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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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WILLIAM L. GUNLICKS, individually and as	)	
majority shareholder of Founding Partners Capital	)	Appeal from the
Management Company,	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	No. 10 L 010353
MAYER BROWN LLP, an Illinois limited	)	
liability partnership, MICHAEL BUTOWSKY,	)	
as an agent, employee, and/or servant of	)	
MAYER BROWN LLP, and JOHN LAWLOR,	)	
as an agent, employee and/or servant of	)	
MAYER BROWN LLP,	)	Honorable
	)	John C. Griffin,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE LIU delivered the judgment of the court.  
Presiding Justice Harris and Justice Pierce concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Section 2-615 dismissal of plaintiff's fourth amended complaint affirmed, where plaintiff failed to sufficiently plead proximate cause in his legal malpractice claims, and breach of fiduciary duty claims were duplicative of the malpractice claims; leave to amend was properly denied because proposed fifth amended complaint did not cure defects of earlier pleading; and plaintiff's argument that court erred in denying pretrial discovery was waived.

¶ 2 Plaintiff, William L. Gunlicks (Gunlicks), appeals from an order of the circuit court of Cook County dismissing his fourth amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). Defendants, Mayer Brown LLP and two of its attorneys, Michael Butowsky, and John Lawlor (collectively, Mayer Brown) were named as parties in the legal malpractice lawsuit in September, 2010. During the course of the litigation, the complaint was amended four times. On October 12, 2012, the circuit court dismissed the fourth amended complaint for failure to sufficiently allege proximate cause. During the hearing on his motion for reconsideration, Gunlicks requested leave to file a fifth amended complaint. The court denied both the motion for reconsideration and request for leave to file a fifth amended complaint.

¶ 3 On appeal, Gunlicks contends that the circuit court erred by: (1) dismissing his legal malpractice claim for failure to sufficiently plead proximate cause; (2) dismissing his breach of fiduciary duty claim; (3) disallowing pretrial discovery; and (4) denying him leave to file a fifth amended complaint. For the following reasons, we affirm.

¶ 4 **BACKGROUND**

¶ 5 Gunlicks is the founder of Founding Partners Capital Management Company (Founding Partners), a Florida corporation registered with the Securities and Exchange Commission (SEC) since 1999 as an investment adviser. Gunlicks was formerly the CEO, director, and majority shareholder of the corporation until April 2009. Prior to 2007, he was the sole shareholder. From 2001 through April 2009, Founding Partners and Gunlicks managed and operated funds that involved investments in loans to Sun Capital, Inc. and Sun Capital Healthcare, Inc. (collectively, Sun Capital). Stable-Value Fund, LP was a general partner of Founding Partners, and loaned funds to Sun Capital to purchase accounts receivable from healthcare providers.

¶ 6 A. The 2007 SEC Cease and Desist Order

¶ 7 In 2002, the SEC commenced an investigation of Gunlicks and Founding Partners. During the period of 2002 to 2007, Mayer Brown acted as legal counsel on behalf of Founding Partners in connection with the SEC investigation.<sup>1</sup>

¶ 8 On or about December 3, 2007, Gunlicks and the SEC entered into a cease-and-desist order that required Gunlicks to cease from violating Section 17(a)(2) of the Securities Act of 1933 (Securities Act). According to the cease-and-desist order, the SEC found that Gunlicks violated Section 17(a)(2) when he "caused Founding Partners to have Stable-Value pay an undisclosed fee to Stewards and had Equity Fund and Stable-Value engage in transactions that were not consistent with their offering memoranda including transactions with entities under common control with Founding Partners."

¶ 9 B. The 2009 SEC Lawsuit and Judgment

¶ 10 In January 2009, the SEC commenced an onsite compliance examination of Founding Partners' records. Subsequently, in February 2009, the SEC transferred the proceeding from its examination unit to its enforcement unit.

¶ 11 On April 20, 2009, the SEC filed a complaint for injunctive relief against Founding Partners and Gunlicks in the United States District Court of the Middle District of Florida. The SEC's complaint alleged that Founding Partners and Gunlicks had violated the following: (1) Section 17(a) of the Securities Act; (2) Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (Exchange Act), 15 USC 78j(b); (3) Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. §§ 80b-6(1),(2), and (4), and Rule 206(4)-8 promulgated thereunder, 17 C.F.R. § 275.206(4)-8; and (4) the 2007 cease-and-desist order.

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<sup>1</sup> Gunlicks alleges in his lawsuit that Mayer Brown also represented him, simultaneously, in his individual capacity with respect to the SEC investigation during 2002-2009.

