no way prevented him from impartially serving all parties in facilitating and drafting this agreement.

38. Hergan considered the fact that Pawlan had expertise as a lawyer, was familiar with the background and documents, had spent time investigating and verifying transactions and[] that he was going to attend meetings Hergan would have with Mo, and that Pawlan was going to be impartial in facilitating and drafting documents that reflected agreements reached. After considering the foregoing, Hergan agreed to retain Pawlan's services as a lawyer for purposes of facilitating and drafting an impartial agreement.

39. Pawlan agreed that the compensation of $70,000 for his entire involvement up to and including his trip to Romania and Hergan's contribution to that amount, was consideration for the work he had done prior to June 6, 2006 including investigation, review, and verification of the loans as well as his role in facilitating and impartially drafting the June 10, 2006 agreement.

40. Prior to speaking with Pawlan on June 10, 2006, Hergan had not anticipated formalizing a legal document that reflected agreements reached with Mo during the meetings in Bucharest, but based on Pawlan's representations Hergan agreed that one should result. It was Hergan's intent to hire Pawlan as the lawyer for purposes of putting together an impartial agreement and he hired him for that purpose."

¶ 28 Plaintiffs again attached the June 9, 2006 written agreement prepared by Pawlan to the first amended complaint. Paragraph 12 of the agreement reads as follows: "The parties acknowledge that Mitchell D. Pawlan is an advisor *to Glenna Mo only* and is *not acting as legal counsel to her or to any other party*." (Emphases added.)

¶ 29 In the first amended complaint, plaintiffs alleged the following counts against defendant: (1) aiding and abetting Mo in committing a breach of fiduciary duty owed to plaintiffs as a result of her role as a shareholder, director, and officer of plaintiff (Count I); (2) breach of fiduciary duty to both Rhombus and Hergan resulting from Pawlan's agreement to serve as a neutral facilitator in drafting an agreement between plaintiffs and Mo (Count II); (3) breach of fiduciary duty to Hergan arising out of Pawlan drafting the financial obligations agreement (Count III); (4) fraud in connection with the agreement concerning Mo's increased ownership percentage (Count IV); (5) fraud in connection with the financial obligations agreement (Count V); (6) breach of contract with regard to plaintiffs having "retained Defendants to serve as an attorney preparing an impartial agreement on behalf of all parties"[7] (Count VI); (7) breach of contract with regard to the financial obligations agreement[8] (Count VII); (8) tortious interference with plaintiffs' valid business relationship (Count VIII); (9) an accounting (Count IX); and (10) negligence in performing the duty of care and candor owed to plaintiffs as the result of the attorney-client relationship between Pawlan and plaintiffs[9] (Count X). The claims for aiding and abetting, breach of fiduciary duty, tortious interference with prospective business relationships and negligence are newly asserted claims. We set forth plaintiffs' alleged grounds for recovery under each claim:

¶ 30 Count I: Aiding and Abetting a Breach of Fiduciary Duty

¶ 31 Plaintiffs allege that defendant aided and abetted Mo in committing a breach of fiduciary duties. As a shareholder, director, and officer of plaintiff, Mo owed plaintiffs the fiduciary duties of good faith, fair dealing, and loyalty. Count I alleges that Mo knowingly and intentionally

[7] Plaintiffs plead Count 6 as an alternative to Count 5.
[8] Plaintiffs pled Count VII in the alternative to Counts I through V.
[9] Plaintiffs allege that Count X is pled "in the alternative," but neglect to say to what is the alternative.

breached her duties to plaintiffs by making false representations regarding transactions between herself and Rhombus and her agreement to assume responsibility for the repayment of loans she secured in exchange for receiving a higher participation percentage in plaintiff and the European companies. Plaintiffs allege that defendant not only knew of Mo's breach of fiduciary duties to plaintiffs, "assisted Mo in her breaches of fiduciary duties" by failing to: fully and accurately account for Mo's transactions in his dealings with plaintiffs; failing to prepare documents that accurately, fairly, and impartially reflected the agreements between plaintiffs and Mo; "falsely claiming that the transactions reported on various spreadsheets and schedules presented by Pawlan during the June 2006 negotiations in Bucharest had been verified;" "failing to disclose to Plaintiffs that Pawlan did not verify a number of Mo's "material transactions;" falsely claiming that he was "serving Plaintiffs' interests in facilitating and drafting a legally enforceable impartial document" while he "in fact introduced provisions that had not been negotiated or agreed to by Plaintiffs and provisions that secretly favored Mo;" drafting the June 6, 2006 agreement "with ambiguity in order to both obfuscate Mo's obligations and to conceal the extraneous provisions that he added that inured to the benefit of Mo alone;" "representing that Mo would assume responsibility for repaying her lenders in exchange for her increased participation percentage;" failing to disclose the Mo had no intention of fulfilling her obligations under the June 9, 2006 agreement prior to plaintiffs' payment of over $5,000,000 in reliance on the agreement "and thereafter preparing accountings that sought to conceal Mo's activities and motives;" and "suborning and corrupting the notes of the meetings and conversations of June 6 through 10, 2006 that would inferentially be prejudicial to Pawlan and Mo," all resulting in money damages.

¶ 32 Count II: Breach of Fiduciary Duty to Rhombus and Hergan

¶ 33 Plaintiffs allege that Pawlan informed them that he would be "impartial in preparing [the agreement], in consequence of which they retained Defendants to prepare that agreement on behalf of all parties. Defendants accepted that retention and as a result thereof became Plaintiffs' fiduciary." Pawlan's experience and background as an attorney, "combined with the role he expressly assumed in facilitating and drafting an allegedly impartial agreement between the shareholders" placed him in a position of superiority over plaintiffs.

¶ 34 In making false representations to plaintiffs regarding his role in the proceedings, including the representation that he had performed due diligence with respect to the financial information at issue, Pawlan breached his duty as a fiduciary to plaintiffs, causing damages.

¶ 35 Count III: Breach of Fiduciary Duty to Hergan

¶ 36 Plaintiffs allege that Pawlan breached the fiduciary duty he owed to Hergan individually that arose from the drafting of the financial obligations agreement between Hergan and Mo regarding the June 10, 2006 loan agreement between Hergan and Mo. The first amended complaint alleges that Pawlan also breached his fiduciary duty by making false representations to Hergan regarding his role in preparing the written agreement, resulting in damages. Pawlan represented to Hergan to "be impartial in preparing [the financial obligations agreement], in consequence of which Hergan retained Pawlan to serve as the attorney in preparing the agreement on behalf of all parties." Pawlan's experience and background as an attorney placed him "in a position of dominance, superiority, and influence with respect to Hergan in negotiating and drafting [the financial obligations agreement]," and thus he had a fiduciary duty to Hergan.

¶ 37 Count IV: Fraud in Connection with the June 9, 2006 Agreement

¶ 38 Plaintiffs allege that Pawlan made representations that he "would act on behalf of all parties to facilitate discussion and prepare an impartial agreement between them," that "he had

reviewed source materials and independently verified all of the transactions between Mo and her investors and between them and the [European] Companies." As a result of his representations, plaintiffs placed their trust and confidence in Pawlan, and relied upon his representations. However, Pawlan's representations were false; Pawlan did not perform the claimed due diligence, did not draft the agreement in an impartial or fair manner, and concealed Mo's true activities and motives. Pawlan made representations regarding Mo's obligations under the agreement despite possessing the knowledge that Mo had "no intention of fulfilling her agreed upon obligations pursuant to the Agreement between the parties."

¶ 39 Plaintiffs allege that Pawlan made these misrepresentations "for the purposes of inducing Plaintiffs to agree to the terms of [the Rhombus agreement] and to subsequently pay Mo in excess of $5,000,000." As a result, plaintiffs suffered damages.

¶ 40 Count V: Fraud in Regard to the Loan Agreement

¶ 41 Plaintiffs allege that when Pawlan approached Hergan about drafting an agreement concerning the financial obligations between Hergan and Mo, Pawlan "represented to Hergan that [Pawlan] was acting on behalf of both parties for the purposes of facilitating and drafting an impartial agreement between Hergan and Mo." Plaintiffs allege that Pawlan made his false representations "for the purpose of inducing Hergan to execute [the financial obligations agreement] and subsequently pay Mo in excess of the amounts owed by him."

