To Be Argued By:
FREDERICK B. WARDER III

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

EXCELSIOR CAPITAL LLC,

Plaintiff-Appellant,

—against—

K&L GATES LLP,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

In this legal malpractice action, Plaintiff-Appellant Excelsior Capital LLC ("Excelsior") appeals the Motion Court's (Cynthia Kern, J.S.C.) Order granting Defendant-Respondent K&L Gates LLP's ("K&L") motion to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7). Excelsior fails to demonstrate any error in the Court's ruling, and the dismissal of the Complaint should be affirmed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Question: Was the Motion Court correct in holding that judicial error was an intervening cause that broke the chain of causation of Excelsior's malpractice claim?

Answer: Yes. All of Excelsior's alleged damages were caused by its appeal of an undisputedly erroneous ruling in the underlying litigation. Excelsior conceded below that K&L's alleged negligence was unrelated to the underlying judicial error, and Excelsior alleges no facts demonstrating the judicial error was the reasonably foreseeable consequence of the alleged malpractice.

2. Question: Was the Motion Court correct in holding that Excelsior's allegation that Allen would have "reaffirmed" millions in guaranties is speculative and insufficient to support Excelsior's malpractice claim?

Answer: Yes. Allen litigated for years against Excelsior over the enforceability of his guaranties, and Excelsior concedes that such litigation was unavoidable. Excelsior's theory of causation depends on its allegation that prior to the litigation, Allen would have willingly waived one of his major defenses to the enforceability of the guaranties, and would have done so in exchange for no consideration.

STATEMENT OF FACTUAL ALLEGATIONS

In its brief, Excelsior recites a number of allegations from its Complaint concerning K&L's purported negligence that are tied to no claim of causation or damages, and thus are irrelevant to this appeal. App.'s Br. at 4-8. Excelsior's recitation of the allegations relevant to this appeal begin under the title "The Malpractice that Injured Excelsior." *Id.* at 8. A summary of those allegations follows.

The Complaint alleges that in 2004 Excelsior made four loans, totaling $18 million, to Superior Broadcasting Co. ("Superior"), a company primarily owned and funded by Robert Allen ("Allen"), an investment tycoon. (R. 18 at ¶¶ 4-6). Three of those loans, totaling $13 million, were guaranteed by Allen. (R. 17-18 at ¶¶ 3, 6). Then, in April 2005, Allen requested that Excelsior extend the maturity dates of the loans. (R. 18 at ¶ 7). Excelsior agreed and so modified the loans. (*Id.*).

In 2006, Excelsior retained K&L as transactional counsel to "provide[] legal advice" concerning the loans. (R. 17 at ¶ 3; R. 19 at ¶ 8). When K&L was retained, the negotiation and drafting of the loans and guaranties, and the subsequent extension of the loans, had already been completed. (*See* R. 18-19 at ¶¶ 5-8).

Under New York law, "a guarantor's obligations could be discharged if the underlying notes were modified without the guarantor's consent." (R. 22 at ¶ 18). However, Allen in fact did consent to the modification of the loans, since, among other things, he personally requested the loans be extended. (*See* R. 18 at ¶ 7; R. 20 at ¶ 13; R. 24-25 at ¶¶ 24-26). Thus, the Complaint affirmatively alleges that Allen's guaranties of the loans were at all times valid and enforceable, and did not require any further action by any party to become or remain valid and enforceable. (*Id.*). Nevertheless, the Complaint alleges that in May 2006 K&L was negligent in failing to secure from Allen, for no consideration, an "agreement or letter reaffirming the Guaranties." (R. 21 at ¶ 15).

Excelsior retained new litigation counsel and filed suit against Allen and Superior in 2007. Excelsior's claims were tried to a jury in June 2009. (R. 24 at ¶ 24 & fn. 2). At the conclusion of evidence, the trial judge dismissed Excelsior's causes of action against Allen with regard to the guaranties. (*Id.*) As Excelsior acknowledges in its Complaint, the trial court's dismissal was an error of law. (*Id.*)

After the claims against Allen were erroneously dismissed, the jury found for Excelsior on its claims against Superior, and a judgment for the full amount of the loans was entered against Superior. (R. 95-96).

Excelsior appealed the dismissal of its claims against Allen. (R. 24 at ¶ 24 & fn. 2). On March 1, 2011, the Second Department issued an opinion unanimously reversing the dismissal of those claims and remanding them for trial. (*Id.*).

Shortly after the Second Department's decision issued, Allen died. (R. 24 at ¶ 24 & fn. 1). Excelsior pursued its claims against the Allen estate. (*Id.*) At trial, the jury found on September 21, 2011 that the guaranties were valid despite the modification of the loans, and a judgment was entered on behalf of Excelsior for the full amount of the Allen guaranties. (*Id.*)

ARGUMENT

I. LEGAL STANDARDS

On a motion to dismiss, the Court must assume all allegations in the Complaint are true, afford the plaintiff reasonable inferences therefrom, and evaluate whether the facts as alleged are legally sufficient to state a claim. *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (2014). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

Moreover, "factual claims either inherently incredible or flatly contradicted by documentary evidence" are not entitled to a presumption of truth on a motion to dismiss. *Franklin v. Winard*, 199 A.D.2d 220, 221 (1st Dep't 1993) (affirming dismissal of legal malpractice claim).

Excelsior's sole claim in this action is for legal malpractice. The elements of a legal malpractice claim under New York law are (1) that the attorney was negligent; (2) that but for such negligence plaintiff would not have suffered the losses it claims; and (3) proof of actual damages. *Global Bus. Inst. v. Rivkin Radler LLP*, 101 A.D.3d 651, 651 (1st Dep't 2012).

II. THE MOTION COURT CORRECTLY FOUND THE UNDERLYING JUDICIAL ERROR WAS AN INTERVENING CAUSE OF EXCELSIOR'S ALLEGED DAMAGES

Excelsior alleges K&L committed malpractice in 2006 when, while engaged in attempted renegotiations of the underlying loans and guaranties, it failed to secure a "reaffirmance" of the pre-existing guaranties from Allen. And yet Excelsior's only alleged damages are those supposedly resulting from Excelsior's successful appeal of the undisputedly erroneous decision in the Allen litigation entered more than three years after the alleged malpractice. That judicial error concerned the sufficiency of evidence that Allen had consented to the loan modifications before the modifications were made. It bears no connection to K&L's alleged negligence. The Motion Court was therefore correct to find the

judicial error was an intervening cause of Excelsior's alleged damages as a matter of law, breaking the chain of causation and mandating dismissal of its claim.

On appeal, Excelsior argues that the underlying judicial error is not an intervening cause of its alleged damages, on the theory that K&L's alleged negligence foreseeably caused the judicial error. Remarkably, Excelsior fails to acknowledge that in its briefing below, it argued precisely the opposite:

> Justice Warshawky's [*sic*] error of law in this case as not an intervening cause excusing K&L Gates from liability for its malpractice because, *inter alia*, the error was unrelated to Defendant's alleged negligence.

R. 441.

Excelsior was correct to acknowledge below that the underlying judicial error had nothing to do with K&L's alleged malpractice. Excelsior can point to no allegations that establish any causal connection between the alleged malpractice and the judicial error. Excelsior is reduced to arguing that it was reasonably foreseeable that K&L's alleged transactional malpractice in May 2006 would cause "an unfavorable judicial outcome" – a definition of intervening cause so abstract that it would render K&L the proximate cause of any adverse determination by the court in the underlying litigation. App.'s Br. at 12, 24, 25. As Excelsior's own case law shows, and as recent Court of Appeals precedent confirms, that is insufficient to satisfy Excelsior's burden to plead proximate cause.