¶ 12 In its complaint, the SEC alleged: (i) that Gunlicks made misrepresentations and omissions concerning the loans made to Sun Capital; (ii) that Gunlicks did not tell Stable-Value investors that the collateral for their investments included the type of receivables that took longer to collect and had more risks; (iii) that Gunlicks "misled" investors with monthly performance reports; (iv) that Gunlicks continued to solicit investors into Stable-Value despite his knowledge by early November 2008 that Sun Capital was exiting the factoring business; (v) that Gunlicks raised \$5 million for Stable-Value from the Archdiocese of New Orleans without disclosing that Sun Capital was exiting the factoring business; (vi) that Gunlicks failed to inform the Archdiocese prior to its investment that Stable-Value was facing significant redemption requests; (vii) that Gunlicks failed to disclose to the Archdiocese that they had suspended redemptions in Stable-Value; (viii) that Gunlicks falsely represented to investors that their funds had available 2007 audited financial statements; (ix) that Gunlicks promised the investors that they would receive audited financial statements for 2007 within 120 days of the close of the calendar year; (x) that Gunlicks failed to disclose the 2007 cease-and-desist order to investors and the finding by the SEC that Founding Partners caused Stable-Value to pay an undisclosed fee to a related entity, and caused several of its funds to engage in transactions inconsistent with their offering memoranda; (xi) that Founding Partners failed to provide a copy of the 2007 cease-and-desist order to all of its current and prospective clients, as well as investors and potential investors, for one year after the order was entered; and (xii) that Gunlicks improperly used fund assets to pay personnel expenses, including approximately \$200,000 in payments from the Stable-Value funds to the Founding Partners CFO during 2008, despite the funds' written representation that the general partners would bear the general administrative and personnel costs of the funds.<sup>2</sup>

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<sup>2</sup> We take judicial notice of the allegations of the SEC complaint provided in the Supplemental Appendix. *Weimann v. Kane County*, 150 Ill. App. 3d 962, 969 (1986).

¶ 13 The SEC also sought to freeze the assets of Founding Partners and to appoint a receiver for Founding Partners. An order appointing a receiver over the corporation's assets was entered by the district court on May 20, 2009.

¶ 14 On March 3, 2010, the district court entered a "judgment of permanent injunction and other relief." Gunlicks consented to the judgment "without admitting or denying the allegations of the complaint \*\*\*; waived findings of fact and conclusions of law; and waived any right to appeal from this Judgment." The district court found that Gunlicks had violated the following : (1) Section 17(a) of the Securities Act; (2) Section 10(b) and Rule 10b-5 of the Exchange Act; (3) Sections 206(1), (2) and (4) of the Advisers Act and Rule 206(4)-6; and (4) the 2007 cease-and-desist order. As part of the order, Gunlicks also consented to the disgorgement of any "ill-gotten gains."

¶ 15 C. The Legal Malpractice Complaint

¶ 16 On September 9, 2010, three of Gunlicks' children (the Gunlicks Children), purporting to be minority shareholders of Founding Partners, filed a malpractice and breach of contract action against Mayer Brown and Ernst & Young U.S. LLP (Ernst & Young). The Gunlicks Children alleged, *inter alia*, that Mayer Brown had breached its duty of care to provide advice as "compliance counsel," which, in turn, led to the 2009 SEC suit and injunction.

¶ 17 1. First amended complaint

¶ 18 On November 19, 2010, the Gunlicks Children filed an amended complaint adding Gunlicks as a named plaintiff. Mayer Brown moved to dismiss pursuant to section 2-615 of the Code, asserting that it owed no duty to these plaintiffs because it represented Founding Partners, not the individual shareholders, with respect to the matters alleged in the suit. Ernst & Young, a co-defendant, also moved to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619

(West 2010)), or alternatively, to compel arbitration. Instead of filing a response to the defendant's motions to dismiss, Gunlicks and Gunlicks Children filed an emergency motion for leave to file a second amended complaint, which the circuit court granted.

¶ 19 2. Second amended complaint

¶ 20 On April 28, 2011, Gunlicks and the Gunlicks Children filed their second amended complaint, alleging the same claims against Mayer Brown and Ernst & Young. Mayer Brown again moved to dismiss this complaint pursuant to section 2-615. Ernst & Young, meanwhile, moved to dismiss pursuant to sections 2-615 and 2-619, or alternatively, to compel arbitration.