¶ 42 Count VI: Breach of Contract with Plaintiffs

¶ 43 As a new allegation in their first amended complaint, plaintiffs allege that they "retained [d]efendants to serve as [their] attorney in preparing an impartial agreement on behalf of all parties. Defendants accepted that retention." "In consideration for Pawlan's entire involvement *** Plaintiffs agreed to pay Pawlan $70,000 for his services as an attorney." Plaintiffs allege that

Pawlan "materially breached his contract with Plaintiffs to act on their behalf of all parties in impartially facilitating and drafting agreements reached by concealing the fact that he was representing Mo alone," failing to perform the promised due diligence, and intentionally adding terms to the agreement not agreed to by plaintiffs or omitting terms from the agreement to which plaintiff agreed. Plaintiffs further allege that as a result of Pawlan's breach, plaintiffs suffered damages.

¶ 44 Count VII: Breach of Contract with Hergan

¶ 45 Plaintiffs pled Count VII in the alternative to Counts I through V. Plaintiffs allege that "Hergan retained Defendants to serve as the attorney preparing an impartial agreement on behalf of all parties. Defendants accepted that retention and the consideration for his services." Plaintiffs further allege that "Pawlan materially breached his contract with Hergan to act on their [*sic*] behalf of all parties in impartially facilitating and drafting agreements reached by concealing the fact that he was representing Mo alone and failing to act impartially in preparing and drafting the [financial obligations agreement]." Plaintiffs also allege that, as a result, Hergan suffered damages.

¶ 46 Count VIII: Tortious Interference

¶ 47 Count VIII is styled, "Tortious Interference." Plaintiffs allege that, as a shareholder in plaintiff company and the European companies, "Hergan had a valid business relationship and a reasonable prospect of receiving a share of the distribution *** proportionate to his ownership in the [European] Companies. Defendants had knowledge of these interests." As a result of misrepresentations made by Pawlan regarding Mo's activities in connection with the companies, plaintiffs relied on those misrepresentations and agreed to increase Mo's participation percentage,

and Hergan agreed to transfer 5% of his interest in the assets of the company, resulting in damages.

¶ 48 Count IX: Accounting

¶ 49 Plaintiffs allege that a fiduciary relationship existed between plaintiffs and Pawlan, and therefore, Pawlan had a "duty to report accurately and completely to Plaintiffs and to tender only truthful documents evidencing the financial transactions between Mo, Hergan, [plaintiff], and [the European companies]." "Pawlan presented transactional reports to Plaintiffs' shareholders during the [Romania negotiations] that [Pawlan] admits were unverified by him and presented secretly for the purpose of gaining a greater interest for Mo." "By falsely representing that he was acting on behalf of all parties, by concealing that he had not verified the numbers, and concealing that he would be paid a lodestar by Mo, Pawlan knowingly assisted Mo in defrauding Plaintiffs, thereby breaching his fiduciary duties toward Plaintiffs." The documents prepared by Pawlan to support the agreements he drafted were "fraudulent and in breach of [Pawlan's] duties to Plaintiffs."

> "Based on the [previous allegations], and the complexity of the transactions and accounts at issue, Plaintiffs do not have an adequate remedy at law, and an accounting is necessary with respect to the documents prepared by Pawlan in order to: determine the debt to third parties arising from their loans to the [European] companies; the true amounts of Mo's loans and equity in [plaintiff] and the [European] companies ***; review the amount of all monies that Mo received from third parties but did not forward in connection with Plaintiffs' activities; and, recover all money Plaintiffs paid to Mo based on Pawlan's representations that proved to be false."

¶ 50 Count X: Negligence

¶ 51 Finally, plaintiffs allege that Pawlan owed plaintiffs "duties of care and candor as a result of the formation of the attorney client relationship." Pawlan breached this duty by failing to perform the promised due diligence by failing to accurately prepare the agreements based on plaintiffs' intent, knowingly misrepresenting material facts, and "falsely claiming that he was serving [plaintiffs'] interests in facilitating and drafting a legally enforceable document that reflected only the terms [plaintiffs] agreed upon, while [Pawlan] in fact introduced provisions which had not been negotiated or agreed to by Plaintiffs and provisions that secretly favored Mo," resulting in damages to plaintiffs.

¶ 52 III. Motion to Dismiss the First Amended Complaint

¶ 53 Defendant filed a motion to dismiss the first amended complaint, pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). On July 25, 2012, the trial court granted Pawlan's motion and dismissed the entire first amended complaint with prejudice. The trial court found that allegations in the amended complaint contradicted allegations made in the original verified complaint, notably the nature of Pawlan's relationship to plaintiffs. The trial court found that the original, verified complaint alleges that Pawlan represented that he was acting as a neutral facilitator, but was in truth representing Mo. By contrast, the amended complaint alleges that Pawlan "was representing [plaintiffs] and their interests as their attorney" which contradicts the original verified complaint. The trial court dismissed the amended complaint as to Pawlan and Pawlan Law. The trial court further found that the amended complaint also contradicted pleadings in case number 07 CH 3966, in which plaintiffs alleges that Mo was the only party represented by an attorney at the meeting in Romania.

¶ 54 The trial court also found that the amended complaint was defective because it was directly contradicted by the written agreement attached to the complaint, which contained a provision that stated that Pawlan was acting as "an advisor to Glenna Mo only and [was] not acting as legal counsel to her or to any other party."

¶ 55 The trial court analyzed each individual count and determined that the existence of plaintiffs' aiding and abetting cause of action was itself an indication of plaintiffs' inconsistent allegations. The trial court found that if plaintiffs retained Pawlan as their attorney, the aiding and abetting count would have been unnecessary because they would have had a cause of action for legal malpractice. To allege a cause of action for aiding and abetting, plaintiffs would have been required to allege that Pawlan was *not* their attorney, but was instead Mo's attorney.

¶ 56 The trial court further found that Counts II and III both alleged a breach of a fiduciary duty and were internally inconsistent. The counts were predicated on the allegations that plaintiffs "*retained* Pawlan and Pawlan Law to prepare the [agreements] based on Defendants' representations that Pawlan would be *impartial* in preparing the Agreements." (Emphases added.) The trial court found that clients "do not retain lawyers to deal impartially with others," but rather to represent their interests. The trial court found that the amended complaint contained contradictory allegations as to whether Pawlan was a neutral facilitator or plaintiffs' attorney, finding that Pawlan could not have a duty to be neutral to all parties if Pawlan was retained to represent plaintiffs. The trial court next found that the inclusion of the allegation that Pawlan was in a position of superiority over plaintiffs amounted to "pleading overkill" because such an allegation would not be necessary if Pawlan was in fact representing plaintiffs. The trial court concluded that the inclusion of the allegation was meant to "be an attempt to create a fiduciary duty where one does not otherwise exist, i.e. in the event that a trier of fact were to conclude that

Pawlan was a neutral [and not plaintiffs' attorney]." The trial court also reasoned that if a court found that Pawlan was not plaintiffs' attorney, there were no facts pled to indicate how Pawlan was in a position of superiority, only the conclusory allegation that he was. Furthermore, the trial court found that the first amended complaint contained no specific allegations of facts that would show that Pawlan agreed to represent plaintiffs as their attorney. Instead, the amended complaint alleges that Pawlan agreed to be neutral, which is inconsistent with an attorney-client relationship.

¶ 57 The trial court next concluded that the breach of contract causes of action, Counts VI and VII, are deficient. The trial court found that plaintiffs failed to allege that they paid the $70,000 to Pawlan for his services as their attorney. Instead, the trial court found that the complaint alleges that the plaintiffs paid the $70,000 to Mo, which is supported by the agreement attached, which includes a provision stating that plaintiffs would pay the $70,000 to Mo to reimburse her for her expenses, including her "legal" fees, not the legal fees of plaintiffs.