A. A Legal Malpractice Claim Must Be Dismissed Where the Plaintiff Alleges Damages Resulting from an Intervening Cause

In order to survive a motion to dismiss, a plaintiff claiming legal malpractice must allege both causation and actual damages. *Global Bus.*, 101 A.D.3d at 651. It is well established under New York law that in a legal malpractice case, as with other negligence-based causes of action, an intervening cause (also known as a superseding cause) of plaintiff's damages will break the chain of causation and warrant dismissal of the claim. *Brooks v. Lewin*, 21 A.D.3d 731, 735 (1st Dep't 2005); *see also GUS Consulting GMBH v. Chadbourne & Parke LLP*, 74 A.D.3d 677, 679 (1st Dep't 2010).[1]

An act is an intervening cause when (i) the defendant is allegedly negligent, and (ii) a subsequent act by a different actor "produces a different result" than what

[1] In its appellate briefing, Excelsior attempts to fault the Motion Court for failing to differentiate between "mere []… intervening cause" and "superseding cause." App.'s Br. at 16-17, 34. Excelsior even goes so far as to argue that the Motion Court "simply ignored the governing principals of law" and erroneously held that "any event subsequent to an attorney's malpractice" will break the chain of causation. *Id.* at 16. That is a gross mischaracterization of the Motion Court's opinion. As a matter of well-established law, intervening cause breaks the causal chain, and courts – including this Court – routinely use the phrases "intervening cause" and "superseding cause" interchangeably. *See, e.g.*, *Powers v. 31 E 31 LLC* 123 A.D.3d 421, 423 (1st Dep't 2014); *Brooks v. Lewin*, 21 A.D.3d 731, 734 (1st Dep't 2004). And in the briefing below, both Excelsior and K&L used the term "intervening cause" to describe what Excelsior now insists must be termed "superseding cause." R. 135-139, 441-442, 459-460.

the original negligent act could reasonably have been expected to cause. *Sheehan v. New York*, 40 N.Y.2d 496, 503 (1976) (quotation omitted). Thus, the subsequent act breaks the chain of causation if it is "independent of, or far removed from the defendant's conduct," or "not foreseeable in the normal course of events." *Kriz v. Schum*, 75 N.Y.2d 25, 36 (1989) (quoting *Deridarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980)).

Although issues of causation and foreseeability are sometimes questions of fact for the jury, the plaintiff has the burden of adequately pleading proximate cause. *E.g.*, *Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 293 (1st Dep't 2001). The plaintiff thus has the burden of alleging facts sufficient to establish that any intervening acts causing plaintiff's damages are the reasonably foreseeable consequence of the defendant's negligence. *E.g.*, *Pyne v. Block & Assocs.*, 305 A.D.2d 213, 213 (1st Dep't 2003); *Mateo v. Akerman Senterfitt*, 82 A.D.3d 515, 518 (1st Dep't 2011).

New York courts dismiss legal malpractice claims at the pleading stage where the facts as alleged demonstrate that the chain of causation is broken by an intervening cause. *See Pyne*, 305 A.D.2d at 213 (1st Dep't 2003) (dismissing complaint at pleadings stage where, despite defendant's alleged negligence, the actions of successor counsel were an intervening cause); *Sherwood Grp., Inc. v. Dornbush, Mensch, Mandelstam & Silverman*, 191 A.D.2d 292, 292 (1st Dep't

1993) (same); *Winters v. Dowdall, Dowdall & Assocs., P.C.*, 2009 NY Slip Op. 30167(U) at *6 (Sup. Ct., N.Y. Cty. 2009) (allowing malpractice claims to proceed against the attorney who allegedly advised plaintiff to retain an unqualified intermediary, but dismissing malpractice claims against remaining counsel based on "intervening acts" of that intermediary), *aff'd*, 63 A.D.3d 650 (1st Dep't 2009).

Here, it is undisputed that the intervening act at issue is the erroneous ruling by the trial court in the underlying litigation. If that judicial error was the intervening cause of whatever damages Excelsior claims, then Excelsior's legal malpractice claim fails as a matter of law.

B. Excelsior's Alleged Damages Are All the Result of the Underlying Judicial Error

Excelsior's underlying litigation against Allen and Superior went to trial in 2009 – more than three years after K&L's alleged malpractice as transactional counsel. R. 24 at ¶ 24. At trial, the judge erroneously found that the evidence of Allen's consent to the modification of the loans was insufficient as a matter of law to sustain Excelsior's claims against Allen, and entered a directed verdict in favor of Allen on the guaranties. *Id.* Excelsior appealed that ruling, and the Second Department unanimously reversed and remanded for trial (which Excelsior won). Excelsior alleges that its damages in this case are the cost and delay resulting from its successful appeal of the trial judge's erroneous ruling. App.'s Br. at 11; R. 439-440.

This is therefore not a case in which the law firm is alleged to have botched the underlying transaction. The underlying transaction took place well before K&L was retained, and Excelsior concedes that the loans and guaranties were at all times fully valid and fully enforceable. *See* R. 18 at ¶ 7; R. 20 at ¶ 13; R. 24-25 at ¶¶ 24-26. This is also not a case in which the law firm is alleged to have caused the plaintiff to lose the underlying litigation. Excelsior won at trial and on appeal, received jury verdicts that found the loans and guaranties to be valid and enforceable, and received judgments for the full amount of both the loans and the Allen guaranties, plus interest. R. 24 at ¶ 24 & fn. 2; R. 95-96. Instead, this is a case in which the plaintiff's alleged damages resulted from the successful appeal of a judicial error. App.'s Br. at 11; R. 439-440.

Finally, Excelsior conceded in its briefing below that it does not claim that K&L's alleged negligence forced Excelsior into unnecessary litigation, nor does it claim that Allen would have foregone litigation. R. 439-440.[2] There is thus no

[2] When Excelsior sued Allen on the guaranties in 2007, Allen vigorously opposed and raised in his verified answer 20 affirmative defenses to Excelsior's claims. R. 89-91, 133. For example, Allen averred that the loans had been procured by fraud, and that they had already been repaid. R. 89-91. The record also shows that Allen's lawyer, Robert Wessely ("Wessely"), argued many of those defenses in 2006, before the underlying litigation was filed. R. 107-108. Those defenses have nothing to do with the modification of the underlying loans, or with K&L's alleged malpractice. When confronted with this record evidence, Excelsior conceded below that Allen would have litigated even if he had "reaffirmed" the guaranties. R. 439-440.

dispute that litigation with Allen was inevitable, even if he had signed a "reaffirmance" of the guaranties.

Because Excelsior has conceded that litigation with Allen was inevitable, and because all of Excelsior's alleged damages resulted from Excelsior's appeal of the erroneous decision in the underlying litigation, the question posed by Excelsior's appeal is whether K&L's alleged negligence was the proximate cause of the judicial error.

C. Judicial Error Is an Intervening Cause If That Error Is Unrelated to the Alleged Malpractice

Where judicial error caused a legal malpractice plaintiff's alleged damages, the plaintiff's burden of pleading causation is a high one. The Court of Appeals has recently held that, as a matter of law, a legal malpractice plaintiff cannot adequately plead the element of proximate causation if the result in the underlying litigation were "likely" the result of judicial error. *Grace v. Law*, 24 N.Y.3d 203, 210-211 (2014).

As with other forms of intervening acts, judicial error is an intervening cause of a plaintiff's damages, thereby breaking the chain of causation, if the error was "independent of, or far removed from the defendant's conduct," or "not foreseeable in the normal course of events" at the time of the alleged negligence. *Kriz v. Schum*, 75 N.Y.2d 25, 36 (1989) (quoting *Deridarian v. Felix Contractor Corp.*, 51 N.Y.2d 308, 315 (1980)). Thus, the legal malpractice plaintiff must adequately

plead that at the time of the alleged negligence, it was reasonably foreseeable to the attorney that his negligence would result in the error of law eventually committed by the judge.

