UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KERRIE CAMPBELL and JAROSLAWA Z. JOHNSON, individually, and on behalf of others similarly situated, **Plaintiffs,** **v.** **CHADBOURNE & PARKE LLP, MARC ALPERT, ANDREW GIACCIA, ABBE LOWELL, LAWRENCE ROSENBERG, HOWARD SEIFE, and PAUL WEBER** **Defendants.**	**Civ. No. 1:16-cv-06832 (JPO)**

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF KERRIE CAMPBELL'S MOTION TO DISMISS COUNTERCLAIM
AND FOR RELATED RELIEF

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PRELIMINARY STATEMENT

This class action and collective action lawsuit alleges that international law firm Chadbourne & Parke, LLP ("Chadbourne," "Defendant," or "the Firm") has engaged in systemic pay discrimination against its current and former female partners, in violation of two federal anti-discrimination statutes: Title VII of the Civil Rights Act of 1964, as amended ("Title VII") and the Equal Pay Act of 1963 ("Equal Pay Act"). Plaintiff Kerrie Campbell ("Ms. Campbell") serves as a proposed Class Representative and Collective Action Representative and brings claims of pay discrimination on behalf of former and current female partners at Chadbourne.

In response, Chadbourne has resorted to naked acts of retribution. In retaliation for Ms. Campbell's initiation of a class action and collective action on behalf of her fellow female employees, Chadbourne has filed a baseless counterclaim predicated almost entirely on Ms. Campbell's actions in connection with *this class action and collective action lawsuit*. Essentially, Chadbourne claims that Ms. Campbell breached her fiduciary duty to Chadbourne by filing *this lawsuit* and discussing her allegations against Chadbourne with colleagues and in the public sphere. This is patently retaliatory under the broad protections afforded by Title VII and the Equal Pay Act. If Chadbourne were permitted to proceed with this *in terrorem* tactic against Ms. Campbell, it would have a powerful chilling effect on female employees at Chadbourne and elsewhere who would otherwise speak out against employment discrimination.

Further, Chadbourne's Counterclaim fails as a matter of law. Chadbourne fundamentally misconstrues any fiduciary duty owed by Chadbourne partners to the Firm.[1] That duty does not

[1] Chadbourne's claim of breach of fiduciary duty is predicated on Chadbourne's factual allegation that Ms. Campbell remains an equity partner at Chadbourne. Ms. Campbell disputes this allegation, as she has been effectively terminated by Chadbourne. *See* Amend. Compl. ¶¶ 5-6; *see also* Answer at ¶¶ 5-6 (admitting that the Management Committee met with Campbell to inform her of their decision that she should leave the Firm and that the decision was "final" and would not be revisited).

require partners to forfeit their employment rights or their rights of free speech and access to the courts. Instead, the fiduciary duty of loyalty is concerned with self-dealing, conflicts of interest, and similar actions taken for pure self-gain. Here, Chadbourne can assert no legitimate interest in the perpetuation of gender discrimination, and Ms. Campbell's actions in pursuing this matter will benefit the Firm's female partners and the Firm itself by securing its compliance with applicable law. Ms. Campbell's efforts to instill a more equitable regime at the Firm in no way constitute a breach of fiduciary duty. In addition, Chadbourne's Counterclaim is barred by the judicial proceedings privilege and the doctrines of waiver and estoppel. Accordingly, Chadbourne's Counterclaim must be dismissed in its entirety.

It is manifest that Chadbourne has one purpose in pursuing a wholly unsupportable Counterclaim – to punish Ms. Campbell for challenging the Firm's entrenched gender bias and to intimidate and deter other victims of discrimination from participating in this action or otherwise pursuing legal relief against the Firm. Accordingly, Ms. Campbell also seeks leave to amend her complaint to include additional allegations of Chadbourne's unlawful retaliation in violation of both Title VII (42 U.S.C. § 2000e-3) and the Equal Pay Act (29 U.S.C. § 215(a)(3)).[2]

STATEMENT OF FACTS

Plaintiff Kerrie Campbell joined Chadbourne as a partner in January 2014. Dkt. No. 12 ("Amend. Compl.") ¶ 41. She was underpaid compared to similarly situated male partners, and she confronted the Firm's male management about the gender pay and power disparities she was experiencing. *Id.* ¶¶ 66-84; *see also* Dkt. No. 27 ("Answer") ¶ 69 (admitting that Campbell sought but was denied a substantial point increase); *id.* ¶¶ 28-30 (admitting that in 2013, 2014, and 2015, the range of points allotted to male partners at Chadbourne was higher than that of female partners).

[2] Plaintiff Jaroslawa Z. Johnson consents to this Motion to Dismiss Counterclaim and Related Relief and to all the relief requested herein.