¶ 21 On October 6, 2011, the circuit court granted Mayer Brown's motion to dismiss without prejudice. The court found, *inter alia*, that the plaintiffs had failed to plead facts establishing that an attorney-client relationship existed between the plaintiffs and Mayer Brown, and instead, had "merely conclude[d]" that Mayer Brown represented both Founding Partners and the plaintiffs individually. The court also granted Ernst & Young's section 2-619 motion to dismiss the second amended complaint and compelled arbitration of the claims brought against it.

¶ 22 3. Third amended complaint

¶ 23 On November 10, 2011, Gunlicks and the Gunlicks Children filed their third amended complaint. They continued to allege malpractice and breach of contract against Mayer Brown, but had reworked their complaint in response to the previous dismissal. On December 20, 2011, Mayer Brown filed a section 2-615 motion to dismiss, asserting, *inter alia*, that plaintiffs had still failed to allege that Mayer Brown owed them any duty with respect to the matters alleged and had also failed to allege "but-for causation."

¶ 24 On April 12, 2012, the court heard argument on Mayer Brown's motion and indicated that it was going to dismiss the third amended complaint, again without prejudice. The court noted

that “tying the duty, the alleged negligent act or omission, proximate cause and the damages \*\*\* are areas that are lacking [in the third amended complaint].” After dismissing the complaint, the court allowed the plaintiffs "one last try" to cure the defects in their complaint.

¶ 25 4. Fourth amended complaint

¶ 26 On June 15, 2012, Gunlicks filed the fourth amended complaint—the version at issue in this appeal—alleging two counts of attorney malpractice (Counts I and IV), two counts of breach of contract (Counts II and V), and two counts of breach of fiduciary duty (Counts III and VI).<sup>3</sup>

¶ 27 In his complaint, Gunlicks alleged that he was the intended beneficiary of Founding Partners, and that Mayer Brown was retained in 1999 "with the intent that their legal services benefit him in his many roles within Founding Partners." Gunlicks described the matters in which Mayer Brown represented him individually as those involving personal investments, tax issues, and SEC licensing requirements. In addition, he alleged that Mayer Brown was specifically to act as "compliance counsel" to ensure his "compliance with all state and federal laws and regulations inclusive of all SEC rules and regulations" and was "lead and primary counsel on all regulatory and investment fund matters."

¶ 28 In Count I, Gunlicks asserted seven grounds for legal malpractice, namely: (1) failure to ensure compliance with SEC regulations; (2) failure to ensure compliance on the part of Founding Partners' accounting firm; (3) failure to ensure compliance with a 2007 SEC settlement; (4) failure to timely complete a letter notifying Founding Partners' investors of the suspension of redemption requests; (5) failure to ensure compliance with respect to disclosures; (6) failure to ensure compliance with respect to transactions between Founding Partners and borrowers Sun Capital Healthcare, Inc. and Sun Capital, Inc.; and (7) failure to provide adequate

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<sup>3</sup> The Gunlicks Children were not parties to the complaint, having voluntarily dismissed their claims pursuant to section 2-1009(a) of the Code (735 ILCS 5/2-1009(a) (West 2012)).

counsel during the January 2009 SEC audit. Gunlicks alleged that because of Mayer Brown's failure to perform certain duties in conformance with "accepted standards of care owed to the Plaintiff, the SEC \*\*\* [filed] suit and obtain[ed] an injunction which prevented the continued operation of Founding Partners' business." He generally alleged that "as a direct and proximate result \*\*\* [he] lost substantial sums of money, inclusive of his investment income, loss of profits, future loss of profits, damage to reputation, and incurred substantial attorneys' fees and costs, and underwent an asset freeze beginning in 2009 and continuing through the present day."

¶ 29 Twice in the fourth amended complaint, Gunlicks referred to specific allegations that the SEC had raised in its 2009 federal complaint. First, Gunlicks alleged that Mayer Brown "had a duty to ensure that [he] remained in compliance with applicable SEC regulations and the terms of their licensure." He claimed that Mayer Brown failed to perform the following: "conduct formal compliance reviews or audits of [him] and his conduct;" advise him on major compliance issues; advise him "to disclose and explain investments that were required to be disclosed by offering documents per the SEC's requirements"; and advise him in 2008 about "issues, including but not limited to, redemption, disclosure, compliance, communication with investors and solicitation of new investors." Gunlicks asserted that the SEC alleged that he and Founding Partners violated the terms of the 2007 cease-and-desist order and that "MAYER BROWN failed to advise [him] that the offering memoranda prepared by MAYER BROWN included representations that MAYER BROWN knew to be inaccurate and failed to advise that the continued use of those offering memoranda could potentially violate" the cease-and-desist order. He asserted that "[a]s a proximate cause of these failures the SEC brought the 2009 action, Founding Partners was placed in receivership and [his] personal assets were frozen."