The plaintiff must plead that the actual error of law committed by the judge was a reasonably foreseeable consequence of the attorney's malpractice. It is insufficient to plead that judicial error, in the abstract, was reasonably foreseeable. "Were it otherwise, an attorney would be subject to liability every time a judge erroneously ruled against the attorney's client. In effect, an attorney would become a guarantor of correct judicial decisionmaking – a result we cannot accept." *Crestwood Cove Apts. Bus. Trust v. Turner*, 164 P.3d 1247, 1256 (Utah 2007) (cited with approval by *Grace*, 24 N.Y.3d at 210).[3] The plaintiff therefore must allege the attorney's malpractice was directly related to judge's error of law. *See, e.g.*, *Rudolf v. Shayne*, 8 N.Y.3d 438 (2007) (attorney directly requested the erroneous instruction given by the judge); *Skinner v. Stone Raskin & Israel*, 724 F.2d 264 (2d Cir. 1983) (attorney's negligence in responding to notice of default caused erroneous entry of default).

[3] Similarly, in the personal injury context, a plaintiff must demonstrate that the actual intervening act, not a generalized or abstract risk of harm, was reasonably foreseeable at the time of the alleged negligence. *Kriz*, 75 N.Y.2d at 36 (citing *Boltax v. Joy Day Camp*, 67 N.Y.2d 617, 619 (1986)).

Furthermore, it is insufficient to allege that the judicial error would not have occurred if the attorney had not been negligent. *See Cedeno v. Gumbiner*, 806 N.E.2d 1188, 1193 (Ill. App. Ct. 2004). The plaintiff must plead that the intervening cause was the reasonably foreseeable consequence of the alleged negligence, not merely the factual or "but-for" result of that negligence. *See, e.g.*, *Deridarian*, 51 N.Y.2d at 315 (citing *Ventricelli v. Kinney System Rent a Car, Inc.*, 45 N.Y.2d 950 (1978)).

D. K&L's Alleged Malpractice Is Unrelated to the Judicial Error, Which Was Not Reasonably Foreseeable as a Matter of Law

Excelsior fails to meet its burden of adequately pleading that the underlying judicial error was the reasonably foreseeable consequence of K&L's alleged malpractice.

1. Excelsior Alleges K&L Was Negligent in Failing to Secure a "Reaffirmance" of the Guaranties

Excelsior's theory of malpractice is strained at best. The Complaint alleges K&L was first retained in 2006, when Excelsior was attempting to re-negotiate the loans and guaranties. By the time K&L was retained, those loans and guaranties had already been executed, and Excelsior had already extended the loans at Allen's request. R. 18-19 at ¶¶ 6-8. It is undisputed that the guaranties were always valid and enforceable, because Allen himself orally requested and consented to the modification of the loans he guarantied. R. 18 at ¶ 7. Excelsior nevertheless

alleges K&L was negligent in failing to secure a *post hoc* "reaffirmance" of Allen's consent to the modification of the loans. R. 21 at ¶ 15.

Excelsior specifically points to a letter that Allen signed on May 26, 2006, drafted by a third party but supposedly "approved" by K&L, in which Allen agreed that Excelsior was not waiving its pre-existing rights under the loans and guaranties while the parties attempted to renegotiate new terms. Excelsior argues that letter should not have been a non-waiver letter, but rather should have been drafted to "reaffirm" the guaranties.[4] But Excelsior does not, and cannot, allege (i) that Excelsior ever asked or instructed K&L to secure such a reaffirmance of the guaranties; (ii) that K&L ever endeavored to secure a reaffirmance; or (iii) that K&L had any ability or authorization to offer Allen any consideration in exchange for a reaffirmance. And because there is no dispute that Allen's guaranties were already valid and enforceable, there is no allegation that the lack of a "reaffirmance" affected Excelsior's rights under the guaranties in any way. Nevertheless, Excelsior's position is that K&L committed malpractice in 2006 by failing to secure from Allen a reaffirmance of millions in guaranties in exchange for nothing. R. 25 at ¶ 26.

[4] At one point in its brief, Excelsior argues that K&L mistakenly believed the May 26 letter would function as a reaffirmance of the guaranties. App.'s Br. at 10. Excelsior offers no citation for that argument, because it has none: no such factual allegation appears anywhere in the Complaint or in the Record.

2. The Underlying Judicial Error Concerned Allen's Consent to the Loan Modifications, Which Occurred Before Excelsior Retained K&L

Excelsior entered into the loans and guaranties in 2004, and then subsequently modified the loans at Allen's request in 2005. R. 18 at ¶¶ 6-7. Excelsior subsequently retained K&L in 2006 to attempt to renegotiate the loans and guaranties. R. 19 at ¶ 8. After those re-negotiations with Allen broke down, Excelsior retained new counsel to sue Superior and Allen in early 2007. R. 24 at ¶ 24 & fn. 2.

In 2009, the case went to trial, and Excelsior presented evidence that Allen himself had requested, and thereby consented to, the loan modifications. In June 2009, the judge presiding over the underlying trial, Justice Warshawsky, erroneously found that the evidence of Allen's consent was insufficient as a matter of law to sustain Excelsior's claims against Allen, and entered a directed verdict in Allen's favor. *Id.* Excelsior appealed that ruling, and the Second Department unanimously reversed, holding:

> [T]he evidence presented at trial provided a rational basis upon which the jury could have found that Allen, who allegedly requested an extension of the maturity dates of the notes he had guaranteed, and who was allegedly consulted regarding the decision to extend the maturity dates, did in fact consent to the extensions. Accordingly, the Supreme Court erred in dismissing Excelsior's causes of action to recover upon Allen's three personal guarantees, and the matter must be remitted to the Supreme Court, Nassau County, for a new trial on those causes of action.

Excelsior Capital LLC v. Superior Broad. Co., 82 A.D.3d 696, 699 (2d Dep't 2011) (internal citations omitted).

3. As Excelsior Admitted Below, K&L's Alleged Malpractice as Transactional Counsel Is Unrelated to the Underlying Judicial Error

On the face of the Complaint, there is no connection between K&L's alleged malpractice and the underlying judicial error. This is not a case where litigation counsel is alleged to have miscited the law, or proposed an erroneous instruction, or otherwise induced the judge to make an erroneous ruling. K&L's alleged malpractice was in its role as transactional counsel, more than three years before the judicial error. K&L could not have reasonably foreseen, when it was attempting to renegotiate the loans in 2006, that a judge in 2009 would make an erroneous ruling about the evidentiary effect of events that had taken place in 2005.

Furthermore, the judge's error of law concerned the sufficiency of evidence regarding Allen's request for, and consent to, the modification of the loans in 2005. The court's error was in finding the testimony and evidence concerning Allen's consent to be insufficient to present to the jury. But K&L had no part whatsoever in obtaining Allen's consent to the loan modifications – K&L was not even retained until 2006. And K&L is not alleged to have been in any way negligent with regard to how the evidence of Allen's consent was presented at the trial. In

short, Justice Warshawsky's erroneous ruling did not relate in any way to K&L's alleged malpractice in the 2006 attempted renegotiation of the loans and guaranties, the drafting of May 26, 2006 letter, or the presence or absence of any "reaffirmance" of the guaranties. As a matter of law, Justice Warshawsky's error of law was not a reasonably foreseeable consequence of K&L's alleged malpractice in 2006.

In fact, in its briefing below, Excelsior admitted that K&L's alleged malpractice was unrelated to the underlying judicial error:

> Justice Warshawky's [*sic*] error of law in this case was not an intervening cause excusing K&L Gates from liability for its malpractice because, *inter alia*, the error was unrelated to Defendant's alleged negligence. Instead, the Nassau Court erred by concluding that no rational jury could find that Allen orally requested and agreed to the modification of the notes.