Chadbourne took no action to address these issues and instead retaliated against Ms. Campbell. In February 2016, Chadbourne informed Ms. Campbell that she was being terminated. Amend. Compl. ¶¶ 5-6; *see also* Answer ¶¶ 5-6 (admitting that the Management Committee met with Campbell to inform her of its decision that she should leave the Firm and that the decision was "final" and would not be revisited). In June 2016, Ms. Campbell filed a class charge of discrimination with the United States Equal Employment Opportunity Commission, alleging systemic gender discrimination at Chadbourne. Amend. Compl. ¶ 18.

Ms. Campbell initiated this class action and collective action lawsuit against Chadbourne on August 31, 2016. *See* Dkt. No. 1. On behalf of former and current female partners at Chadbourne, she asserted claims of systemic gender discrimination in pay under Title VII and the Equal Pay Act. *Id.* at Counts I, II. Ms. Campbell also brought, *inter alia*, individual claims for retaliation under these statutes. *Id.* at Counts III, V.

This class action and collective action litigation generated widespread interest at the Firm, in the legal industry, and among the public at large. Without a doubt, the pending litigation is a matter of public concern. As a proposed Class Representative and Collective Action Plaintiff, Ms. Campbell recognized the need to speak up on behalf of her fellow female employees who have experienced discrimination. Hence, she responded to requests for interviews and has publicly discussed the allegations in this litigation. At all times, her comments have been carefully circumscribed to focus on the allegations in this publicly-filed lawsuit. Ms. Campbell's claims of systemic gender discrimination at Chadbourne are well supported. For the record, she has never encouraged any colleagues to make any unfounded accusations.

Shortly after Ms. Campbell filed her initial Complaint, she experienced further retaliation at Chadbourne. For example, Chadbourne Head of Litigation Abbe Lowell approached Ms.

Campbell's office and removed from the wall outside her office an inspirational quote from Nobel Peace Prize winner Nelson Mandela. Amend. Compl. ¶ 9; *see* Answer ¶ 9 (admitting that Chadbourne Head of Litigation Abbe Lowell, on more than one occasion, went to Campbell's office while she was not there and removed postings from the wall outside her office). These retaliatory acts were captured on videotape.

On October 27, 2016, a First Amended Class Action Complaint was filed, which added an additional representative plaintiff, Jaroslawa Z. Johnson; named as additional defendants current and former Chadbourne partners Marc Alpert, Andrew Giaccia, Abbe Lowell, Lawrence Rosenberg, Howard Seife, and Paul Weber; and detailed the additional retaliation that Ms. Campbell had suffered at the Firm since filing her original complaint. *See* Amend. Compl.. ¶¶ 42, 44-49, 109-115, Counts X, XI.

As part of both the original and amended Complaints, Ms. Campbell alleged – based on information made generally available to all Chadbourne partners – that she was paid less than similarly situated males. *See, e.g., id.* ¶¶ 66-84. None of the information that Ms. Campbell referenced had been designated "confidential" by the Firm, and the Firm's Partnership Agreement does not prohibit the use or dissemination of any of the information she referenced in the Complaints. She took care to include only as much information as she believed necessary to satisfy the applicable pleading standard.

On November 3, 2016, Defendants filed their Answer to First Amended Class Action Complaint with Counterclaim. Dkt. No. 27. The Answer was procedurally improper (*see infra* Part C) and larded with false, extraneous, and disparaging material designed to harass and intimidate Ms. Campbell. *See, e.g., id.* ¶ 8. As detailed herein, the Counterclaim, which Chadbourne asserted only against Ms. Campbell, is clearly designed to retaliate against her for

initiating this lawsuit. Moreover, Chadbourne's Counterclaim plainly fails to state a valid cause of action.

While Chadbourne's Counterclaim accuses Ms. Campbell of breaching a fiduciary duty by, *inter alia*, disclosing purportedly confidential information, at no point has the Firm moved to strike any of Plaintiffs' allegations, moved to seal any filings, or sought a protective order in connection with this action. To the contrary, in both its Answer and Motion for Summary Judgment and Motion to Dismiss Class Allegations, Chadbourne itself publicly disclosed detailed information and documents relating to the Firm's finances and partnership structure. Chadbourne's disclosures include the Firm's Partnership Agreement, a purported explanation of the partnership point setting and bonus allocation process (with an accompanying memorandum), and particulars of the Firm's policies. Chadbourne has voluntarily revealed purported staffing procedures, information regarding the allocation of partner billing rates, and the process of setting of the terms and conditions of employment for non-partner attorneys. *See* Aff. of Defendant Andrew Giaccia ¶ 25, 29, 35, 40, 41, Exs. A & D; Answer ¶¶ 24, 64. This goes far beyond anything contained in Plaintiffs' pleadings.