¶ 30 The second reference Gunlicks made to a specific SEC allegation was in his claim that Mayer Brown failed to ensure compliance with the 2007 SEC cease-and-desist order. Gunlicks alleged that the 2003 SEC case against him was "settled" by the administrative order dated December 3, 2007, and that, pursuant to this order, he was required to: (1) provide a copy of the order to all of Founding Partners' current and prospective clients and investors for one year from the date of the order; and (2) provide an affidavit of compliance to the SEC within five days of completing the one-year notice requirement. According to Gunlicks, Mayer Brown failed to satisfy its "duty to ensure compliance with the Settlement Agreement Order as it ran alongside the affirmative duty undertaken by MAYER BROWN to preserve all aspects of [Gunlicks'] licensure." He alleged that "this failure" resulted in the SEC's claim that he and Founding Partners violated the cease-and-desist order, and was a proximate cause for the initiation of the 2009 SEC lawsuit, the receivership, and freeze on his personal assets.

¶ 31 In Count II of the fourth amended complaint, Gunlicks incorporated his prior allegations and claimed breach of contract, alleging that he was "the direct beneficiary of the attorney-client contract" between Mayer Brown and Founding Partners. In Count III, Gunlicks asserted breach of fiduciary duty based on "the omissions and failures of MAYER BROWN as articulated in the previous counts." Counts IV, V, and VI of the fourth amended complaint raised the same respective claims as Counts I through III; however, Gunlicks alleged in those counts that he was the intended beneficiary of legal services rendered by Mayer Brown.

¶ 32 D. Motion to Compel and Motion to Dismiss

¶ 33 Prior to filing his fourth amended complaint, and while Mayer Brown's motion to dismiss the third amended complaint was pending, Gunlicks had joined the Gunlicks Children in a motion to compel discovery. The movants requested, *inter alia*, that Mayer Brown be compelled

to produce the client files of Gunlicks and Founding Partners; they contended that the law firm had denied their discovery request.<sup>4</sup> On December 23, 2011, Mayer Brown sent a letter to the receiver's counsel asking for his position on Gunlicks' request for the Founding Partners client file. The receiver's counsel responded "that any files in the possession of Mayer Brown LLP relating to the representation or business of [Founding Partners] and its Funds belong to the Receiver alone." He instructed Mayer Brown to refuse Gunlicks' demand for their production. Mayer Brown, in turn, filed a motion to strike the motion to compel. The receiver subsequently intervened in the suit and was granted leave to file an objection to the motion. The court then set a briefing schedule for the motion to compel and the receiver's objection.

¶ 34 On April 12, 2012, when dismissing the third amended complaint, the circuit court addressed the pending motion to compel, at which time the plaintiffs' counsel stated that his clients "would be best served [with] ample time to amend the pleading" and that the motion to compel should be "postpone[d]." As a result, the court stayed briefing on the motion to compel "pending further order of the court."

¶ 35 On July 10, 2012, counsel for Gunlicks sought to have the stay on the motion to compel lifted. Counsel informed the court that the motion was still pending and was "fully briefed." The court requested copies of the briefs and set a date for status on the motion.

¶ 36 On July 17, 2012, Mayer Brown moved to dismiss the fourth amended complaint pursuant to section 2-615 of the Code. Mayer Brown asserted, *inter alia*, that Gunlicks had still not alleged that Mayer Brown owed him any duties with respect to the conduct alleged and had also still failed to properly allege but-for causation with respect to any of the alleged breaches. Specifically, Mayer Brown contended that Gunlicks failed to allege that there was a duty owed to Gunlicks personally with respect to the matter at issue in the SEC complaint, and that he failed to

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<sup>4</sup> The movants' request was dated one day before the motion to compel was filed.

allege facts showing that any breach of duty proximately caused damages to him.

¶ 37 On July 20, 2012, Mayer Brown filed a motion to continue the stay of the motion. Gunlicks responded that the fourth amended complaint "demonstrated a viable claim for relief," but that "in order to move forward, briefing and argument on the Motion for Pretrial Discovery and to Compel must begin immediately." Gunlicks asserted that "[b]y denying [him] access to discovery, this Court is unduly prejudicing [him] and ensuring that he will not receive a fair trial." The court ultimately decided to continue the stay of the motion to compel until a ruling was entered on Mayer Brown's motion to dismiss the fourth amended complaint.

¶ 38 On October 12, 2012, the circuit court dismissed Gunlicks' fourth amended complaint with prejudice. The court found that Gunlicks had failed to plead "sufficient facts that identify what Mayer Brown should have done differently that would have prevented the SEC action against him." Further, the court found that Gunlicks' breach of fiduciary duty claims were duplicative of his legal malpractice claims in that they "all stem from the same operative facts."