¶ 58 The trial court next examined plaintiffs' fraud causes of action, Counts IV and V. The trial court found that plaintiffs failed to allege facts that would show that Pawlan had a duty to disclose the material facts complained of because plaintiffs failed to adequately allege facts that would demonstrate that Pawlan was their attorney or fiduciary. The trial court also found that plaintiffs failed to allege sufficient facts to show that Pawlan knowingly made false statements. The trial court found that many of the claimed false statements were addressed in the written agreement attached to the complaint, yet plaintiffs allege that Pawlan included terms in the agreement that were not agreed upon. Further, the trial court reasoned that plaintiffs should have discovered the claimed discrepancies in the agreement after reading it before they signed the

agreement. Further, plaintiffs do not explain why they did not read the agreement prior to signing it.

¶ 59 The trial court also found Count VIII, alleging tortious interference, deficient. Plaintiffs failed to allege that a valid business relationship was terminated, and plaintiffs did not allege that Pawlan knew that Mo's alleged increased ownership percentage would come from Hergan's ownership percentage, or that Pawlan intended that Hergan's ownership percentage would decrease as a result of his efforts.

¶ 60 With regard to the accounting cause of action, Count IX, the trial court determined that plaintiffs failed to allege that no adequate remedy at law exists. Finally, the trial court determined that plaintiffs failed to allege a negligence cause of action, count X, because they failed to allege facts that would show a duty owed to them by defendant.

¶ 61 After the trial court dismissed plaintiffs' first amended complaint with prejudice, plaintiffs filed a timely notice of appeal.

¶ 62 ANALYSIS

¶ 63 The issue before this court is whether the trial court erred in dismissing all counts in the first amended complaint with prejudice. We reverse only the dismissal of the first count for aiding and abetting a breach of fiduciary duty, and remand with instructions that plaintiff be allowed to replead Count I. We affirm the remainder of the order of the trial court dismissing the remaining nine counts with prejudice. We remand for further proceedings on only Count I.

¶ 64 Standard of Review

¶ 65 A motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)) challenges the legal sufficiency of the complaint. *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 9 (citing *Dloogatch v. Brincat*, 396 Ill. App.

3d 842, 846 (2009)). In ruling on the motion, the court accepts as true all well-pleaded facts in the complaint as well as all reasonable inferences drawn therefrom. *Karimi,* 2011 IL App (1st) 102670, ¶ 9 (citing *Vitro v. Mihelic*, 209 Ill. 2d 76, 81 (2004)).

¶ 66 Dismissal under section 2-615 is proper if the pleadings and attachments, when construed in the light most favorable to the plaintiff, clearly show that the plaintiff cannot prove any set of facts that would entitle him to relief. *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill. 2d 419, 424 (1999). Therefore, a cause of action should not be dismissed unless the pleadings clearly show that no set of facts could be proven which would entitle the plaintiff to relief. *Hoffman Group,* 186 Ill. 2d at 424. A complaint should be dismissed with prejudice under section 2-615 only if it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. *McLean v. Rockford Country Club,* 352 Ill. App. 3d 229, 233 (2004) (citing *Andersen v. Mack Trucks, Inc*., 341 Ill. App. 3d 212, 219 (2003)).

¶ 67 In order to determine whether plaintiffs' verified amended complaint cannot prove any set of facts that would entitle him to relief, we must consider each count of the complaint separately. Our review of a dismissal under section 2-615 is *de novo*. *Hoffman Group,* 186 Ill. 2d at 424. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 68 I. Count I: Aiding and Abetting a Breach of Fiduciary Duty

¶ 69 Plaintiffs first argue the court erred in dismissing Count I against defendant for aiding and abetting a breach of a fiduciary duty. Plaintiffs argue that Mo owed a fiduciary duty to both plaintiff Rhombus and plaintiff Hergan, and that defendant aided and abetted Mo's breach of fiduciary to both plaintiffs.

¶ 70 "In Illinois, a claim for aiding and abetting includes the following elements:

'(1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.' " *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 27-28 (2003) (quoting *Wolf v. Liberis*, 153 Ill. App. 3d 488, 496 (1987)).

¶ 71 To state a claim for an underlying breach of fiduciary duty, a plaintiff must allege: (1) a fiduciary duty existed; (2) the fiduciary duty was breached; and (3) damages were proximately caused by the defendant's breach. *Neade v. Portes*, 193 Ill.2d 433, 444 (2000). See also *Pippen v. Pedersen and Houpt*, 2013 IL App (1st) 111371, ¶ 22.

¶ 72 Mo owed a fiduciary duty to plaintiff Rhombus. Individuals who control corporations owe a fiduciary duty to their corporation and their shareholders. *Kerrigan v. Unity Savings Ass'n*, 58 Ill. 2d 20, 27 (1974); *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 364 (1994); *Graham v. Mimms*, 111 Ill. App. 3d 751, 761 (1982). Mo was the director of Rhombus during the period of the meetings involving defendant in Romania and at the time the June 9, 2006 agreement was executed. Directors and officers of a corporation have a duty " 'to deal openly and honestly' with each other [citation], and to 'exercise the utmost good faith and honesty in all dealings and transaction.' " *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 365 (1994) (quoting *Illinois Rockford Corp. v. Kulp*, 41 Ill. 2d 215, 222 (1968); *Couri v. Couri*, 95 Ill. 2d 91, 98 (1983)).

¶ 73 Mo also owed a fiduciary duty to plaintiff Hergan in two ways: (1) as a fellow shareholder and director of Rhombus; and (2) as Hergan's partner in their overarching joint venture. First, shareholders in a close corporation owe to each other fiduciary duties similar to those of partners in a partnership. *Hagshenas v. Gaylord*, 199 Ill. App. 3d 60, 71 (1990) (50%

shareholder owed fiduciary duties to fellow shareholders). They owe a duty of loyalty to the corporation and to other shareholders. *Hagshenas*, 199 Ill. App. 3d at 71. See also *Rexford Rand Corp. v. Ancel*, 58 F. 3d 1215, 1219 (7th Cir. 1995) ("Minority shareholders have an obligation as *de facto* partners in a joint venture not to do damage to the corporate interests").

¶ 74 Plaintiffs specifically alleged an underlying breach of fiduciary duty by Mo to Rhombus and to Hergan as a shareholder of Rhombus: that a fiduciary duty existed between Mo and the other shareholders, that a breach of the fiduciary duty occurred and that the breach proximately caused damages. Plaintiffs squarely alleged in Count I that "[a]s a shareholder, Director, and Officer of Rhombus, Mo owed fiduciary duties of the utmost good faith, fair dealing, and loyalty to Hergan and the other shareholders of Rhombus." In Count I plaintiffs also alleged:

> "Mo knowingly and intentionally breached her fiduciary duties to Hergan and the other shareholders of Rhombus by making false representations including but not limited to representations regarding the source, purpose, amount, and validity of Mo's transactions with the [European] Companies and her agreement to assume responsibility for the repayment of the principal and interest of the lenders from which she sourced funds in exchange for receiving an increase in her participation percentage in Rhombus and the [European] Companies."

¶ 75 Plaintiffs also alleged a breach of fiduciary duty to Hergan individually, apart from solely any harm to Rhombus as a corporation. "In determining the nature of the wrong alleged, a court must look to 'the body of the complaint, not to the plaintiff's designation or stated intention.' " *Spillyards v. Abboud*, 278 Ill. App. 3d 663, 671 (1996) (quoting *Lipton v. News International, Plc*, 514 A. 2d 1075, 1078 (Del. 1986)). "To have standing to sue individually, rather than derivatively on behalf of the corporation, the plaintiff must allege a special injury, 'either "an

injury which is separate and distinct from that suffered by other shareholders," or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation. [Citations omitted.]' " *Spillyards*, 278 Ill. App. 3d at 670-71.