ARGUMENT

A. CHADBOURNE'S COUNTERCLAIM SHOULD BE DISMISSED BECAUSE IT CONSTITUTES UNLAWFUL RETALIATION IN VIOLATION OF APPLICABLE ANTI-DISCRIMINATION LAWS

The anti-discrimination statutes invoked in this class and collective action lawsuit – Title VII and the Equal Pay Act – serve the broad remedial purposes of promoting equal employment. *See, e.g., Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288 (1987) ("The purpose of Title VII is 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.'") (quoting *Griggs*

v. Duke Power Co., 401 U.S. 424, 429-430 (1971)); *Corning Glass Works v Brennan*, 417 U.S. 188, 208 (1974) ("The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.").[3]

It is axiomatic that these statutes cannot achieve their purpose – eradicating employment discrimination in all its forms and vestiges – unless victims of discrimination are willing to come forward. *Burlington N. & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 67 (2006) ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."); *Alvarez v. 894 Pizza Corp.*, No. 14-CV-6011, 2016 U.S. Dist. LEXIS 102145, at *14 (E.D.N.Y. Aug. 2, 2016) ("In enacting the FLSA, Congress 'chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.'") (quoting *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960));[4] *Proulx v. Citibank, N.A.*, 659 F. Supp. 972, 978 (S.D.N.Y. 1987) ("'enforcement of Title VII rights is necessarily dependent on individual complaints") (citation omitted).

Because the remedial schemes in these statutes depend on individuals bringing complaints of discrimination, Congress enacted strong anti-retaliation protections. These protections are interpreted broadly. *See Burlington N.*, 548 U.S. at 67 ("Interpreting the antiretaliation provision

[3] *See further, e.g., Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 286-87 (1998) (Title VII: (i) "aims broadly to eradicate discrimination throughout the economy" and (ii) seeks to "make persons whole for injuries suffered through past discrimination.") (citation omitted); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) ("[I]n enacting Title VII … Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, and ordained that its policy of outlawing such discrimination should have the 'highest priority'") (citations omitted).

[4] "'As part of the [Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*], the Equal Pay Act utilizes the FLSA's enforcement mechanisms and employs its definitional provisions.'" *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 92675, at *24 (S.D.N.Y. June 19, 2012) (quoting *Anderson v. State Univ. of N.Y.*, 169 F.3d 117, 119 (2d Cir. 1999)).

to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends."); *see also* 2 EEOC Compl. Man. (BNA) § 614.1(f)(2), at 614:0007 (Apr. 1988) ("If retaliation for engaging in such protected activity were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination").

It is well-established that an employer's filing of a baseless lawsuit against an employee can constitute unlawful retaliation. As the Supreme Court has explained:

> A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation. . . . [B]y suing an employee who files charges . . . or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. . . . Furthermore, . . . the chilling effect of a . . . lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.

Bill Johnson's Restaurants, Inc. v. *NLRB*, 461 U.S. 731, 740 (1983). *See also, e.g.*, *Burlington N.*, 548 U.S. at 67 (approvingly citing *Bill Johnson's* for the propostion that an anti-retaliation provision prohibits the "retaliatory filing of a lawsuit against an employee"); *Darveau v. Detecon, Inc.*, 515 F.3d 334, 343-44 (4th Cir. 2008) (reversing dismissal of retaliation claim where plaintiff alleged his employer sued him with a retaliatory motive and without a reasonable basis in fact or law); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 157-58 (3d Cir. 1999) (employer engaged in unlawful retaliation by suing Title VII plaintiff for breach of non-competion agreement: "These facts resemble those in other cases in which courts have found retaliation when an employer instigates government action against a former employee."); *Crawford v. Coram Fire Dist.*, Civ. No. 12-3850, 2015 U.S. Dist. LEXIS 57997, at *20-23 (E.D.N.Y. May 4, 2015) (claim that employer brought Article 75 charges and state court lawsuit in retaliation for FLSA complaint); *Spencer v. Int'l Shoppes, Inc.*, No. 06-CV-2637, 2010 U.S. Dist. LEXIS 30912, at *31-40

(E.D.N.Y. Mar. 29, 2010) (holding that plaintiff had established *prima facie* case of retaliation based on defendant-employer's filing of allegedly retaliatory defamation suit); *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 471-74 (S.D.N.Y. 2008) (granting summary judgment on wage and hour plaintiffs' retaliation claim against employer who asserted baseless counterclaims); *Jacques v. DiMarzio, Inc.*, 216 F. Supp. 2d. 139, 144 (E.D.N.Y. 2002) (dismissing defendant's retaliatory counterclaim and issuing sanctions *sua sponte*).[5]

The employer's counterclaim may constitute actionable retaliation even if it is not frivolous. *Spencer*, 2010 U.S. Dist. LEXIS 30912, at *39 ("Even if the litigation is not frivolous, it still may be considered retaliatory if motivated, even partially, by a retaliatory animus."); *Crawford*, 2015 U.S. Dist. LEXIS 57997, at *20-21 (allegedly retaliatory charges and lawsuit "are adverse actions, even if they are not frivolous.").