R. 441 (emphasis added). Excelsior also attempted to distinguish the finding that judicial error was an intervening cause in *McCluskey v. Gabor & Gabor*, 18 Misc. 3d 1129(A) (Sup. Ct., Nassau Cty. 2008), *aff'd*, 61 A.D.3d 646 (2d Dep't 2009), on the grounds that "the court's error of law in *McCluskey* was directly linked to the alleged malpractice, which is not the case here." R. 442 (emphasis added).

This Court can and should decline to hear Excelsior argue for the first time on appeal a position directly contrary to the position it took below. *See, e.g.*, *Kohn v. City of New York*, 69 A.D.3d 463, 463-64 (1st Dep't 2010). That

is especially true here because, in making its new argument, Excelsior relies on evidence not part of the record on appeal and not presented to the Motion Court. App.'s Br. at 24; *id.* at 5-6 & fn. 3; *see Lee v. Luk*, 132 A.D.3d 515, 516 (1st Dep't 2015); *Titova v. D'Nodal*, 117 A.D.3d 431, 431 (1st Dep't 2014).

But even if this Court were to consider Excelsior's new argument, Excelsior was correct when it pointed out below that the judicial error did not concern the subject of K&L's alleged malpractice. That is the definition of an intervening cause, and it breaks the chain of causation.

E. Case Law from New York and Other Jurisdictions Confirms that the Underlying Judicial Error Is an Intervening Cause

The Court of Appeals recently weighed in on the question of judicial error and legal malpractice causation in *Grace v. Law*, 24 N.Y.3d 203 (2014). In *Grace*, the Court of Appeals held that legal malpractice claims fail as a matter of law where the plaintiff failed to appeal an adverse decision in the underlying litigation, if an appeal was "likely to succeed." 24 N.Y.3d at 210. In so holding, the Court of Appeals followed the reasoning of several other jurisdictions, as well as that of the New York Appellate Divisions, that "an attorney should be given the opportunity to vindicate him or herself on appeal of an underlying action prior to being subjected to a legal malpractice suit." *Id.* at 209.

Importantly, the *Grace* court indicated that its ruling was based on the "proximate cause element" of legal malpractice, and for that proposition cited with approval a case from the Utah Supreme Court, which had likewise "consider[ed] proximate cause in analyzing this issue." *Id.* at 210 & fn. 2 (citing *Crestwood Cove Apts. Bus. Trust v. Turner*, 164 P.3d 1247 (Utah 2007)). In that case, the Utah Supreme Court analyzed the same cases as did the Court of Appeals in *Grace*. *Crestwood Cove*, 164 P.3d at 1251-54. From that analysis the court concluded that the requirement that plaintiffs must first pursue meritorious appeals was simply a different "guise" for the legal principle that "a plaintiff cannot establish a claim for legal malpractice where judicial error was the proximate cause" of the plaintiff's alleged injury. *Id.* at 1255.

In *Crestwood Cove*, the Utah Supreme Court declined to adopt a bright-line rule with regard to malpractice plaintiffs who fail to appeal decisions below. *See id.* at 1253. The Court of Appeals was willing to go further, and in *Grace* held that the failure to pursue a likely successful appeal breaks the chain of causation as a matter of law.

In sum, the Court of Appeals has held, as a matter of law, that a legal malpractice plaintiff cannot adequately plead the element of proximate causation if an appeal would likely be successful – *i.e.*, if the result in the underlying litigation were likely the result of judicial error. *Grace*, 24 N.Y.3d

at 210-211; *see Buczek v. Dell & Little, LLP*, 127 A.D.3d 1121, 1124 (2d Dep't 2015) ("By establishing that an appeal would likely have been successful, a defendant in a legal malpractice action can establish that the alleged negligence did not proximately cause the plaintiff's damages." (citing *Grace*, 24 N.Y.3d at 210)). In other words, if judicial error likely caused the plaintiff's damages, and the plaintiff fails to appeal that erroneous ruling, then the judicial error is an intervening cause as a matter of law.

The Court of Appeals' analysis in *Grace* confirms that, absent extraordinary circumstances, judicial error in the underlying litigation will be an intervening cause that breaks the chain of causation required to plead legal malpractice. Moreover, if clients could successfully appeal and then turn around and allege attorney negligence caused them to incur the cost of an appeal, the policy rationale underlying the prevention of limiting malpractice suits based on judicial error would be frustrated. *See Grace*, 24 N.Y.3d at 210; *see also Zarin v. Reid & Priest*, 184 A.D.2d 385, 385-86 (1st Dep't 1992) (affirming dismissal, at the pleadings stage, of legal malpractice complaint for failing to plead causation where plaintiff "actually prevailed" in the underlying litigation after a successful appeal).

The only pre-*Grace* New York case to directly address judicial error as intervening cause reached a similar conclusion. In *McCluskey v. Gabor &*

Gabor, 18 Misc. 3d 1129(A) (Sup. Ct., Nassau Cty. 2008), *aff'd*, 61 A.D.3d 646 (2d Dep't 2009), the defendant attorney had attempted to introduce certain newly discovered evidence in the underlying trial, but the judge had erroneously found that evidence inadmissible. *Id.* at *20. In his subsequent malpractice suit, plaintiff alleged that his lawyers were negligent for failing to introduce that evidence. *Id.* at *15-16. The *McCluskey* court dismissed plaintiff's malpractice claim. It found that the new evidence had, in fact, been admissible as a matter of law, but held that the trial judge's "incorrect evidentiary ruling was an intervening cause which led to the unfavorable verdict." *Id.* at *20. In *McCluskey*, unlike here, plaintiff couched his malpractice claim in terms of failing to prevent judicial error; nevertheless, there were no facts to indicate the particular judicial error that occurred was reasonably foreseeable, and so the judicial error was an intervening cause.

Courts from other jurisdictions have come to similar conclusions. For example, the Court of Appeals of Michigan affirmed the dismissal of a plaintiff's legal malpractice complaint on the pleadings, where the plaintiff sought damages based on the two years he spent in prison while his conviction was successful appealed. *Simko v. Blake*, 506 N.W.2d 258 (Mich. Ct. App. 1993). The court roundly rejected the argument that attorneys may be held

liable in malpractice for erroneous judicial rulings on the theory that the attorney could have taken additional steps to avoid the need for an appeal:

> There is no motion that can be filed, no amount of research in preparation, no level of skill, nor degree of perfection that could anticipate every error or completely shield a client from the occasional aberrant ruling of a fallible judge or an intransigent jury. . . . It is unfortunate that the success of [plaintiff's] defense [in the underlying action] was delayed until this Court could correct the errors that had been made below. However, [defendant] was not [plaintiff's] insurer against all possible misfortune. . . .

Id. at 259-260.

Similarly, in *Cedeno v. Gumbiner*, 806 N.E.2d 1188, 1193 (Ill. App. Ct. 2004), a legal malpractice plaintiff alleged the defendant lawyer had negligently filed a deficient notice of claim. The opposing party in the underlying litigation moved for summary judgment based on the deficient notice, and the court erroneously granted the motion. *Id.* at 1190.

In the ensuing malpractice suit, the Illinois Court of Appeals affirmed the dismissal of plaintiff's claims on the pleadings. The court held that as a matter of law the judicial error in granting summary judgment was an intervening cause, breaking the chain of causation. *Id.* at 1193-94. The court noted that the plaintiff had alleged but-for causation, but had failed adequately to plead that the court's error was reasonably foreseeable:

> Although [the opposing party] would not have moved for, and the circuit court would not have granted summary judgment in the absence of the defective Notice, defendants cannot be held accountable for the court's acceptance of a legally unsound basis for granting summary judgment against plaintiff. . . . [T]he circuit court's misapplication of the law served as an intervening cause, [and] it cannot be said that plaintiff's damages proximately resulted from defendant's Notice.