¶ 76 In the "Facts Common to All Counts" of the Amended Complaint, plaintiffs alleged the following:

> "26. As a result of Pawlan's representations regarding Mo's contributions to Rhombus and the Companies, Hergan and the other shareholders were induced to have Mo treat her loans and loans that she sourced from third parties as her own equity contribution and also to receive a greater participation percentage in Rhombus and in the Companies than she would otherwise have received. ***
>
> ***
>
> 29. Based on Pawlan's representations regarding Mo's activities in connection with the Charles de Gaulle Plaza, LaFarge Headquarters, Avrig 3 and Avrig 5, and the Canadian Embassy, Plaintiffs agreed to an adjustment of Mo's participation percentages in these four projects from 15% to 25% for purposes of the pending distribution only. Hergan also agreed to transfer 5% of *his interest* in the net proceeds from the sale of the Avrig 3 and Avrig 5 project in satisfaction of a prior agreement with Mo, (Exhibit 3) and an additional 200 basis points based on Pawlan's representations. For all other projects, Mo was to receive an increased ownership interest to 20%, subject to further dilution (Exhibit 1).

30. Based on Pawlan's representations, Hergan agreed to give *his right* to 7% of the proposed distribution of $20,000,000 and 2% in other projects within the companies to Mo that he otherwise would not have given." (Emphasis added.)

¶ 77 Also, in paragraph 10 of the allegations in the "Facts Common to All Counts" of the Amended Complaint, which is incorporated into Count I (see paragraph 77), plaintiffs allege that Hergan and Proskine only made additional capital contributions into Rhombus.

¶ 78 These allegations are all incorporated into Count I. These allegations support a direct action by Hergan in his individual capacity against defendant for his role in aiding and abetting Mo, resulting in harm to him directly. See *Sterling Radio Stations, Inc. v. Sterling Radio Stations, Inc. v. Weinstine*, 328 Ill. App. 3d 58, 62 (2002) (shareholder had standing to bring suit against a law firm for legal malpractice in his individual capacity because he was seeking to recover for a harm done to him directly, as guarantor of promissory note on which corporation defaulted, rather than harm done to the corporation).

¶ 79 Plaintiffs further alleged a breach of fiduciary duty to Hergan on a second basis, individually as a partner in the joint venture based on the June 9, 2006 agreement. Partnership law governs joint ventures (*Ioerger v. Halverson Construction Co., Inc*., 232 Ill. 2d 196, 202 (2008); *Smith v. Metropolitan Sanitary District*, 77 Ill. 2d 313 (1979)), and partners in a joint venture owe each other a fiduciary duty as a matter of law. *Yokel v. Hite*, 348 Ill. App. 3d 703, 708 (2004) (citing *Holstein v. Grossman*, 246 Ill. App. 3d 719, 738 (1993)). It is undisputed that Mo and Hergan, along with the other partners, were partners in the joint venture.

¶ 80 Plaintiffs alleged the following regarding a breach of a fiduciary duty to Hergan individually:

"Mo also knowingly and intentionally breached her fiduciary duties to Plaintiffs by failing to disclose her intention to reneg [*sic*] on the June 9, 2006 Agreement, and concealing her intentions until after Rhombus and the [European] Companies (partially on behalf of Hergan) paid her over $5,000,000 in furtherance on the June 9, 2006 Agreement."

¶ 81 While based on the fact that Hergan is a party to the June 9, 2006 agreement, there may be a fiduciary duty that was owed to him, plaintiffs do not allege what type of fiduciary duty was owed to Hergan individually and in what capacity.

¶ 82 The next question is whether plaintiffs adequately alleged a claim for aiding and abetting Mo's breach of fiduciary duty. To state a claim for aiding and abetting a breach of fiduciary duty, plaintiffs were required to allege that defendant was aware of Mo's breach of fiduciary duty at the time he provided the assistance which plaintiffs alleged in the complaint, and allege that the defendant knowingly and substantially assisted the principal violation, causing damages. *Thornwood*, 344 Ill. App. 3d at 27-28. In *Thornwood*, this court held that an attorney may become liable to a non-client when it is alleged that an attorney aided and abetted it's client's breach of fiduciary duty to a former partner of the client. *Thornwood*, 344 Ill. App. 3d at 27-29. Here, plaintiffs specifically alleged that defendant, in his capacity as Mo's attorney, assisted Mo's breach of fiduciary duty to plaintiffs as her partners in defrauding plaintiffs.

¶ 83 Plaintiff alleged that defendant aided and abetted Mo's breach of fiduciary duty by the following acts:

"A. failing to fully and accurately account for Mo's transactions to the Plaintiffs;

B. failing to prepare documents that accurately, fairly, and impartially reflected the agreements between Mo and the Plaintiffs;

C. falsely claiming that the transactions reported on various spreadsheets and schedules presented by Pawlan during the June 2006 negotiations in Bucharest had been verified;

D. failing to disclose to Plaintiffs that Pawlan did not verify, through source documents and otherwise, a number of Mo's material transactions;

E. falsely claiming that he was serving Plaintiffs' interests in facilitating and drafting a legally enforceable impartial document that reflected only the terms they agreed upon, while Pawlan in fact introduced provisions that had not been negotiated or agreed to by Plaintiffs and provisions that secretly favored Mo;

F. drafting the June 9th, 2006 Agreement with ambiguity in order to both obfuscate Mo's obligations and to conceal the extraneous provisions that he added that inured to the benefit of Mo alone;

G. representing that Mo would assume responsibility for repaying her lenders in exchange for her increased participation percentage;

H. failing to disclose to Plaintiffs after June 21, 2006 that Mo had no intention of fulfilling her agreed upon obligations pursuant to the June 9, 2006 Agreement reached prior to Plaintiffs['] payment of over $5,000,000 in reliance on that Agreement and thereafter preparing accountings that sought to conceal Mo's activities and motives; and

I. suborning and corrupting the notes of the meetings and conversations of June 6 through 10, 2006 that would inferentially be prejudicial to Pawlan and Mo."

¶ 84 The allegations that defendant hid terms in the agreement, or somehow drafted them to be ambiguous, or misrepresented the terms of the agreement, do not state any cognizable claim, including aiding and abetting a breach of a fiduciary duty. These allegations include the above

paragraphs B, E, F, and G. As this court reiterated in *Tucker v. Soy Capital Bank and Trust Co*., 2012 IL App (1st) 103303:

> "One is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations which he undertakes by the execution of a written agreement. *** And the law is that a party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations." (Internal citations and quotations marks omitted.) *Tucker*, 2012 IL App (1st) 103303, ¶ 27 (quoting *Nilsson v. NBD Bank of Illinois*, 313 Ill. App. 3d 751, 762 (1999)).

¶ 85 The allegations in paragraphs B, E, F, and G of Count I thus fail as a matter of law, as plaintiff had a duty to ascertain the true terms of the June 9, 2006 agreement.

¶ 86 The allegations that defendant aided and abetted Mo's breach of fiduciary duty by acting or failing to act in certain ways regarding any accounting also fail to state a cause of action as a matter of law. There is a cause of action for an accountant's liability to a third party, but the defendant must actually be an accountant and be hired for his or her professional services as an accountant. This court recognized and clarified that "to be sufficient plaintiff's complaint must allege facts showing that the purpose and intent of the accountant-client relationship was to benefit or influence the third-party plaintiff." *Brumley v. Touche, Ross & Co*., 139 Ill. App. 3d 831, 836 (1985). Section 30.1 of the Illinois Public Accounting Act (225 ILCS 450/0.01 *et seq*. (West 2006)), enacted one year after the decision in *Brumley*, governs liability to third parties not in privity with an accountant and sets forth the only circumstances under which an accountant may be sued by a third-party for negligence in rendering his professional services. It provides

that an accountant may be held liable to a third party when "such person, partnership or corporation was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action." 225 ILCS 450/30.1(2)(West 2006). Under any set of facts, defendant is not an accountant and was not hired to provide accounting services. Under plaintiffs' own allegations, defendant was hired to draft the parties' agreement. Plaintiffs' allegations that there was any expectation of accountings are inconsistent, do not state any possible claim as defendant is not in fact an accountant, and should be stricken from this count.

¶ 87 Further, as the circuit court noted, plaintiffs' factual allegations of an attorney-client relationship with Pawlan are inconsistent because, to allege a claim for aiding and abetting Mo's breach of fiduciary duty, plaintiffs would be required to allege that Pawlan was *not* their attorney but was, instead, Mo's attorney. To the extent that Count I incorporates the preceding factual allegations that defendant was acting as plaintiffs' attorney, it does not state a proper claim for aiding and abetting. The factual allegations that defendant was plaintiffs' attorney must be stricken from any further amended complaint if plaintiffs replead their aiding and abetting breach of a fiduciary duty claim on remand.