Here, it is clear that Chadbourne's Counterclaim is retaliatory in nature. On its face, *the Counterclaim is predicated entirely on Ms. Campbell's actions in connection with this lawsuit or otherwise opposing unlawful discrimination and retaliation*. Except for a smattering of

[5] *See further, e.g.*, *Parry v. New Dominion Constr., Inc.*, No. 14cv1115, 2015 U.S. Dist. LEXIS 16272, at *18 (W.D. Pa. Feb. 10, 2015) ("Courts have found an employer in violation of the FLSA's anti-retaliation provision if it files a claim (or in this case, a counterclaim) against an employee for a retaliatory motive *and* without a reasonable basis in fact or law"; permitting plaintiff to amend complaint to allege retaliation based on employer's counterclaim); *Phillips v. M.I. Quality Lawn Maint., Inc.*, No. 10-20698, 2010 U.S. Dist. LEXIS 111979, at *16 (S.D. Fla. Oct. 21, 2010) (retaliation claim adequately pled against former employer who brought state court suit against FLSA litigant; "Courts routinely find that an employer can violate FLSA's anti-retaliation provision by filing a lawsuit against an employee with a retaliatory motive and without a reasonable basis in fact or law."); *Zebroski v. Gouak*, No. 09-1857, 2010 U.S. Dist. LEXIS 30870, at *3 (E.D. Pa. Mar. 29, 2010) (employee plaintiff may recover for retaliation "if the petitions and lawsuit were motivated by a desire for retaliation and without a reasonable basis in fact or law"); *Rosania v. Taco Bell of Am., Inc.*, 303 F. Supp. 2d 878, 885 (N.D. Ohio 2004) (allowing plaintiff to amend complaint to assert retaliation claim based on allegedly retaliatory counterclaim: "[A] lawsuit … may be used by an employer as a powerful instrument of coercion or retaliation and may dissuade employees from pursuing discrimination claims.").

background allegations containing no accusations of wrongdoing,[6] the Counterclaim is comprised exclusively of allegations regarding: (a) the content of the complaint Ms. Campbell filed in this case (Countercl. ¶¶ 6, 33-34, 36-37); (b) the publicity associated with this lawsuit and Ms. Campbell's (or her counsel's) public statements regarding gender discrimination and retaliation at Chadbourne (*id.* ¶¶ 7-25, 30, 35-37); (c) Ms. Campbell's gathering of evidence of retaliatory acts alleged in this action (*id.* ¶¶ 26, 38); and (d) Ms. Campbell's discussion of gender discrimination and retaliation with her colleagues at Chadbourne (*id.* ¶ 27, 39-40).

To be clear: there are no accusations of wrongdoing by Ms. Campbell that are separate and apart from her actions in filing this case; discussing the allegations made in this case, including her experiences with gender discrimination and retaliation; collecting evidence in support of this case; and speaking to potential class members regarding gender discrimination and other mistreatment. Ms. Campbell would be remiss as a Class Representative if she did not engage in these activities.

"Congress designed the remedial measures in [Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 358 (1995) (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975)). Rather than engage in the process of introspection and self-correction that should have followed Ms. Campbell's serious allegations of systemic gender discrimination, Chadbourne has viciously retaliated against Ms. Campbell. This conduct cannot be countenanced. To safeguard the remedial purposes of Title VII and the Equal Pay Act and to preserve the integrity of this lawsuit, Chadbourne's retaliatory Counterclaim should be dismissed in its entirety.

[6] These background allegations are found in Paragraphs 1-5, 29, and 32 of the Counterclaim; they purportedly describe Chadbourne or Ms. Campbell without advancing any allegations of wrongdoing.

B. CHADBOURNE'S COUNTERCLAIM SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A COGNIZABLE CLAIM OF BREACH OF FIDUCIARY DUTY

1. The Standard on a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal where a claimant "fail[s] to state a claim upon which relief can be granted." As this Court explained in *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 455 (S.D.N.Y. 2012) (Oetken, J.), *aff'd*, 807 F.3d 541 (2d. Cir. 2015):

> In order to survive a motion to dismiss pursuant to Federal Rule 12(b)(6), [the claimant] must plead sufficient factual allegations 'to state a claim to relief that is plausible on its face.' *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

Satisfying this pleading standard "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Further, a court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). Dismissal is appropriate where, as here, the pleading does not contain enough factual information to give rise to a plausible claim or the claim fails as a matter of law.