¶ 39 E. Motion to Reconsider

¶ 40 On November 13, 2012, Gunlicks filed a motion to reconsider and for leave to file a fifth amended complaint. He asserted, *inter alia*, that the court had imposed too demanding of a standard with regard to proximate cause and that he had "stumbled upon" new evidence establishing an attorney-client relationship between Mayer Brown and him, namely an engagement letter dated January 5, 2004. The engagement letter, which was attached to the motion, stated that Mayer Brown LLP would represent both Founding Partners and Gunlicks "in the above referenced matter," which was "Founding Partners Capital Management Company SEC Investigation." Gunlicks asserted, further, that the court erred in denying him discovery prior to ruling on the motion to dismiss.

¶ 41 On February 6, 2013, the circuit court denied Gunlicks' motion to reconsider and denied leave to file a fifth amended complaint. Rejecting Gunlicks' contention that the deficiency could be cured by a fifth amended complaint, attached to which was an engagement letter purportedly memorializing Mayer Brown's legal representation of him, the court held:

"[T]he Plaintiff has attempted, on five separate occasions, to state a cause of action for legal malpractice and breach of contract, but has failed to do so. The Plaintiff attempts to persuade this Court to grant him leave to amend his complaint once again by asserting that his sixth attempt to plead said causes will somehow hit the preverbal [*sic*] nail on the head. The Court is not so persuaded."

¶ 42 The court determined that the fourth amended complaint was "devoid of any allegations explaining how [Gunlicks], *but for* Mayer Brown's purported malpractice, would have been successful in the 2009 SEC action for which Mayer Brown was allegedly retained." As for Gunlicks' claim that the court erred in denying him discovery before ruling on the motion to dismiss, the court found that Gunlicks had waived this argument by requesting a stay of a ruling on the motion. In so ruling, the court noted that Gunlicks "never informed the Court, after dismissal of the third amended complaint, that additional discovery was needed so that [he] could sufficiently plead a fourth amended complaint or that additional discovery or a continuance was needed to adequately respond to the Defendants' motion to dismiss the fourth amended complaint."

¶ 43 Gunlicks now brings his timely appeal of the court's October 12, 2012 order and the court's denial of leave to file a fifth amended complaint.

¶ 44

## ANALYSIS

¶ 45

## A. Section 2-615 Dismissal

¶ 46 We initially address Gunlicks' challenge to the dismissal of his fourth amended complaint. "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The question presented by such a motion is "whether the allegations of the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). Mere conclusions of law or fact unsupported by specific factual allegations will not suffice to survive a section 2-615 motion. *Pooh-Bah Enterprises, Inc.*, 232 Ill. 2d at 473. In ruling on a section 2-615 motion, we may consider only those facts apparent from the face of the pleadings, matters of which this court may take judicial notice, and judicial admissions in the record. *Id.* We review *de novo* the circuit court's order granting a section 2-615 motion to dismiss. *Bell v. Hutsell*, 2011 IL 110724, ¶ 9.

¶ 47

## 1. Legal Malpractice

¶ 48 Gunlicks maintains that the circuit court erroneously found that he failed to state a cause of action for legal malpractice in either tort or contract. "To state a cause of action for legal malpractice, the plaintiff must allege facts to establish (1) the defendant attorney owed the plaintiff client a duty of due care arising from an attorney-client relationship, (2) the attorney breached that duty, (3) the client suffered an injury in the form of actual damages, and (4) the actual damages resulted as a proximate cause of the breach." *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008) (citing *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 199 (2006)). To state a cause of action for breach of contract, the plaintiff must allege (1) the

existence of a valid and enforceable contract, (2) substantial performance by the plaintiff, (3) a breach by defendant, and (4) resultant damages. *W.W. Vincent and Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 759 (2004). Whether a legal malpractice claim is brought in tort or contract, a plaintiff must plead facts establishing that the breach was the proximate cause of the alleged damages. *Radtko v. Murphy*, 312 Ill. App. 3d 657, 665 (2000).

¶ 49 Gunlicks claims that the court erred in dismissing his legal malpractice claims on the ground that he failed to sufficiently allege proximate cause. He argues that he was only required to plead a "but for" relationship and that the court held him to a heightened pleading burden when it required him to plead "what Mayer Brown should have done differently that would have prevented the SEC action against him."