¶ 88 The remaining allegations in Count I may contain the gist of a claim for aiding and abetting a breach of a fiduciary duty to Rhombus, which include: the allegation that defendant failed to disclose that Mo "had no intention of fulfilling her agreed upon obligations pursuant to the June 9, 2006 Agreement reached prior to Plaintiffs['] payment of over $5,000,000 in reliance on that Agreement" in paragraph H of Count I; and, possibly, the allegation that defendant altered the notes of the meetings and conversations to aid and abet Mo. There may be a claim for aiding and abetting a breach of fiduciary duty to Hergan as well, but as the amended complaint

stands the allegations are insufficient. These allegations are conclusory and not clear and concise. Our Code of Civil Procedure requires that all pleadings "shall contain a plain and concise statement of the pleader's cause of action ***." 735 ILCS 5/2-603 (West 2010).

¶ 89 Nevertheless, given the complexity of the parties' dealings, there may be facts which plaintiff can allege with more clarity on remand which can state a claim for aiding and abetting Mo's breach of fiduciary duty, and so dismissal of this claim with prejudice was improper. Accordingly, we reverse the dismissal of count I with prejudice and remand to allow plaintiffs the opportunity to properly re-plead this claim and for further proceedings on this claim.

¶ 90 As explained below, however, none of the other counts can state the claims asserted and the circuit court correctly dismissed those remaining counts with prejudice.

¶ 91 II. Count II: Breach of a Fiduciary Duty to Rhombus and Hergan

¶ 92 In Count II of the first amended complaint, plaintiffs allege that they hired defendant as their agent, and that defendant breached his fiduciary duty as their agent. Specifically, plaintiffs allege: "Pawlan told Plaintiffs and they believed that he would be impartial in preparing what became [the] June 9, 2006 Agreement, in consequence [*sic*] of which they retained Defendants to prepare that agreement on behalf of all parties. Defendants accepted that retention and as a result thereof became Plaintiff's [*sic*] fiduciary."

¶ 93 Plaintiffs further add a new allegation in Count II of the first amended complaint that defendant was retained as plaintiffs' attorney. Plaintiffs also then alleged that "[b]ased on Pawlan's experience, education, and background as an attorney, combined with the role he expressly assumed in facilitating and drafting an allegedly impartial agreement between the shareholders, Pawlan was in a position of dominance, superiority, and influence with respect to Plaintiffs in negotiating and drafting the June 9, 2006 agreement."

¶ 94 First, we agree with the circuit court that there is no fiduciary duty that can be alleged between defendants and plaintiff because the written agreement attached to the first amended complaint alleges that defendant was acting as "*an advisor to Glenna Mo* only and [was] not acting as legal counsel to her or to any other party." (Emphasis added.) Any exhibits attached to the complaint are considered part of the pleading. 735 ILCS 5/2-606 (West 2010). See also *Faison v. RTFX, Inc.*, 2014 IL App (1st) 121893, ¶ 27. Where the allegations in the complaint conflict with an exhibit attached to the complaint, the exhibit controls. *Bajwa v. Metropolitan Life Ins. Co.*, 208 Ill. 2d 414, 431-32 (2004); *Kanfer v. Busey Trust Co.*, 2013 IL App (4th) 121144, ¶ 63. Also, the motion to dismiss does not admit allegations conflicting with the facts disclosed in the exhibit. *Kanfer*, 2013 IL App (4th) 121144, ¶ 63.

¶ 95 The written agreement attached to the first amended complaint defeats any allegations that defendant was hired by plaintiffs in any capacity at all, whether as plaintiffs' attorney or as their agent. The agreement clearly states that defendant was acting as "an advisor *to Glenna Mo only* and [was] not acting as legal counsel to her or to any other party." (Emphasis added.) Even accepting as true the allegations that defendant was in fact Glenna Mo's attorney, and not just her advisor, this does create any fiduciary relationship between defendant and *plaintiff*s. The first amended complaint thus fails to allege any fiduciary duty to Rhombus.

¶ 96 Second, any allegations in the amended complaint that defendant Pawlan was plaintiffs' attorney should be stricken because, as the circuit court pointed out, such allegations directly contradict the allegations in the original complaint, which was verified. Section 2-605 of the Illinois Code of Civil Procedure governs verified pleadings in Illinois. 735 ILCS 5/605 (West 2010). Section 605(a) clarifies that "[v]erified allegations do not constitute evidence except by way of admission." 735 ILCS 5/605(a) (West 2010). If the original pleading is verified, a factual

admission remains a judicial admission binding on the party that made it, unless the pleader amends the pleading and the amendment alleges that the prior admission was the product of a mistake or inadvertence. See *Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc*., 2012 IL App (1st) 111296, ¶ 19; *Farmers Auto. Ins. Ass'n v. Danner*, 394 Ill. App. 3d 403, 412 (2009).

¶ 97 The first amended complaint contains allegations that defendant was hired as plaintiffs' attorney, directly contradicting the verified original complaint, without any allegation that the prior admission was a result of mistake or inadvertence. Plaintiffs are bound by their original admission. The circuit court was correct in ruling that all allegations that defendant was plaintiffs' attorney must be stricken, and we affirm that ruling as an additional basis for dismissal of both breach of fiduciary duty claims (Counts II and III) on the basis of any alleged attorney-client relationship.

¶ 98 Also, to the extent Count II alleges a breach of fiduciary duty to Hergan, Count II is duplicative of Count III, and we find dismissal of this portion of Count II appropriate. Duplicative pleading of counts is not allowed under the Illinois Code of Civil Procedure. Section 2-603 requires that "[e]ach separate cause of action upon which a separate recovery might be had shall be stated in a separate count." 735 ILCS 5/2-603(b) (West 2004). Section 2-613(a) of the Code also provides that the counts of a complaint be "separately designated and numbered" and that they constitute separate "causes of action." 735 ILCS 5/2-613(a) (West 2004). "While pleading in the alternative is generally permitted (see, e.g., *Collins v. Reynard*, 154 Ill. 2d 48, 50 [***] (1992)), duplicate claims are not permitted in the same complaint." *Neade v. Portes*, 193 Ill. 2d 433, 445 (2000).

¶ 99 We thus affirm the dismissal of Count II with prejudice.

¶ 100 III. Count III: Breach of a Fiduciary Duty to Hergan

¶ 101 Count III of the first amended complaint alleges that defendant also agreed to act as an agent for Hergan individually as a partner along with the other partners and investors. Again, there is no fiduciary duty that can be alleged between defendants and plaintiff because the written agreement attached to the first amended complaint alleges that defendant was acting as "an advisor *to Glenna Mo only* and [was] not acting as legal counsel to her or to any other party." (Emphasis added.) The written agreement attached to the first amended complaint defeats any allegations that defendant was hired by plaintiffs as their agents. Also, Count II incorporates the allegations that plaintiffs hired defendant as their attorney, but the attached agreement directly contradicts these allegations. As with Count II regarding the claim for breach of fiduciary duty to Rhombus, the first amended complaint fails to allege a breach of fiduciary duty to Hergan. We therefore also affirm the dismissal of Count III with prejudice.

¶ 102 IV. Count IV: Fraud in Connection with the June 9, 2006 Agreement

¶ 103 The circuit court also properly dismissed Count IV with prejudice. In order to plead a cause of action for fraud in the preparation of the June 9, 2006 agreement, (1) there must be a false statement of material fact, (2) the defendant must know that the statement was false, (3) the defendant must intend that the statement would induce plaintiff to act, (4) plaintiff must reasonably rely on the truth of the statement, and (5) plaintiff must suffer damages resulting from the reliance. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496 (1996).

¶ 104 Here, plaintiffs have alleged elements 1, 2, 3 and 5, that there were false statements, that defendant knew the statements were false, that defendant intended the statements to induce plaintiffs to act, and that plaintiffs suffered damages as a result. But, as a matter of law, plaintiffs cannot establish the fourth element: reasonable reliance.