Id. at 1194. The same is true here. Excelsior alleges, at best, that if there had been a reaffirmance of the guaranties, the judge might not have had occasion to rule on the sufficiency of the evidence of Allen's consent in 2005 to the extension of the loans. But that allegation does not satisfy the requirement that the judge's error have been reasonably foreseeable to K&L. In fact, the lack of foreseeability is even more clear here than in *Cedeno*, where the court's erroneous ruling was based directly on the attorney's allegedly negligent conduct. Here, Justice Warshawsky's ruling concerned an evidentiary issue – sufficiency of the proof of Allen's contemporaneous consent to the loan modifications in 2005 – and was not based on K&L's conduct.

The California Court of Appeal also affirmed the dismissal of a malpractice claim on the pleadings in *Kasem v. Dion-Kindem*, 179 Cal. Rptr. 3d 711 (Ct. App. 2014). There, the underlying litigation turned on whether damage to the plaintiff's property was caused by a "hazardous material," as defined under federal environmental law. *Id.* at 714. At the underlying bench

trial, the plaintiff's attorney argued that the sewage that had caused the property damage was a "hazardous material" as defined under two federal environmental statutes. *Id.* The court erroneously rejected that argument. *Id.* at 715-16. In entering a judgment for the opposing party, the trial judge specifically "faulted [the attorney] for failing to present expert testimony" despite having the "opportunity to call expert witnesses or any witness familiar and knowledgeable with" the federal environment laws at issue. *Id.* at 716. In the subsequent malpractice suit, the plaintiff alleged the attorney was negligent in failing to call any expert witnesses to aid the judge's understanding of the relevant federal statutes. *Id.* at 714.

The lower court dismissed the legal malpractice suit on the pleadings, and the California Court of Appeal affirmed. The court noted that the attorney had "properly sought judicial notice of the relevant statutes," and that the trial judge had erred as a matter of law in refusing to do so. *Id.* at 715-16. The court thus held: "this subsequent legal malpractice action provides no remedy for the trial court's error. Judicial error by the underlying trial court can negate the elements of a legal malpractice claim. That is the case here." *Id.* at 716 (internal citations omitted).

Here, the lack of connection between the alleged malpractice and the judicial error is even more apparent than in *Kasem*. There is no allegation that

K&L committed malpractice in the underlying litigation; no allegation that in 2006 K&L had notice or reason to believe Justice Warshawsky would in 2009 erroneously find evidence of Allen's consent insufficient as a matter of law; and no allegation that K&L was negligent in failing to aid the judge's understanding of the law.

F. Excelsior's Own Cases Confirm that the Underlying Judicial Error Must Be Directly Related to the Alleged Negligence

The cases on which Excelsior relies demonstrate that courts will require a close and direct relationship between alleged malpractice and intervening judicial error before submitting the question of proximate causation to the factfinder. For example, in *Skinner v. Stone Raskin & Israel*, 724 F.2d 264 (2d Cir. 1983), the court in the underlying litigation had entered a default judgment, erroneously finding there had been no valid excuse for the default; that erroneous finding was reversed on appeal, and the case was remanded. *Id.* at 265. In the ensuing legal malpractice case, the Second Circuit held the factfinder could find the plaintiff's attorney was a proximate cause of the erroneous decision because the alleged negligence was the attorney's failure to respond to notice of the default judgment. Specifically, the attorney was alleged to have committed malpractice by (i) failing to enter a notice of appearance, despite representing to the court he would do so; (ii) failing to act

when he received, a month in advance, notice that an entry of default judgment was about to take place; and (iii) after the default judgment was entered, negligently failing to offer the trial court the excuses for default. *Id.* at 265-266. In other words, the attorney was alleged to have negligently allowed the default judgment to be entered, despite notice, and then to have negligently responded to the entry of that judgment.

The facts of this case stand in stark contrast to those in *Skinner*. Unlike the defendant in *Skinner*, K&L is not accused of mishandling the underlying litigation in which the erroneous ruling was made. In fact, K&L's alleged malpractice has nothing to do with the litigation at all: K&L is accused of malpractice in its role as transactional counsel. And unlike in *Skinner*, K&L is not alleged to have had notice of the judicial error – which occurred some three years after the alleged malpractice – or to have responded to the error negligently. Here, K&L is alleged to have failed to secure a "reaffirmation" in 2006 relating to loans that had been extended in 2005 (before K&L was retained), whereas the judge's error of law in 2009 was in finding evidence of Allen's consent to the loan extensions to be insufficient.

Excelsior's reliance on *Rudolf v. Shayne*, 8 N.Y.3d 438 (2007), is misplaced for similar reasons. In *Rudolf*, neither the Court of Appeals nor the Appellate Division addressed the question of intervening cause. *See id.;* 31

A.D.3d 418 (2d Dep't 2006). Excelsior strains to argue a ruling on intervening cause is nonetheless "implicit" in *Rudolf*. App.'s Br. at 23. But the alleged malpractice in *Rudolf*, as in *Skinner*, bore a direct relationship to the specific judicial error at issue. The trial court in *Rudolf* erred by giving an erroneous jury instruction – and the alleged legal malpractice was that the attorney had in fact requested the court to issue the erroneous instruction. *Id.* at 442. That is the type of direct connection between an attorney's actions and judicial error that justifies the submission of the question of intervening cause to the jury. Here, K&L's alleged malpractice as transactional counsel in 2006 is – as Excelsior admitted below – unrelated to the judicial error committed in 2009 in the subsequent litigation.

Excelsior also relies on *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192 (Colo. App 1992). But contrary to Excelsior's description of that case, App.'s Br. at 19, *Temple* did not involve judicial error in the underlying litigation, or any dispute as to whether judicial error broke the alleged chain of causation. The defendant law firm had drafted an options contract, but the counterparty to the contract later refused to honor it, claiming it violated the rule against perpetuities. *Id.* at 194. The parties to the contract entered litigation and then settled. *Id.*

In the ensuing legal malpractice case, the *Temple* court found as a matter of law that the contract drafted by the defendant lawyer did not violate the rule against perpetuities. *Id.* at 197. But the plaintiff argued that disputes about the rule against perpetuities were common and foreseeable, and that the defendant was negligent for failing to include a standard "savings clause" to remove all doubt about the application of the rule. *Id.* at 198.

Thus the question in *Temple* was not whether intervening judicial error had broken the chain of causation; rather, the question was whether the defendant "should have foreseen that the option, as drafted, was likely to result in litigation." *Id.* Here, K&L was not involved in Excelsior's decision to accept Allen's consent to the modification of the loans he had guaranteed, and Excelsior has already conceded that litigation with Allen was inevitable.

The final case on which Excelsior relies is *Lombardo v. Huysentruyt*, 110 Cal. Rptr. 2d 691 (Ct. App. 2001). In that case, the lawyer was alleged to have negligently responded to a court order stating his client's trust could not be amended without judicial approval. *Id.* at 696. While the court's order was ambiguous, the "most literal" interpretation of the order required the attorney to receive court permission prior to amending the trust. *Id.* at 669. The attorney nonetheless amended the trust without court approval, and the probate court held the amendment was invalid. *Id.* at 696. The attorney appealed, arguing

the order requiring pre-approval was itself invalid; while the appeal was pending, the parties settled. *Id.* In the subsequent malpractice suit, the attorney argued that the court's order was erroneous, and therefore the attorney's conduct was not a proximate cause the plaintiff's damages. *Id.* at 696-97.

In *Lombardo*, just as in *Skinner*, the lawyer was alleged to have been negligent in his response to an erroneous judicial order of which he had advance notice. Specifically, the attorney was allegedly negligent in failing to seek either prior court approval or a clarification of the court's order. *Id.* at 696. The attorney himself conceded that he knew the judge's order was "ambiguous" and could be interpreted to require pre-approval of amendments to the trust. *Id.* at 695. On those facts, the California Court of Appeal held that a factfinder could determine that the attorney had reasonably foreseen that the judge would find, erroneously or not, that the unapproved trust amendment was invalid. *Id.* at 702.