2. The Court Should Dismiss Chadbourne's Counterclaim Because the Acts Alleged Do Not Constitute a Breach of Fiduciary Duty

Chadbourne's Counterclaim alleges that Ms. Campbell committed a breach of fiduciary duty and, in particular, a breach of the duty of loyalty. The Counterclaim is based on the following: (a) the inclusion in Ms. Campbell's complaint of supposedly confidential and proprietary financial information (Countercl.¶ 6, 33-36), (b) her communication with the press and public regarding her allegations of gender discrimination and retaliation (*id.* ¶¶ 12, 16, 17, 25), (c) her attorney's communication with the press and public regarding this case (*id.* ¶¶ 11, 13, 14, 16-23), (d) Ms.

Campbell's alleged videotaping of retaliatory acts at Chadbourne (*id.* ¶ 26, 38), and (e) Ms. Campbell's communications with current and former Chadbourne employees regarding alleged gender discrimination (*id.* ¶ 27, 39-40). Even if Defendant's factual allegations were accepted as true for the limited purposes of deciding this Motion to Dismiss, none give rise to a cognizable breach of fiduciary duty claim.

Under New York law, a claim for breach of fiduciary duty requires: "(i) "the existence of a fiduciary duty; (ii) a knowing breach of that duty; and (iii) damages resulting therefrom." *Johnson v. Nextel Commc'ns*, Inc., 660 F.3d 131, 138 (2d Cir. 2011). The duty of loyalty, which is the primary focus of Defendant's Counterclaim, ensures that partners do not engage in "self-dealing" or otherwise place their personal interest above that of the partnership. *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (N.Y. 1989). A partner's duty of loyalty is typically summarized as follows: "[a]s a fiduciary, a partner must consider his or her partner's welfare, and refrain from acting for purely private gain." *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578, 581 (App. Div. 2000) (citing *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1263 (Mass. 1989)).

A crucial aspect in any breach of the duty of loyalty claim is a partner's pursuit of pure self-interest to the detriment of the partnership. Precedents typically involve the unlawful appropriation of partnership property for private uses. As examples, breaches of the duty of loyalty have been found when a partner engaged the partnership in transactions with businesses he owned and loaned the partnership money at high rates, *see Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 972-74 (2d. Cir. 1989); when a partner made payments to his wife from partnership property, *see Birnbaum*, 539 N.E.2d at 576; and when one partner concealed from his fellow partner the fact that he gave the partner a lower share of the proceeds from the sale of their business, *see Auld v. Estridge*, 382 N.Y.S.2d 897, 902 (Sup. Ct. 1976).

As a matter of law, the duty of loyalty does not preclude discrimination suits against a company or other legal actions against a company's unlawful conduct. Such actions do not subordinate the partnership's interests to the bare self interest of the partner. Rather, they advance the partnership's inherent interest in adhering to its legal obligations. Essentially, the entity has veered off course by violating governing law, and the employee seeks to get it back on track. To hold otherwise would insulate a company for illegal conduct, prevent enforcement of the law, and undermine the remedial purposes of statutes such as Title VII and the Equal Pay Act.

Thus, this action is wholly distinguishable from cases that have found a breach of the duty of loyalty. Here, the pleadings themselves make clear that Ms. Campbell is not focused solely on her own self-interest: she brings class action and collective action claims *on behalf of female partners who have suffered gender discrimination at Chadbourne*. Indeed, Ms. Campbell seeks to ensure that Chadbourne *comply with its legal obligations* with respect to the equal treatment of its female partners, and to that end, her complaint demands broad injunctive relief. This relief will bring Chadbourne into compliance with the law and help it compete for the most qualified employees. This is certainly in the interests of the Firm, even if Chadbourne refuses to admit it.

Tellingly, Chadbourne fails to allege that Ms. Campbell pursued any concrete self-interest at the expense of her partners; all it alleges is that her acts functioned as an "implicit extortionate threat" to extract a settlement. Countercl. ¶ 9. Chadbourne's mere suspicion of an "implicit" threat is conclusory and does not form a sufficient basis to sustain a breach of fiduciary duty claim.

(a) *Allegations Regarding Disclosures of Purportedly Confidential Material*

Defendant alleges that Ms. Campbell breached the duty of loyalty by disclosing supposedly confidential and proprietary financial information. Even if the information disclosed in the complaint were actually confidential or proprietary (which it was not), Chadbourne cannot

plausibly allege that Ms. Campbell disclosed the information for the purpose of private gain. Ms. Campbell pled all of the facts in her Complaint in service of the class and collective action complaints of systemic gender discrimination in pay. Consequently, Ms. Campbell's alleged disclosure stands in stark contrast to the disclosure in *Gibbs*, where a partner breached his duty of loyalty to his fellow partners by disseminating confidential information about his firm's employees to advance efforts to move his practice to a new firm (Chadbourne). Moreover, as discussed below, Chadbourne has taken no steps to prevent the dissemination of confidential material. The fact that Chadbourne has directly engaged in far more extensive – and more sensitive – disclosures contradict the Counterclaim's claims regarding confidentiality.