¶ 105 As part of their fraud claims, plaintiffs must allege that their reliance on the misrepresentation was justified. *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 125-26 (1995). "In determining whether reliance was justifiable, all of the facts which the plaintiff knew, as well as those facts the plaintiff could have learned through the exercise of ordinary prudence, are taken into account." *Adler*, 271 Ill. App. 3d at 125.

¶ 106 Here, even taking plaintiffs' allegations as true, there cannot be any justifiable reliance as a matter of law. Because any further allegations that defendant acted as an attorney for plaintiffs must be stricken as contradictory to the original verified complaint, it is established that defendant was not acting as an attorney for plaintiffs. The agreement specifically stated defendant was "an advisor to Glenna Mo only." It was unreasonable for plaintiffs to have allegedly relied on any representations by defendant regarding the financial aspects of the transactions alleged and for plaintiffs to not obtain their own counsel or have their own accountants review the financial representations before entering into the agreements. Although the reasonableness of a plaintiff's reliance on a statement is usually a question of fact, "where only one conclusion can be drawn from the undisputed facts, the question becomes one for the court to determine." *Siegel Development, LLC v. Peak Construction, LLC*, 2013 IL App (1st) 111973, ¶ 114. We affirm the trial court in dismissing Count IV with prejudice.

¶ 107 V. Count V: Fraud in Connection with the June 10, 2006 Loan Agreement

¶ 108 We also affirm the dismissal with prejudice of Count V for fraud based on the June 10, 2006 loan agreement. Defendant argues that this claim was properly dismissed because of the release agreed to in the June 10, 2006 promissory note, which provided as follows: "Mr. Hergan hereby waives and releases any and all rights to notice, defenses and counterclaims in regard to the monies owed."

¶ 109 Although defendant argues that this release in the promissory note is dispositive, a release will not be given effect where the party executing the release was not aware of existing claims he or she was releasing, especially where fraud is alleged. See *Borsellino v. Putnam*, 2011 IL App (1st) 102242, ¶ 104 (the alleged perpetrator of the fraud cannot enforce a release and the innocent party may rescind the contract). "Where the releasing party was unaware of other claims, Illinois case law has restricted general releases to the specific claims contained in the release agreement." *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 614 (2007) (citing *Farm Credit Bank v. Whitlock*, 144 Ill. 2d 440, 447 667 (1991)). "Therefore, a release will not be construed to defeat a valid claim that was not within the contemplation of the parties at the time the agreement was executed, and general words of release are inapplicable to unknown claims." *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 614 (2007) (citing *Farm Credit Bank*, 144 Ill. 2d at 447-48; *Thornwood, Inc*., 344 Ill. App. 3d at 21).

¶ 110 Here, Hergan was allegedly unaware of the claims against defendant at the time Hergan signed the June 10, 2006 promissory note, including the claim for aiding and abetting which is properly alleged. The release in the note is therefore ineffective and does not bar the claims. The claim against defendant for fraud regarding the note does not fail based on the release.

¶ 111 Rather, the claim for fraud regarding the June 10, 2006 note fails for the same reason the claim regarding the June 6, 2006 agreement fails: because any reliance by plaintiffs on representations made by defendant was unreasonable. Under the facts alleged, even accepting the allegations as true, plaintiffs simply cannot establish reasonable reliance on the alleged financial misrepresentations of defendant. We affirm the dismissal of Count V with prejudice.

¶ 112 VI. Count VI: Breach of Contract with Hergan and Rhombus

¶ 113 Plaintiffs' first amended complaint also fails to state a cause of action for breach of contract. Under Illinois law, to properly plead a breach of contract claim, plaintiff must allege (1) the existence of a valid contract, (2) that plaintiff performed all of their obligations under its terms, (3) that the defendant breached the contract, (4) resulting in damages to plaintiff. *Akinyemi v. JP Morgan Chase Bank*, 391 Ill. App. 3d 334, 337 (2009) (citing *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 823 (2005)).

¶ 114 The agreement attached to the first amended complaint contradicts all allegations that defendant was hired by plaintiffs at all. Rather, the agreement establishes that defendant was "an advisor to Glenno Mo only." This document refutes any purported allegation of a contract between defendant and plaintiffs. We affirm the dismissal of Count VI with prejudice.

¶ 115 VII. Count VII: Breach of Contract with Hergan

¶ 116 Similarly, plaintiffs' complaint fails to state a claim for breach of contract between defendant and Hergan based on defendant's fraudulent misrepresentation and aiding and abetting Mo in defrauding plaintiffs. Plaintiffs pled Count VII in the alternative to Counts I through V. But, again, the agreement attached to the first amended complaint, stating that defendant was "an advisor to Glenna Mo only" directly contradicts any allegation that defendant was hired by Hergan. We affirm the dismissal of Count VII with prejudice.

¶ 117 VIII. Count VIII: Tortious Interference with a Prospective Economic Advantage

¶ 118 Plaintiffs' first amended complaint also fails to state a claim for tortious interference with a prospective economic advantage. In order to plead a cause of action for tortious interference with a prospective economic advantage, plaintiffs must plead: (1) a reasonable expectation of entering into a valid business relationship, (2) that the defendant had knowledge of plaintiffs' expectancy, (3) that defendant's purposeful interference prevented plaintiffs' legitimate

expectancy from ripening into a valid business relationship, and (4) that damages resulted f*rom the interference. Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. *2d 460, 484 (1998); Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 300-01 (2001). A plaintiff must also allege: (5) action by the defendant directed towards the party with whom the plaintiff ex*pects to do busi*ness. *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1039 (1998).

¶ 119 Plaintiffs are apparently alleging that defendant tortiously interfered with Hergan's prospective economic advantage with the "companies" which would include co-plaintiff Rhombus. The allegations in this count are confusing, as the trial court pointed out, because Count VIII incorporates paragraphs 1-76 and specifically makes reference to paragraphs 21-34 which resurrects the allegations from the original verified complaint that defendant agreed to be a neutral and impartial facilitator, whereas other paragraphs allege that defendant was Hergan's attorney. To the extent that this count repeats any allegations that defendant was Hergan's attorney, dismissal of this count was appropriate.

¶ 120 Plaintiffs attempt to allege that defendant, acting as Mo's attorney, conspired with Mo to deprive plaintiff of a prospective economic or business advantage. But the allegations, taken as a whole, were that fraud was already committed in the drafting of the June 9, 2006 agreement and the June 10, 2006 loan document, thereby defrauding plaintiffs of their appropriate shares, in the *past* tense, and not that there is some other *future* expected business interest or prospective economic advantage. Defendant's alleged actions did not prevent plaintiffs' legitimate expectancy from ripening into a valid business relationship. Rather, according to the first amended complaint, plaintiffs already had a valid business relationship and defendant's actions changed the amount of the percentage interest in an already existing business relationship. We thus affirm the dismissal of Count VIII with prejudice.

¶ 121 IX. Count IX: Accounting

¶ 122 To sustain an action for an accounting in equity, the complaint must allege the absence of an adequate remedy at law and one of the following: (1) a breach of fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature. *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 500-501 (1986). We agree with the circuit court that, "[w]hen a party seeks an accounting, the trial court must make two separate and distinct determinations: (1) that an accounting is required and (2) that a sum certain is due. These determinations are traditionally made in separate hearings with separate discovery phases." *McCormick v. McCormick*, 118 Ill. App. 3d 455, 462 (1983).

¶ 123 Plaintiffs have failed to allege the necessary element of the absence of an adequate remedy at law. Plaintiffs rely on the alleged breach of fiduciary duty by defendant to overcome this pleading deficiency. We have recognized an exception to the requirement that equitable remedies are denied when there is an adequate remedy at law in cases in which an accounting is sought based on a breach of fiduciary duty. *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 501 (1986). This exception exists because a breach of fiduciary duty "is a form of constructive fraud." *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 33.