In *Lombardo* the connection between the alleged malpractice and the judicial error could hardly be more dissimilar to the facts of this case. The attorney in *Lombardo* knew from the court's order that there was a significant risk that the court would erroneously require pre-approval of the trust amendment, and then he invited that error by amending the trust without such approval. Here, K&L's alleged malpractice preceded any litigation and the

judicial error concerned the sufficiency of evidence of Allen's consent, which occurred before K&L was retained.

G. Excelsior's Argument that a "Negative Judicial Outcome" Was Foreseeable Is Unavailing

In its briefing, Excelsior fails to articulate how Justice Warshawsky's judicial error could be a reasonably foreseeable consequence of K&L's alleged malpractice. In fact, Excelsior does not even try to argue the trial court's actual error was foreseeable. Instead, Excelsior argues that an "unfavorable judicial outcome" was foreseeable. App.'s Br. at 25; *see also id.* at 12 ("an unfavorable judicial outcome . .. was reasonably foreseeable"); *id.* at 24 ("an unfavorable judicial outcome . . . was entirely foreseeable").

By trying to link K&L's alleged negligence to "an unfavorable judicial outcome," rather than to the particular error committed by the trial judge, Excelsior attempts to side-step the intervening cause analysis entirely. The reasonable foreseeability of Justice Warshawsky's error of law cannot be adequately pleaded by merely alleging that some kind of adverse outcome in some future litigation was foreseeable. If the standard were whether "an unfavorable judicial outcome" was reasonably foreseeable, rather than whether the particular judicial error at issue was foreseeable, then K&L would be liable for any damages that Excelsior might have suffered several years later as the result of any judicial error that occurred in the underlying litigation.

H. Excelsior Cannot Prove Foreseeability by Relying on a "K&L Reply Brief" Not In the Record

In its briefing, Excelsior relies on a document that is not in the appellate record and was not introduced below to argue that K&L foresaw Justice Warshawsky's judicial error. Specifically, Excelsior provides a short quotation, with no context, from a reply brief filed by K&L on behalf of Excelsior in another case. App.'s Br. at 6. Excelsior asserts that this Court may take judicial notice of that brief, but its own cases show otherwise. *See Kinberg v. Kinberg*, 85 A.D.3d 673, 674 (1st Dep't 2011) (judicial notice appropriate for official court files, such as orders); *RGH Liquidating Trust v. Deloitte & Touche LLP*, 71 A.D.3d 198, 208 fn. 8 (1st Dep't 2009) ("We recognize, of course, that judicial notice should not be taken of a controverted matter of fact simply because a document alleging that 'fact' has been filed with a court."), *rev'd on other grounds*, 17 N.Y.3d 397 (2011).

Moreover, Excelsior's quotation from the brief does not show that K&L anticipated, or reasonably could have anticipated, Justice Warshawsky's error of law. The brief states that "Excelsior retained counsel, who insisted upon written confirmation that Excelsior's rights under the Guaranties were extant and would be preserved." App.'s Br. at 5. That is precisely what the May 26 letter provided: that Excelsior's existing rights would not be waived during renegotiations. *See supra* p. 14.

I. Excelsior's Argument that the Alleged Negligence Risked a "Swearing Contest" Is Irrelevant

Excelsior argues that without a reaffirmance of the guaranties, Excelsior faced the risk that the jury might not credit Excelsior's evidence of Allen's consent. App.'s Br. at 25. Excelsior claims that it was reasonably foreseeable that K&L's alleged negligence would cause jury risk by creating a "swearing contest" as to whether Allen consented to the modifications. *Id.*

But that argument has no application to the facts of this case. The jury unanimously found that Allen had consented to the modifications, and entered a verdict for Excelsior. The injury claimed by Excelsior in this action has nothing to do with the jury's verdict, or with any "swearing contest." Excelsior cannot overcome its failure to adequately plead causation by arguing that the alleged malpractice might foreseeably have caused some other, hypothetical injury.

J. Excelsior Does Not Plead, and the Record Disproves, that the Underlying Litigation Could Have Been Decided on Summary Judgment

In its briefing, Excelsior continues to rely on a single off-hand comment by the judge in the underlying trial, without putting the transcript in the record. *See* App.'s Br. at 12. Excelsior attempts to stretch a part of the judge's comment — "we would not be here if it was" — into a judicial finding that "if the May 26 Letter had been a reaffirmance, litigation over the validity and

enforceability of the Guaranties would have been 'cut short,' thereby avoiding a trial altogether." *Id.* at 28.[5] However, Justice Warshawsky's comment is not a judicial finding. It is not part of an order. It is offhand speculation by the judge made during the course of a discussion with counsel before the jury was brought in for the afternoon session.

Excelsior's argument that this comment, even if admissible, could prove that Excelsior might have won its claims against Allen on summary judgment is conclusively disproven by the record below. As discussed above, *see supra* pp. 10-11 & fn. 2, Allen raised 20 affirmative defenses to the enforceability of the guaranties, including that the loans had been repaid, that the guaranties had been procured by fraud, and that he was incompetent to enter contracts. R. 89-91. Those defenses had nothing to do with whether Allen consented to the modification of the loans, and almost certainly would have prevented summary judgment in Excelsior's favor regarding Allen's guaranties.

Moreover, Excelsior's speculation that it might have won on summary judgment is foreclosed by the course of its claims against Superior. In the underlying litigation, Excelsior sued Allen to enforce the guaranties and sued Superior to enforce the loans themselves. In order to recover on the Allen

[5] As discussed above, *see supra* p. 14, Excelsior does not, and cannot, allege that the May 26 letter was ever intended to be a reaffirmance of the Allen guaranties.

guaranties, Excelsior first had to prove that the loans to Superior were in default and enforceable. To recover on the loans, Excelsior was forced to try its claims against Superior all the way to a jury verdict. R. 95. The fact that Excelsior could not and did not obtain summary judgment with regard to the loans disproves any speculation that Excelsior could have won summary judgment enforcing Allen's guaranties of those loans.

K. Conclusion

The Motion Court correctly found that the underlying judicial error was an intervening cause of Excelsior's alleged damages, requiring dismissal of the Complaint. And as Excelsior conceded below, the underlying judicial error was unrelated to K&L's alleged malpractice. Excelsior has failed to meet its burden of alleging facts that, accepted as true, would demonstrate that Justice Warshawsky's 2009 error of law regarding proof of Allen's 2005 consent was the reasonably foreseeable consequence of K&L's alleged transactional negligence in 2006. The judicial error therefore breaks the chain of causation, and the Motion Court's Order should be affirmed.

III. THE MOTION COURT CORRECTLY FOUND THAT EXCELSIOR'S CLAIM WAS SPECULATIVE

Excelsior's entire case depends on the allegation that, if K&L had asked, Allen would have willingly signed a reaffirmance, thus waiving one of his major defenses to the enforceability of millions of dollars in guaranties, in

exchange for nothing in return. Excelsior then piles speculation upon speculation by arguing Allen could easily have been duped into signing a reaffirmance because his lawyer would have failed to understand or research the legal import of the document. The Motion Court correctly found that Excelsior's theory of causation is speculative, and thus Excelsior fails to plead a cognizable claim for legal malpractice.