¶ 50 Mayer Brown responds that Gunlicks' argument presents a "false distinction." Specifically, Mayer Brown argues that "adequately pleading a but-for relationship requires pleading *sufficient facts* to show that there actually was something the lawyer supposedly should have done differently that would have prevented the claimed harm."

¶ 51 Our supreme court recently stated the proper standard for proximate cause in *In re Estate of Powell*, 2014 IL 115997. The supreme court explained that "[t]o satisfy the element of proximate cause, the plaintiff must plead sufficient facts to establish that 'but for' the negligence of the attorney, the plaintiff would not have suffered actual damages." *Id.* ¶ 24.

¶ 52 Here, Gunlicks has largely failed to allege with specificity any of the facts relevant to *why* or *how*, but for the purported omissions of Mayer Brown, he would not have been subjected to the 2009 SEC enforcement proceeding, the freeze on his personal assets, and the receivership over Founding Partners. In all but two of his malpractice claims, Gunlicks has merely alleged negligent conduct by Mayer Brown and concluded that such conduct proximately caused the

2009 SEC action and injunction, as well as the damages he suffered. He has not alleged the specific violations cited by the SEC in its complaint, or the violations cited by the court in entering the injunction; thus, he has not pleaded specific *facts* that link Mayer Brown's alleged negligent acts and/or omissions to the 2009 SEC action and the resultant losses to him personally.

¶ 53 In *Kniznik v. Quick*, 130 Ill. App. 2d 273 (1970), this court rejected similar allegations of proximate cause. There, the plaintiff alleged that " 'as a direct and proximate consequence of the actions of defendant \*\*\* the plaintiff suffered actual monetary damages.' " *Id.* at 279. This court found that the plaintiff's proximate cause allegations were "mere conclusions" and held that the trial court properly dismissed the complaint "because of the conclusionary [*sic*] nature of the pleadings." *Id.* We find, as in *Kniznik*, that the majority of Gunlicks proximate cause allegations are conclusory and thus do not suffice to state a cause of action for attorney malpractice.

¶ 54 The only two claims in which Gunlicks refers to the violations cited by the SEC are his claims that Mayer Brown: (1) failed to ensure compliance with SEC regulations; and (2) failed to ensure compliance with the 2007 SEC cease-and-desist order. As for the first of these claims, we find that Gunlicks has again failed to allege sufficient facts to establish a cause of action for attorney malpractice. In his complaint, Gunlicks asserted that the SEC alleged that he and Founding Partners violated the terms of the 2007 cease-and-desist order. He alleged that "MAYER BROWN failed to advise [him] that the offering memoranda prepared by MAYER BROWN included representations that MAYER BROWN knew to be inaccurate and failed to advise that the continued use of those offering memoranda could potentially violate" the cease-and-desist order. While Gunlicks referred to an allegation made by the SEC in this claim, he failed to allege what conduct the SEC cited when it alleged that the 2007 order had been

violated, such that Mayer Brown's purportedly negligent conduct can be linked to the 2009 SEC action. Gunlicks also failed to allege what representations Mayer Brown knew to be inaccurate and thus has provided no specific *facts* establishing a breach of duty by Mayer Brown. Under these circumstances, we find that Gunlicks has failed state a viable claim that Mayer Brown was negligent in failing to ensure compliance with SEC regulations.

¶ 55 This leaves Gunlicks' claim that Mayer Brown failed to ensure compliance with the 2007 SEC cease-and-desist order.<sup>5</sup> According to the fourth amended complaint, Mayer Brown was "tasked" with ensuring that the 2007 order was complied with, *i.e.*, that it was sent to Founding Partners' clients and investors and that an affidavit of compliance was provided to the SEC. With respect to this claim, Gunlicks has admittedly pleaded specific facts tying Mayer Brown's allegedly negligent conduct to the 2009 SEC action. It is not enough for purposes of proximate cause, however, that the SEC filed a complaint alleging that Gunlicks failed to comply with the 2007 order. Gunlicks must allege that, but for Mayer Brown's negligence, he would not have suffered actual damages.