Accordingly, Ms. Campbell's alleged disclosure does not give rise to a claim of breach of the duty of loyalty.

(b) *Allegations Regarding Ms. Campbell's Public Statements*

Chadbourne's assertion that Ms. Campbell engaged in a "national smear campaign" is also scurrilous and conclusory. Chadbourne identifies three statements that Ms. Campbell made to the press (*see id.* ¶¶ 12, 17(a), 25).[7] These statements are purely descriptive, factual, and are not derogatory in nature. Elsewhere, Chadbourne states that "Campbell proceeded to slander Chadbourne before the audience [at Stanford Law School]" without providing any specific information as to the content of any statements she made. Countercl. ¶ 16. Thus, the allegation of "slander" is a mere label or legal conclusion that, under *Iqbal* and *Twombly*, cannot be treated

[7] While Defendant complains of Ms. Campbell's allegedly false statements, Chadbourne styles its allegations as a breach of fiduciary duty claim rather than as a defamation claim – likely in order to avoid the rigorous pleading standard for defamation claims. *See Biro*, 883 F. Supp. 2d at 456 ("While the federal rules do not require the particularized pleading requirements set forth in New York's C.P.L.R. section 3016, Rule 8 [of the Federal Rules of Civil Procedure] still requires that each pleading be specific enough to afford defendant sufficient notice of the communications complained of to enable him to defend himself.") (quoting *Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation*, No. 06 Civ. 1260, 2009 U.S. Dist. LEXIS 111675, at *8-9 (E.D.N.Y. Dec. 1, 2009) (citations omitted)).

as a well-pled factual allegation. None of Ms. Campbell's statements gives rise to a claim of breach of the duty of loyalty.

(c) *Allegations Regarding Ms. Campbell's Counsel's Statements and Actions*

While Chadbourne purports to bring its Counterclaim only against Ms. Campbell, the Counterclaim against Ms. Campbell is predicated largely on allegations directed at a non-party: Ms. Campbell's attorney, David Sanford. *See* Countercl. ¶ 11, 13-24.

Chadbourne cannot manufacture a breach of fiduciary duty claim against Ms. Campbell based on the words and actions of Mr. Sanford. Mr. Sanford is not a party in this litigation and has no fiduciary duty to the Chadbourne partners. Therefore, none of Mr. Sanford's statements or actions gives rise to a claim against Ms. Campbell for breach of fiduciary duty.

(d) *Allegations Regarding Videotaping of Firm Premises*

Defendant also alleges that Ms. Campbell breached her fiduciary duty by supposedly videotaping Firm premises where "privileged client business is being conducted," Countercl. ¶ 38. But Chadbourne does not allege that she actually videotaped any client business or other private or sensitive matters. Rather, the video recording merely captured Defendants' hostile and punitive actions in response to Ms. Campbell's protected activities.

Chadbourne again fails to allege facts that could give rise to a cognizable claim of breach of fiduciary duty. Chadbourne does not allege the existence of any policy prohibiting Ms. Campbell from videotaping in the office, much less Ms. Campbell's knowledge of any such policy. Further, Chadbourne alleges no damages resulting from the alleged videotaping. Accordingly, Ms. Campbell's alleged videotaping cannot give rise to a breach of fiduciary duty claim.

(e) *Allegations Regarding Ms. Campbell's Communications with Colleagues*

Finally, Chadbourne alleges that Ms. Campbell has "reached out to numerous Chadbourne employees and former employees" in an effort to "elicit false accusations" against Chadbourne. *Id.* ¶¶ 39, 40. Chadbourne does not allege any facts supporting an inference that Ms. Campbell actually encouraged colleagues to lie or to levy false accusations. Rather, it simply places a conclusory label on the gender discrimination claims made in this lawsuit. While Chadbourne may dispute Ms. Campbell's allegations, there is no case law to support a claim that communicating with fellow employees regarding a *bona fide* gender discrimination class action is in any way disloyal. Indeed, in light of the remedial nature of Title VII and the Equal Pay Act, any attempt to prohibit or chill such interactions is decidedly contrary to public policy. Moreover, such inter-employee communications are also protected by the National Labor Relations Act. *See, e.g., Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) ("[T]he right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.").[8]

(f) *Defendant Fails to Allege Damages, an Essential Element of the Counterclaim*

Finally, despite Defendant's repeated assertions that Ms. Campbell breached her fiduciary duties to the Firm, Chadbourne fails to allege any damages whatsoever. Therefore, Chadbourne fails to adequately state a claim: "without damages, a claim for breach of [fiduciary] duty must fail." *Sang v. Hai*, 951 F. Supp. 2d 504, 528 (S.D.N.Y. 2013) (Oetken, J.). While Chadbourne