A. Legal Malpractice Claims Premised on Speculative Allegations Are Subject to Dismissal at the Pleading Stage

Contrary to Excelsior's contention that the Motion Court "switched the parties' burden" in finding its claims to be speculative, there can be no doubt that Excelsior bears the burden of pleading sufficient factual allegations to establish all the elements of its legal malpractice cause of action. *See, e.g.*, *Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 293 (1st Dep't 2001) ("As we have often stated, in order to prevail in an action for legal malpractice, the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was the proximate cause of the injuries, and that actual damages were sustained.") Those factual allegations must be non-conclusory and not mere speculation. *See, e.g.*, *id.* ("Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice"); *Franklin v. Winard*, 199 A.D.2d 220, 220 (1st Dep't 1993) ("allegations consisting of bare legal conclusions, as well as factual

claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to" a presumption of truth on motion to dismiss); *Bua v. Purcell*, 99 A.D.3d 843, 848 (2d Dep't 2012) ("Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative").

Because speculative allegations cannot satisfy a legal malpractice plaintiff's pleading burden, New York courts routinely dismiss legal malpractice claims on the pleadings when they are premised on speculation as to causation and/or damages. *See, e.g., Sierra Holdings, LLC v. Phillips, Weiner, Quinn, Artura & Cox*, 112 A.D.3d 909, 910 (2d Dep't 2013); *Bua*, 99 A.D.3d at 848; *Hashmi v. Messiha*, 65 A.D.3d 1193, 1195 (2d Dep't 2009); *Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 293 (1st Dep't 2001); *Brooklyn Law Sch. v. Great Northern Ins. Co.*, 283 A.D.2d 383, 383 (2d Dep't 2001); *Perkins v. Norwick*, 257 A.D.2d 48, 51 (1st Dep't 1999); *Giambrone v. Bank of N.Y.*, 253 A.D.2d 786, 787 (2d Dep't 1998); *Sherwood Grp., Inc. v. Dornbush, Mensch, Mandelstam, & Silverman*, 191 A.D.2d 292, 292 (1st Dep't 1993); *Franklin v. Winard*, 199 A.D.2d 220, 221 (1st Dep't 1993); *Theophilova v. Moss*, 2015 N.Y. Slip Op. 31966(U) (Sup. Ct., N.Y. Cty. 2015); *Isaacson v. Law Office of Norman L. Horowitz, Esq.*, 2013 N.Y. Slip. Op. 32598(U) (Sup. Ct., N.Y. Cty. 2013).

B. Excelsior's Allegation that Allen Would Have Signed Away a Defense in the Forthcoming Litigation, in Exchange for No Consideration, Is Speculative and Inherently Incredible

Allen was represented in connection with the guaranties by his own counsel, Robert Wessely, at the time a partner at Arnold & Porter. R. 21-22 at ¶¶ 15, 18-19. By the time Excelsior retained K&L to assist it with renegotiating the loans to Superior, the loans and guaranties had already been in place for years, and Excelsior had already agreed to extend the underlying loans based on Allen's request and consent. R. 18-19 at ¶¶ 6-8. In other words, before K&L had any involvement, Allen already had what he wanted: an extension of the loans.

Excelsior does not and cannot allege that it ever requested or instructed K&L to secure a "reaffirmance" of the guaranties. And Excelsior does not and cannot allege that Allen was under any legal obligation to sign such a "reaffirmance." To the contrary: Excelsior's own pleadings acknowledge that in signing a "reaffirmance," Allen would have been giving up a potential major defense against the enforcement of the guaranties, which Allen in fact relied upon at trial: namely, the defense that the loans were modified without his consent. R. 21 ¶ 15. But Excelsior does not, and cannot, allege that K&L was authorized to offer Allen anything in exchange for signing a "reaffirmance." Excelsior does not dispute that its premise is that Allen would have signed a "reaffirmance" of millions in guaranties for no consideration whatsoever – not in exchange for a new

deal, a restructuring of the loans, a forbearance in enforcement, or for anything else offered by Excelsior.

In its briefing, Excelsior argues that Allen might have had an incentive to reaffirm the guaranties "as the price of Davis [*i.e.*, Excelsior's principal] not enforcing [the guaranties] immediately." App.'s Br. at 44. In making that argument, Excelsior invents facts beyond the pleadings and speculates about Allen's motivations. *See id.* at 41.[6] Moreover, Excelsior does not, and cannot, allege that K&L would have been authorized to promise Allen that Excelsior would not sue on the guaranties for some period of time in exchange for his signing a reaffirmance.

Finally, Excelsior's assertion that Allen would have waived his defense in exchange for a hoped-for, non-binding, uncertain, and indeterminate delay in litigation is even more speculative in the face of Excelsior's admission that that Allen was never going to pay the guaranties voluntarily, and that litigation was inevitable. R. 439-440*; see supra* pp. 10-11.

In sum, the linchpin allegation upon which the entirety of Excelsior's claim depends is as follows: if K&L had merely asked, Allen – a sophisticated investment tycoon who was represented by a prominent law firm and who

[6] Allen, who died during the course of the underlying litigation, will never be able to testify as to his state of mind in 2006.

demonstrated an intent to defend himself vigorously in his inevitable litigation with Excelsior – would have willingly signed away a defense to the enforceability of millions in guaranties (a defense he did in fact assert in the subsequent litigation) in exchange for no consideration. That allegation is so speculative, counterfactual, and inherently incredible that it is insufficient as a matter of law to sustain Excelsior's burden of pleading causation.

The facts of this case mirror those of *Bua v. Purcell & Ingrao, P.C.*, a recent decision dismissing a legal malpractice complaint claim on the pleadings. 99 A.D.3d 843 (2d Dep't 2012). In *Bua*, as here, (i) the defendant law firm had represented the plaintiff with regard to a transaction; (ii) the plaintiff subsequently entered into litigation concerning that transaction with the counterparty to the transaction; (iii) the plaintiff prevailed in the underlying litigation; (iv) the plaintiff conceded that its contractual rights were, in fact, at all times valid and enforceable; (v) the plaintiff nevertheless alleged transactional counsel committed malpractice by failing to secure a written cancellation agreement that supposedly would have to made its rights "clear and unambiguous"; and (vi) the counterparty was under no obligation to enter into such a written agreement. *Id.* at 843-47. The Second Department affirmed the dismissal of the complaint as unduly speculative, holding:

> The plaintiff's contention rests on speculation as to how the buyer would have responded to [the lawyer's requests for a written agreement]. . . . Accordingly, the plaintiff's contention that the

> alleged malpractice resulted in legally cognizable damages is conclusory and speculative inasmuch as it is premised on decisions that were within the sole discretion of the buyer.

Id. at 848 (internal citations omitted).

Here, Excelsior's case is similarly premised on decisions "within the sole discretion" of Allen, and rests entirely on "speculation as to how [Allen] would have responded to" a request for a reaffirmance of the guaranties. Excelsior's allegations are even more speculative than those in *Bua* because the counterparty in *Bua* had anticipatorily repudiated the contract, suggesting that it might have had some interest in agreeing to cancel the contract. There is no allegation that Allen had evinced any interest in "reaffirming" the guaranties. And unlike in *Bua*, in this case Excelsior has conceded that Allen was going to litigate no matter what, making it even more speculative to assert he would have signed an agreement that would have waived one of his defenses in that litigation.

Two First Department cases, *Sherwood Grp., Inc. v. Dornbush, Mensch, Mandelstam & Silverman*, 191 A.D.2d 292, 292 (1st Dep't 1993) and *Perkins v. Norwick*, 247 A.D.2d 48 (1st Dep't 1999) are also on point. In both cases, the plaintiffs sought legal advice concerning their rights under a pre-existing contract, then sued their lawyers for malpractice. And in both cases, the plaintiff's theory of causation and damages was that but for the alleged malpractice, the counterparty

would have agreed to different terms than in the pre-existing contract. The First Department held both cases should be dismissed on the pleadings as speculative.