¶ 56 Here, the 2009 SEC complaint against Gunlicks alleged not only a violation of the 2007 cease-and-desist order, but a multitude of claims based on purported violations of various security laws and regulations not previously referenced in the 2007 order, as well as fraudulent misrepresentations made to investors and the misuse of investor funds. See *Weimann*, 150 Ill. App. 3d at 969 (noting that in reviewing a section 2-615 motion, "an appellate court may \*\*\* take judicial notice of records of proceedings in its own or other courts which contain easily verifiable, though not generally known, facts as an 'aid in the efficient disposition of litigation.'"). Pursuant to the March 2010, judgment order, Gunlicks was required to "pay

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<sup>5</sup> Mayer Brown LLP disputes that Gunlicks was its client with respect to the matters alleged in the fourth amended complaint.

disgorgement of ill-gotten gains, prejudgment interest \*\*\* and a civil penalty" pursuant to the Securities Act and the Exchange Act. Gunlicks has failed to plead that, but for Mayer Brown's failure to comply with the 2007 order, the SEC would not have filed its federal lawsuit against him individually in 2009 and obtained the judgment—to which he *consented* and waived his appeal rights—that resulted in his alleged damages. He therefore has not sufficiently pleaded proximate cause.<sup>6</sup> See *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 364-65 (2011) (to adequately plead proximate cause, the legal malpractice claimant must plead facts to show that he "*would have been able to successfully oppose*" the adverse legal result) (emphasis in original). In light of Gunlicks' failure to state a sufficient claim of attorney malpractice against Mayer Brown, we find that the circuit court properly dismissed Count I of the fourth amended complaint for attorney malpractice.

¶ 57 We find Gunlicks' reliance on *Goldfine v. Barack, Ferrazzano, Kirschbaum and Perlman*, 2013 IL App (1st) 111779, *appeal allowed*, No. 116362 (Sep. 25, 2013), to be unpersuasive. In *Goldfine*, the plaintiffs brought a legal malpractice action against a law firm and several of its partners to recover damages resulting from the defendants' failure to preserve a cause of action under the Illinois Securities Law. *Goldfine*, 2013 IL App (1st) 111779, ¶ 1. The case proceeded to trial where the court found that the law firm "had breached its duties to plaintiffs by negligently failing to carry out its assignment to preserve plaintiffs' Illinois Securities Law claim and that the loss of that claim had been caused by [the law firm's] negligent conduct." *Goldfine*, 2013 IL App (1st) 111779, ¶¶ 12-13. On appeal, the defendants argued that the plaintiffs had failed to prove that their loss was proximately caused by the defendants' legal malpractice. *Goldfine*, 2013 IL App (1st) 111779, ¶ 81. This court disagreed, finding that the plaintiffs

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<sup>6</sup> Because Gunlicks cannot state a claim of attorney malpractice without sufficiently pleading the element of proximate cause, we need not address Mayer's Brown's additional argument that Gunlicks also failed to sufficiently plead the element of duty.

proved proximate cause where: (1) they filed an Illinois Securities Law claim; (2) their claim was dismissed as time-barred because a timely six-month rescission notice had not been served; and (3) they established that the damages they were entitled to under the Illinois Securities Law were greater than the settlement they had received when settling other non-Illinois Securities Law claims. *Goldfine*, 2013 IL App (1st) 111779, ¶ 84.

¶ 58 Gunlicks claims *Goldfine* is on point and controls our disposition, but provides no analysis as to why he believes *Goldfine* applies in this case. We note that the procedural posture of the instant case is entirely different from that in *Goldfine*, *i.e.*, a section 2-615 motion to dismiss rather than a trial. Also, we note that the facts of *Goldfine* are different, *i.e.* the failure to preserve a cause of action rather than the failure to avoid an SEC suit and the resulting penalties. We find *Goldfine* distinguishable and Gunlicks' reliance on that case to be without merit.

¶ 59 2. Breach of Fiduciary Duty

¶ 60 Gunlicks next claims that the circuit court erred in dismissing his breach of fiduciary duty claims as duplicative of his legal malpractice claims. We note that " 'when \*\*\* the same operative facts support actions for legal malpractice and breach of fiduciary [duty] resulting in the same injury to the client, the actions are identical and the later should be dismissed as duplicative.' " *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 760 (2008). Here, Gunlicks' claims of breach of fiduciary duty were based on "the omissions and failures of MAYER BROWN as articulated in the previous counts" Gunlicks also alleged the same injury as the previous counts, *i.e.*, the SEC filing suit and obtaining an injunction. Gunlicks' breach of fiduciary duty claims were duplicative of his legal malpractice claims and, thus, were properly dismissed. *Nettleton*, 387 Ill. App. 3d at 760. We conclude the circuit court did not err in dismissing the fourth amended complaint.

¶ 61

## 3. Rule 23 Order

¶ 62 Lastly, we address a matter that is not relevant to the merits of this appeal; however, we note that it is worth mentioning as a cautionary point. In a footnote contained in his reply brief, Gunlicks has included a 10-line discussion about a decision, issued pursuant to Rule 23, involving a case that purportedly involved "a similar question regarding the proximate cause prong of the plaintiff's legal malpractice." Gunlicks notes that he "recognizes this is a Rule 23 and cites [sic] not for authority but rather as an illustration of when a reviewing Court has allowed a pleading to stand." It is evident that he is aware that Rule 23 orders are "not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Ill. S. Ct. R. 23(e)(1). The Rule 23 order cited by Gunlicks was not raised to support any of these theories and therefore has no precedential value. We strongly caution parties to refrain from violating Rule 23 for "illustrative" purposes.