¶ 124 However, the first amended complaint fails to state any claim for breach of fiduciary duty to plaintiffs. Plaintiffs' new allegations that defendant was their attorney were directly contradicted by the original verified complaint, and the attached agreement directed contradicted any claim that defendant was hired by plaintiffs at all but, rather, established that defendant was an advisor to only Mo. As the circuit court found, plaintiffs failed to adequately plead that

defendant owed them any fiduciary duties. The set of facts alleged in the first amended complaint thus fails to adequately state a cause of action for an accounting within the fiduciary duty exception. We thus affirm the dismissal of Count IX with prejudice.

¶ 125 X. Count X: Negligence

¶ 126 Finally, we hold that the circuit court appropriately dismissed Count X. The first amended complaint alleges that Count X is pled in the alternative. This count alleges that defendant committed negligence in performing the "duties of care and candor as a result of the formation of the attorney[-]client relationship" between Pawlan and plaintiffs.

¶ 127 First, the economic loss doctrine, also known as the *Moorman* doctrine (*Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982)), bars the use of negligence or strict liability theories for recovery of economic losses arising out of commercial transactions where the loss is not personal injury or damage to other property. However, one of the exceptions to the economic loss doctrine is where a plaintiff's damages are proximately caused by a defendant's intentional, false misrepresentation, such as fraud. See *In re Illinois Bell Switching Station Litigation*, 161 Ill. 2d 233, 240-241 (1994).

¶ 128 Even assuming any claim for negligence could be raised despite the economic loss doctrine, there was no attorney-client or agency relationship between defendant and plaintiffs and the first amended complaint fails to state a claim for fraud, as the attached agreement clearly establishes that defendant was an advisor to only Mo and there could not be any reasonable reliance on representations by defendant. As such, Count X was appropriately dismissed and there is no set of facts which can be pled to support such a claim for negligence under the facts alleged. We affirm the dismissal of Count X with prejudice.

¶ 129 CONCLUSION

¶ 130 We reverse the dismissal with prejudice of Count I for aiding and abetting a breach of a fiduciary duty and remand for plaintiffs to properly replead this claim and for further proceedings on this claim.

¶ 131 We affirm the dismissals with prejudice of the remaining counts, Count II through Count X, as these counts fail to state the purported claims because the attached agreement establishes that defendant was hired only by Mo and not by plaintiffs. We remand for further proceedings.

¶ 132 Affirmed in part and reversed in part; remanded.

¶ 133 JUSTICE MASON, joined by Justice Neville, specially concurring:

¶ 134 I agree that Count I of the amended complaint states the "gist" of a claim against Pawlan for inducing a breach of Mo's fiduciary duty to Rhombus, although I harbor great skepticism as to whether the facts of this case support such a claim. I write separately because the order does not in my view discuss the numerous shortcomings in the amended complaint in its current form, which must be corrected on remand in order to state a viable claim.

¶ 135 The amended complaint alleges that Mo was an officer and director of Rhombus during the period of the meeting involving Pawlan in Romania and at the time the June 9, 2006 agreement was executed. As an officer and director of the corporation, Mo owed a fiduciary duty to Rhombus. Directors and officers of a corporation have a duty " 'to deal openly and honestly' with each other [citation], and to 'exercise the utmost good faith and honesty in all dealings and transactions.' " *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 365 (1994) quoting *Illinois Rockford Corp. v. Kulp*, 41 Ill. 2d 215, 222 (1968); *Couri v. Couri*, 95 Ill. 2d 91, 98 (1983). Given the existence of a fiduciary relationship, the question is whether the allegations of Count I of plaintiffs' amended verified complaint are sufficient to state a claim for defendants' conduct in aiding and abetting Mo's alleged breach.

¶ 136 Our Code of Civil Procedure requires that all pleadings "shall contain a plain and concise statement of the pleader's cause of action ***." 735 ILCS 5/2-603 (West 2012). Plaintiffs' 10-count, 178-paragraph first amended verified complaint is the antithesis of this statutory mandate. Count I alone incorporates 76 separate paragraphs of factual allegations and includes 10 more paragraphs (one with nine subparagraphs) purporting to set out the elements of the claim. Because we are remanding with directions to allow plaintiffs to replead, in part, the aiding and abetting a breach of fiduciary duty claim, I discuss the shortcomings of the amended complaint in its present form.

¶ 137 The allegations of fact conflate Mo's dealings with the corporation and her fellow shareholders with her dealings with Hergan on loans she made to him. As discussed below, to the extent that Count I purports to incorporate factual allegations relating not only to the June 9 agreement among Mo and the other shareholders, but also the allegations relating to the separate June 10 agreement between Hergan and Mo, the latter allegations fail as a matter of law because Hergan has no claim against Pawlan arising out of the June 10 agreement.

¶ 138 With respect to the June 9 agreement, the amended verified complaint suffers from a number of defects. In particular, Count I combines damages sought on behalf of the corporate entity and Hergan individually. ("As a proximate and direct result of the above-alleged wrongful acts and omissions of Defendants, Plaintiffs suffered damages as alleged above but in no amount less than $2,000,000, of which Hergan's share was no less than $800,000.") If, in fact, Rhombus has been damaged as a result of Pawlan's conduct, then damages are payable to the corporate entity, not its shareholders and Hergan does not get a "share."

¶ 139 When a shareholder claims that an officer or director of a corporation has breached her fiduciary duty to the corporation, the direct injury is sustained by the corporation and

shareholders are injured only derivatively by virtue of their interest in the corporation. When all shareholders are injured in the same way as a result of alleged misconduct, none of them has an individual claim against the wrongdoer and the claim must be pursued by the corporation itself or by a shareholder suing derivatively on behalf of the corporation. *Spillyards v. Abboud,* 278 Ill. App. 3d 663, 673-674 (1996) ("That injury, inadequate consideration [for the stock of the corporation], inures directly to the corporation and only indirectly to the shareholders. Since the 'failure to shop' claim was derivative, plaintiff's class count [for breach of fiduciary duty] should have been dismissed for lack of standing."); *Zokoych v. Spaulding,* 36 Ill. App. 3d 654, 663 (1976) ("Where there is no showing that plaintiff himself had been injured in any capacity other than in common with his fellow stockholders, the cause of action belongs to the corporation [citation], and a stockholder may not seek relief on his own behalf."); *Frank v. Hadesman and Frank, Inc.*, 83 F.3d 158, 160 (7th Cir. 1996) ("Illinois follows the widespread rule that an action for harm to the corporation must be brought in the corporate name. When investors have been injured in common, they must continue to act through their collective—the corporation.").

¶ 140 Although the amended complaint also contains allegations that Hergan was induced individually to give up certain rights not shared with other shareholders (*e.g.*, "[b]ased on Pawlan's representations, Hergan agreed to give up his right to 7% of the proposed distribution of $20,000,000 and 2% in other projects within the companies to Mo that he otherwise would not have given"), Count I contains no "plain and concise" claim to this effect. If Hergan means to claim that he has been injured by Mo's conduct in a manner not shared by other Rhombus shareholders, he must specifically so plead.

¶ 141 Further, apart from alleging that Mo got more than she was entitled to, the amended complaint is less than clear about the manner in which that was connected to Mo's breach and, even more so, regarding Pawlan's role in allegedly aiding and abetting that breach.

¶ 142 Hergan, in particular, owned nearly one-third of the outstanding shares of Rhombus. Although the complaint alleges that Mo, aided by Pawlan, misrepresented her dealings with Rhombus, Hergan does not allege that he did not have access to Rhombus' books and records or took any steps to verify for himself the nature of Mo's dealings with the corporation they both owned. Hergan's repeated allegations that he relied on Pawlan's asserted verification of Mo's transactions is tenuous given that emails attached to the amended complaint suggest that Hergan met Pawlan for the first time at the meeting in Romania where the parties reached their agreements. Prior to this meeting in June 2006, Mo, Hergan and the other investors had been transacting business together through Rhombus for years. The June 9 agreement itself recites that a "dispute" among the parties had arisen regarding ownership of certain assets. The amended complaint recites transactions among the parties involving millions of dollars and so we must assume these are sophisticated investors. Under these circumstances, it is not apparent, first, how Hergan could have been misled by Pawlan, or Mo, for that matter, about the details of her dealings with Rhombus or, second, why he would reasonably rely on Pawlan, a stranger, to inform him in that regard.