[8] *See further Cintas Corp. v. NLRB*, 482 F.3d 463, 468-69 (D.C. Cir. 2007) (affirming finding that employer policy prohibiting the release of information regarding employees could reasonably be construed by workers to restrict discussion of wages and other terms and conditions of employment and thus would be likely to chill protected activity); *NLRB v. Ne. Land Serv*s., 645 F.3d 475, 481-83 (1st Cir. 2011) (noting that the NRLA bars employer interference with employees' right to discuss the terms and conditions of their employment with others; accordingly, deeming provision requiring employee to keep terms of employment, including compensation, confidential to be a violation of the NLRA).

states that its reputation is "perhaps its most valuable asset," Countercl. ¶ 3, it makes no allegations that Ms. Campbell's conduct harmed its reputation or resulted in any financial losses. In fact, this lawsuit will ultimately enhance Chadbourne's reputation by bringing it into compliance with the law and by ensuring that its partners are paid equitably.

3. The Court Should Dismiss Chadbourne's Counterclaim Because Plaintiff Campbell is Protected by the Judicial Proceedings Privilege

Defendant's allegation that Ms. Campbell breached the duty of loyalty by disclosing supposedly confidential and proprietary financial information is further barred by the judicial proceedings privilege. Specifically, Chadbourne alleges – without supplying any particular examples – that "Campbell's First Amended Complaint contains numerous allegations purporting to disclose confidential and proprietary financial information of Chadbourne and its individual partners." Countercl. ¶ 6.

The statements that Ms. Campbell made in the complaint, however, do not give rise to any legally cognizable claim. The judicial proceedings privilege provides that a litigant is absolutely immune from suit for statements made in a judicial proceeding, including in a complaint. *See Frierson-Harris v. Hough*, No. 05 Civ. 3077, 2006 U.S. Dist. LEXIS 4805, at *22 (S.D.N.Y. Feb. 7, 2006) ("Statements made in the course of judicial proceedings are 'absolutely privileged if, by any view or under any circumstances, [they] may be considered pertinent to the litigation.'") (quoting *Martirano v. Frost*, 255 N.E.2d 693, 694 (1969)); *see also Jones v. SmithKlineBeecham*, No. 1:07-CV-00033, 2007 U.S. Dist. LEXIS 59980, at *13 (N.D.N.Y. Aug. 17, 2007) ("If the statements are relevant to the litigation . . . they are absolutely privileged and may not be the basis for any civil action.").

4. The Court Should Dismiss Chadbourne's Counterclaim Because the Doctrines of Waiver and Estoppel Preclude Chadbourne's Assertion of a Breach of Fiduciary Duty Claim

Defendant's allegation that Ms. Campbell breached the duty of loyalty by disclosing supposedly confidential and proprietary financial information is further barred by the doctrines of waiver and estoppel. While Chadbourne alleges that Campbell's purported disclosure of "confidential and proprietary financial information of Chadbourne and its individual partners" constituted a "direct breach of loyalty to her partners and the Firm," Countercl. ¶¶ 6, 36, the Firm itself knowingly and voluntarily made far broader disclosures.

"To establish waiver under New York law one must show that the party charged with waiver relinquished a right with both knowledge of the existence of the right and an intention to relinquish it." *Voest-Alpine International Corp. v. Chase Manhattan Bank, N.A.*, 707 F.2d 680, 685 (2d Cir. 1983). Waiver can be established as a matter of law "by the express declaration of a party or in situations where the party's undisputed acts or language are so inconsistent with his purpose to stand upon his rights as to leave no opportunity for reasonable inference to the contrary." *NetTech Solutions, L.L.C. v. ZipPark.com*, 2001 U.S. Dist. LEXIS 14753, at *18 (S.D.N.Y. Sept. 20, 2001) (citations and internal quotation marks omitted).

Chadbourne's conduct is wholly "inconsistent" with the assertion of its rights against Ms. Campbell. Chadbourne included substantial amounts of purportedly confidential and proprietary information in its Answer and in the materials accompanying its Motion for Summary Judgment. These materials included the Firm's Partnership Agreement and an internal memorandum regarding the Firm's purported procedures for setting points and bonuses. Aff. of Defendant Andrew Giaccia, Ex. A & D. In addition, Chadbourne disclosed supposedly confidential information in their Statement of Material Undisputed Facts Pursuant to Local Rule 56.1, including

information regarding the estimated value of partner points. *Id.* ¶ 49. By freely publishing this information in public filings, Chadbourne has waived its right to assert a claim against Campbell for disclosure of similar (but less sensitive) information.

Likewise, it would be inherently unfair to allow Chadbourne to freely disclose confidential information for its own benefit in this lawsuit while at the same time seeking to punish Ms. Campbell for more innocuous disclosures. The doctrine of equitable estoppel is derived from the "[d]eeply rooted" "maxim that no man may take advantage of his own wrong." *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959).