¶ 63

## B. Denial of Leave to File Fifth Amended Complaint

¶ 64 Gunlicks next contends that the court erred in denying his motion for leave to file a fifth amended complaint. He claims that the proposed fifth amended complaint contained sufficient facts to establish the element of proximate cause and that a majority of the *Loyola* factors were satisfied. Mayer Brown responds that the trial court did not abuse its discretion in denying Gunlicks leave to file a fifth amended complaint where it expressly warned him that he had "one last try" to state a claim in the fourth amended complaint and where he had four chances to sufficiently plead his claims.

¶ 65

Section 2-616 of the Code grants the circuit court discretion to allow the amendment of a pleading "on just and reasonable terms" at any time before final judgment is entered. 735 ILCS

5/2-616(a) (West 2012). The decision regarding leave to amend a complaint rests within the sound discretion of the circuit court and will not be reversed absent an abuse of that discretion.

*I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010).

¶ 66 In determining whether the court abused its discretion in denying leave to file a proposed amendment, we consider four factors: “(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). “The plaintiff must meet all four factors, and ‘if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis.’” *I.C.S. Illinois*, 403 Ill. App. 3d at 220 (quoting *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004)).

¶ 67 Here, Gunlicks provided additional allegations in his proposed fifth amended complaint that specifically addressed the element of proximate cause with respect to his claim of attorney malpractice. He alleged that “[i]n 2009, the SEC brought an action against [him] and Founding Partners alleging several SEC violations occurring between 2004 and 2009, including an allegation that the 2007 Settlement Agreement (Cease and Desist Order) had also been violated.” He alleged that, at all times mentioned in the SEC complaint, Mayer Brown had been advising him and Founding Partners on compliance issues; that he and Founding Partners complied with that advice; and that Mayer Brown assured them that they were in compliance with all SEC regulations and the 2007 Settlement Agreement. Gunlicks alleged that “[b]ased upon the 2009 SEC complaint, which the SEC prevailed on, [he] and Founding Partners were NOT in compliance with several SEC regulations and were NOT in compliance with the 2007 Settlement

Conference." He alleged that if Mayer Brown had "given proper advice to [him] and Founding Partners on issues of compliance, [he] and Founding Partners would have acted upon that advice, assured compliance, and the 2009 SEC action would have been avoided."

¶ 68 Although it is clear that Gunlicks made some effort to address the deficiencies in his earlier pleading, we nonetheless find that the circuit court properly denied Gunlicks leave to file the proposed fifth amended complaint because the deficiencies were still not cured. Gunlicks again fails to allege, with regard to proximate cause, the specific violations cited by the SEC in its complaint or by the court in entering the injunction, meaning there continues to be a lack of *specific factual* allegations that link Mayer Brown's allegedly negligent acts to the 2009 SEC action and the resultant damages. Ultimately, Gunlicks has failed to adequately plead his claims despite having been given four opportunities to do so and being expressly warned prior to filing the fourth amended complaint that it was his "one last try." Under the circumstances, we find that the circuit court acted properly in bringing this case to an end. *Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 750 (1981) ("The trial court may bring the litigation to an end when it believes that further amendments to pleadings will not further the interests of justice.").

¶ 69 C. Denial of Pretrial Discovery

¶ 70 Gunlicks lastly contends that the circuit court erred in denying him pretrial discovery. In his opening brief, Gunlicks has offered reasons as to why he should have been granted discovery in this case. However, he has completely failed to identify the specific ruling of the court that he seeks to challenge. Moreover, as Mayer Brown correctly notes, there actually was no denial of discovery in this case; rather, the court merely stayed the motion to compel.

¶ 71 The supreme court rules provide that the appellant's brief shall contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). "An issue not clearly defined and sufficiently presented fails to satisfy the requirements of Supreme Court Rule 341(h)(7) and is, therefore, waived." *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007). Here, Gunlicks failed to adequately present his discovery argument in his opening brief in violation of the supreme court rules. We therefore find that he has waived the issue for review.

¶ 72 For the reasons stated, we affirm the dismissal of Gunlicks' fourth amended complaint by the circuit court of Cook County and its denial of leave to file a fifth amended complaint.

¶ 73 Affirmed.