¶ 143 Further, although plaintiffs claim, with respect to third-party investors obtained by Mo, that she "confabulated certain transactions as both loans, either from third-parties or from her individually, as her own equity contribution," the complaint fails to allege what the specifics of these "confabulated" transactions were. It simply references an exhibit to complaint that is no

more informative than its conclusory allegations. And the amended complaint is silent on Pawlan's role in the "confabulation."

¶ 144 Plaintiffs' allegations regarding Pawlan's role in drafting the agreement between Rhombus, Mo and the other investors are similarly vague. Although plaintiffs claim that Pawlan "introduced new provisions that were not agreed upon, obscured the agreed upon obligations of Mo and made material misrepresentations to plaintiffs regarding the meaning and effect of other provisions," nowhere in the dozens of allegations of fact do plaintiffs articulate precisely (i) why they would not have recognized "new provisions" that had not been agreed upon (and why they signed the agreement containing provisions not agreed to), (ii) how Pawlan "obscured" the agreed upon terms or (iii) what misrepresentations Pawlan made about the "meaning and effect" of other (unspecified) provisions. I agree that the allegations that Pawlan "hid" terms in the agreement, drafted them to be "ambiguous" or "misrepresented" the agreement's terms, do not state any cognizable claim.

¶ 145 Plaintiffs also place great emphasis on their belief that as part of the June 9 agreement, Mo agreed to assume responsibility to repay third-party lenders from whom she had secured funds. But that provision is nowhere found in the barely 3-page agreement attached to the amended complaint. Plaintiffs offer no explanation for their failure to discover this prior to signing the agreement. Plaintiffs also point to a provision that they claimed they never agreed to providing that the agreement "shall be effective from the inception of each corporate signatory," but again offer no explanation as to why they signed an agreement with this provision included. Finally, the June 9 agreement on its face recites that Pawlan was acting as an advisor to Mo only and was not acting as counsel to her or to anyone else, thus undercutting any claim that plaintiffs believed Pawlan was looking out for their interests.

¶ 146 As this court reiterated in *Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303, ¶ 27:

> "One is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations which he undertakes by the execution of a written agreement. *** And the law is that a party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations." (Internal citations and quotation marks omitted.)

See also *Northern Trust v. VIII South Michigan Assoc.*, 276 Ill. App. 3d 355, 365-66 (1995) (guarantors of loan had no right to rely on bank's alleged oral representations changing the terms of the parties' written agreement: "A party cannot close his eyes to the contents of a documents and then claim that the other party committed fraud merely because it followed this contract. [citation] The application of this rule is particularly appropriate where the parties to the agreement are sophisticated business persons ***.") Thus, I agree that plaintiffs' claims that Pawlan somehow misled them about the terms of the June 10 agreement (contained in subparagraphs B, E, F, & G of paragraph 81 of the amended verified complaint) fail as a matter of law and may not be repled on remand.

¶ 147 Likewise, I agree that plaintiffs' claim that Pawlan failed "to fully and accurately account for Mo's transactions to the Plaintiffs," does not state any actionable claim. Pawlan, as Mo's "advisor," had no duty to "account" to plaintiffs for anything and any claim based on this allegation may also not be re-asserted on remand.

¶ 148 Further, as the circuit court noted, plaintiffs' factual allegations of an attorney-client relationship with Pawlan are inconsistent because, to allege a claim for aiding and abetting Mo's breach of fiduciary duty against Pawlan, plaintiffs would be required to allege that Pawlan was *not* their attorney, but was, instead, Mo's attorney. The circuit court was not required to tolerate plaintiffs' conduct in pleading in successive verified complaints that Pawlan was Mo's lawyer (the original version) and that plaintiffs, in fact, hired Pawlan as their lawyer (the amended version).

¶ 149 The remaining allegations in Count I regarding Pawlan's conduct consist of the following: that he "falsely claim[ed] that the transactions reported on various spreadsheets and schedules presented by Pawlan during the June 2006 negotiations in Bucharest had been verified (paragraph 81, subparagraph C); that he failed to disclose that Mo "had no intention of fulfilling her agreed upon obligations pursuant to the June 9, 2006 Agreement reached prior to Plaintiffs[']payment of over $5,000,000 in reliance on that Agreement (*id.*, subparagraph H); and that he "corrupt[ed] the notes of the meetings and conversations of June 6 through 10, 2006 that would inferentially be prejudicial to Pawlan and Mo" (*id.*, subparagraph I). In my view, these allegations in their present form, without more, fail to state a claim against Pawlan for aiding and abetting Mo's claimed breach of fiduciary duty, but given the complexity of the parties' dealings, I agree that plaintiffs should be afforded another opportunity to state a "plain and concise" claim.

¶ 150 But I cannot say the same with respect to the allegations of the complaint pertaining to the June 10 agreement, which, as noted, are incorporated into Count I. Perhaps the incorporation of these allegations is simply another example of "over-pleading" on plaintiffs' part, but to the extent that Hergan is purporting to assert an aiding and abetting claim against Pawlan arising out of the June 10 agreement, that claim is not viable.

¶ 151 On this issue, although he never specifically so alleges, it is safe to assume from the allegations of the amended complaint that Hergan borrowed money from Mo. A lender-borrower relationship does not give rise to fiduciary duties as a matter of law. See *Northern Trust Co. v. Halas,* 257 Ill. App. 3d 565, 572 (1993) (relationship between bank and borrower not a fiduciary relationship as a matter of law); *Santa Claus Industries v. First National Bank,* 216 Ill. App. 3d 231, 238 (1991) ("As a general rule, a fiduciary relationship does not exist between a *** debtor-creditor as a matter of law."); *McErlean v. Union National Bank of Chicago,* 90 Ill. App. 3d 1141, 1148 (1980) ("We find nothing inherent in business dealings between lender and borrower from which springs a cognizable fiduciary relationship in the absence of facts or circumstances pleaded from which such a connection may be inferred.") Again, Hergan improperly conflates his relationship with Mo vis-à-vis their investment in Rhombus with his status as a borrower. But just because Mo and Hergan were fiduciaries in connection with their investment in Rhombus does not translate into a fiduciary relationship in other aspects of their financial dealings. The amended complaint does not allege any particular facts that would take the lender-borrower relationship between Mo and Hergan outside the general rule. Therefore, as to the June 10 agreement, the predicate for a claim against Pawlan for aiding and abetting a breach of fiduciary duty, i.e., a fiduciary relationship, simply does not exist.

¶ 152 Moreover, even if the duties attendant to Hergan and Mo's investment in Rhombus carried over to their lending relationship, the facts alleged in the amended complaint are nevertheless insufficient. Hergan alleges that on June 10 Pawlan, whom he had known at that point for three or four days, also offered to reduce to writing an agreement resolving "all financial disputes between Hergan and Mo." It is reasonable to assume that Hergan would be able to verify how much money he borrowed from Mo and would have had access to documents

regarding those transactions. The amended complaint, in fact, alleges that when presented with the list of his purported obligations, Hergan recognized that certain of them related to corporate transactions and not his personal loans. Among these mistakes was a loan having an outstanding balance of more than $445,000, an amount reinforcing the conclusion that Hergan must be deemed to be a sophisticated investor.

¶ 153 The amended complaint further alleges that after reviewing his own records, Hergan determined that he owed Mo $862,098.63, and tendered that amount to her on June 30. But, curiously, after alleging that he personally determined the amount he owed Mo and paid that amount to her, Hergan alleges that "but for Pawlan's representations to Hergan during the June 10, 2006 meeting, Hergan would have never signed the June 10, 2006 agreement *** and would not have paid $862,098.63 to Mo that Hergan believed to have been in full satisfaction of all items claimed." This allegation, besides being internally inconsistent, simply makes no sense. Hergan does not allege that Mo has demanded payment of more than the amount he paid or that he has sustained any damage whatsoever as a result of Pawlan's conduct.

¶ 154 Given the foregoing deficiencies, I believe that dismissal with prejudice of Count I as to any claims relating to Pawlan's role in the June 10 agreement between Mo and Hergan was appropriate and I do not understand the lead opinion to hold otherwise.