At minimum, as a matter of law, Defendant's actions belie any claim that it has suffered or may suffer damages from Ms. Campbell's conduct. Chadbourne's willing disclosures confirm to a virtual certainty that no injury has occurred. And any possible harm is entirely self-made.

C. PLAINTIFF CAMPBELL SHOULD BE GRANTED LEAVE TO AMEND HER COMPLAINT TO ASSERT ADDITIONAL ALLEGATIONS OF RETALIATION BASED ON DEFENDANT'S BASELESS AND RETALIATORY COUNTERCLAIM

Chadbourne has filed its Counterclaim against Ms. Campbell as punishment for this gender discrimination lawsuit. Chadbourne's actions are plainly retaliatory.

As detailed above (*see supra* Part A), courts in the Second Circuit and throughout the country have determined that retaliatory claims or counterclaims against a plaintiff in a federal civil rights lawsuit constitute unlawful retaliation. *See, e.g.*, *Jacques*, 216 F. Supp. 2d at 144 (ruling that "the factually unsupported, conclusory lay nature of the counterclaim can only realistically be viewed. . . as a bad faith retaliatory *in terrorem* tactic against the plaintiff for bringing her claims to court" and levying sanctions under Rule 11). In *Torres*, a group of current and former grocery store workers filed suit for FLSA violations, and the defendant filed a faithless servant counterclaim against two plaintiffs. The court dismissed the counterclaim and granted summary

judgment to the plaintiffs, finding that the counterclaim constituted unlawful retaliation under the FLSA. *See* 628 F. Supp. 2d at 471-475. As the *Torres* court stressed: "Bad faith or groundless counterclaims and other legal proceedings against employees who assert statutory rights are actionable retaliation precisely because of their in *terrorem* effect." *Id*. at 473 (citing cases including *Bill Johnson's Restaurant,* 461 U.S. at 740).

Here, as in *Torres*, Chadbourne has asserted a legally baseless counterclaim. Chadbourne has characterized Ms. Campbell's legally protected activity in pursuing this lawsuit as a breach of fiduciary duty. Chadbourne has also raised allegations barred by the judicial proceedings privilege and the doctrines of waiver and estoppel. Further, the fact that Chadbourne has not even attempted to plead damages suggests, as it did in *Torres*, that Chadbourne knows and does not care that the Counterclaim is destined to be unsuccessful. The mere filing of the Counterclaim, even a futile one, is sufficient to exact revenge on Ms. Campbell and exert the desired chilling effect.

Moreover, Chadbourne's impermissible motive is firmly underscored by the procedural irregularity of its filings. It was improper for Chadbourne to file its Answer and Counterclaim and *then* to file a Rule 12(b)(6) motion to dismiss. *See* Fed. R. Civ. P 12(b) ("A motion asserting any of these defenses must be made *before* a pleading if a responsive pleading is allowed.") (emphasis added). The appropriate procedure was to file the Rule 12(b) motion first, and only to file the Answer and Counterclaim once the Rule 12(b) motion was decided. Yet, driven by a desire to punish and besmirch Ms. Campbell, Chadbourne violated the Rule.

Accordingly, Ms. Campbell respectfully moves for leave of Court to amend the complaint to add additional allegations of retaliation. Fed. R Civ. P. 15(a)(2); *see, e.g., Flores v. Mamma Lombardis of Holbrook, Inc.*, 942 F. Supp. 2d 274, 279 (E.D.N.Y. 2013) (granting employee leave to amend complaint to assert a claim for retaliation where defendant employer filed allegedly

"baseless" counterclaim in response to FLSA suit). "Such amendments are to be 'freely granted' when justice so requires." *Flores*, 942 F. Supp. 2d at 278 (quoting Fed. R. Civ. P. 15(a)(2)).

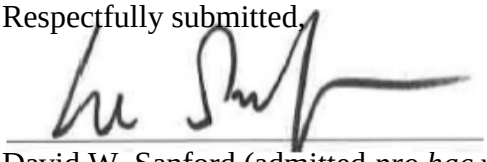
CONCLUSION

In retaliation for Ms. Campbell's initiation of a class and collective action lawsuit on behalf of her fellow female employees, Chadbourne filed a groundless Counterclaim predicated almost entirely on Ms. Campbell's actions in connection with the lawsuit. As a matter of law, Ms. Campbell's actions designed to bring gender equity to Chadbourne do not constitute a breach of fiduciary duty. Further, Chadbourne's claims are barred by the judicial proceedings privilege and the doctrines of waiver and estoppel.

Accordingly, Chadbourne's Counterclaim should be dismissed. Ms. Campbell should be granted leave to amend her complaint to include additional allegations of retaliation based on Chadbourne's assertion of its Counterclaim.

Dated: December 16, 2016

Respectfully submitted,



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