In *Sherwood*, the plaintiff, a corporation, received advice from the defendant with regards to its pre-existing corporate stock option plan. 191 A.D.2d at 292. The plaintiff thereafter entered litigation with a beneficiary of the plan, and was found liable for the cash value of the stock as of a prior time when stock price was significantly higher. *Id.* The plaintiffs alleged that but for the defendant's allegedly negligent advice, they would have avoided that liability by tendering stock instead of cash. *Id.* The First Department noted, however, that the beneficiary was under no obligation to accept stock, as she had the right to demand a cash payment under the plan. *Id.* In affirming the dismissal of the plaintiff's claim, the First Department stated:

> The speculative nature of plaintiffs' claim is revealed by arguments in plaintiffs' brief that [the beneficiary] "might have held onto the stock," or that she "might also have been able to sell the stock privately," or that plaintiffs "would have sought … [to] reach some other agreement." All of these contentions are couched in terms of gross speculations on future events and point to the speculative nature of plaintiffs' claim. There was, therefore, a failure by plaintiffs to show that defendants' actions were a proximate loss to any of them.

Id.

In *Perkins*, the First Department faced facts it found "directly analogous" to *Sherwood*. 257 A.D.2d at 50. In *Perkins*, the plaintiff retained the defendant attorney to represent him in connection with a shareholders agreement. *Id.* at 48.

The First Department held that under the plain terms of that agreement, he was entitled to $3 million for his shares. Nonetheless, plaintiff alleged that but for the defendant's alleged negligence, the counterparty "would have voluntarily agreed to increase the agreement's valuation of his and plaintiff's share to more than $7 million," or that the counterparty "would have agreed to 'different terms' that would have required [the counterparty] to pay plaintiff more than $7 million for his shares." *Id.* at 50. The First Department found those allegations to be "completely speculative," and, citing *Sherwood*, found that the plaintiff's complaint was based on "gross speculation on future events." *Id.*

Here, as in both *Sherwood* and *Perkins*, Excelsior alleges that it was injured by K&L's conduct with regard to already-existing (and already-modified) agreements. And just as in those cases, Excelsior alleges that although Allen would have been under no obligation to do so, but for the alleged malpractice Allen would have voluntarily signed an after-the-fact agreement that would not have benefitted him at all, but would have eliminated one of his legal defenses in the imminent litigation. That is, as both First Department decisions found, "gross speculation on future events" and warrants the dismissal of Excelsior's complaint.

C. Excelsior's Authority Supports Dismissal of the Complaint as Speculative on Its Face

In arguing that its causation allegations are not impermissibly speculative, Excelsior relies on two cases. In *SF Holdings Grp., Inc. v. Kramer Levin Naftalis*

& Frankel LLP, 2008 NY Slip Op 31753(U), (Sup Ct., N.Y. Cty. 2008), *aff'd*, 56 A.D.3d 281 (1st Dep't 2008), the defendant allegedly failed to draft a merger agreement as instructed, and did not list a particular asset as working capital. *Id.* The court rejected the defendant's argument that it was speculative to assume that the counterparty to the merger would have agreed to the terms the defendant law firm had purportedly failed to draft. *Id.* But the plaintiff in *SF Holdings* was in the middle of negotiating a complex merger of two corporations, with give and take from both sides: from the face of the pleadings, there was no reason to believe changing a single term of a multi-faceted transaction would have prevented the deal from closing. *See id.* Here, by contrast, Excelsior alleges Allen would have agreed, after the loans had already been modified, to an entirely one-sided "reaffirmance" of his guaranties, thereby surrendering for no consideration a valuable defense that he, in fact, later asserted in litigation.

Excelsior's other case, *Feinberg v. Boros*, 17 A.D.3d 275, 276 (1st Dep't 2005), actually supports K&L's position. In *Feinberg* the plaintiff lost an arbitration against his former business partner. The plaintiff subsequently tried to pursue a related claim against the business's former accountants, but was collaterally estopped from doing so by the arbitration award. The plaintiff then sued his lawyers for malpractice, alleging they were negligent in not advising him to pursue a "limiting agreement" with his adversary in the arbitration, which could

have avoided the collateral estoppel effect. The court in *Feinberg* dismissed the plaintiff's original complaint on the pleadings, finding it unduly speculative to assert the plaintiff's former business partner would have signed a "limiting agreement." 2004 N.Y. Slip Op. 30276(U) (Sup. Ct., N.Y. Cty. 2004).

Only after the plaintiff amended its complaint, adding numerous specific factual allegations supporting its claim that the counterparty would have agreed to enter such an agreement, did the *Feinberg* IAS court find the pleadings sufficient to survive a motion to dismiss. *Id.* For example, the plaintiff alleged that his former business partner had approached him and suggested they jointly file suit against the former accountants – a tactic that would only have been possible if the parties entered a limiting agreement. Moreover, the plaintiff alleged he was willing to provide consideration in exchange for the limiting agreement. Here, Excelsior has failed to allege any facts suggesting that Allen was interested in "reaffirming" the guaranties, or that any consideration would be provided for such a reaffirmance.

D. Excelsior's Allegation that Allen and His Counsel Would Have Had No Idea What Rights They Were Signing Away Is Speculative and Inherently Incredible

In a last-ditch effort to save its claim, Excelsior argues that three additional factual allegations regarding Allen's counsel demonstrate that Allen would have

signed a "reaffirmance" of the guaranties for no consideration. App.'s Br. at 40-43.

First, Excelsior points to correspondence Wessely sent and received in early 2006. App.'s Br. at 40-41. Excelsior argues this correspondence proves that Wessely believed that Allen had executed guaranties for three loans, and that those loans had had their maturity dates extended. *Id.* Excelsior does not explain how Wessely's knowledge of the existence of guaranties and the loan extensions demonstrates that Allen would have willingly signed away his defense that the loans were modified subsequent to the guaranties.

Second, Excelsior points to a July 2006 letter, sent shortly after the underlying loans had gone into default, in which Wessely stated, "Bob Allen is the guarantor . . . . There is nothing stopping Rich Davis [*i.e.*, Excelsior's principal] from going ahead and suing Bob Allen without further notice." App.'s Br. at 42. Again, Excelsior offers no explanation as to how this demonstrates that Allen would have signed a reaffirmance. Wessely's email merely states, correctly, that Excelsior had the ability to file suit; it does not say or imply that such a suit would be meritorious, or that Allen would have no defenses to the enforceability of the guaranties. If anything, Wessely's knowledge that litigation could be imminent makes it even more speculative to assert that he would have counseled Allen to reaffirm the guaranties.

Excelsior's third and final allegation is that Allen and his counsel would not have known what they were losing if they had signed a reaffirmance. App.'s Br at 42-46. Excelsior argues that Wessely did not know that modifying a loan can invalidate a guaranty, and so agreeing to sign a reaffirmance "would have been the legal equivalent of giving ice in the winter." *Id.* at 44. Excelsior's argument that Wessely and Allen would have unwittingly signed away a potential defense is based on an excerpt from Wessely's testimony in the underlying litigation. *Id.* at 42-43. In that testimony, Wessely states he did not know in 2006 that modifying a loan could invalidate a guaranty, because "there's a lot of details in the law that one only investigates when an issue comes up" and he did not previously have occasion to investigate that issue. *Id.*

Of course, this issue did not arise in 2006, and Wessely had no occasion to research it then. Excelsior's theory goes one step further: Excelsior argues that even if this issue had arisen, *i.e.*, if K&L had proposed a reaffirmance in 2006, neither Allen nor Wessely would have researched its effect on Allen's rights, and Allen would simply have signed on the dotted line. None of the factual allegations in Excelsior's complaint, taken as true and given the benefit of favorable inferences, supports Excelsior's speculative assertion that Allen and his counsel would have ignorantly agreed to sign away a basis for arguing that his guaranties

were unenforceable with the prospect of litigation looming. *See, e.g.*, *Sherwood* 191 A.D.2d at 292; *Perkins*, 257 A.D.2d at 50.

E. The Record Directly and Conclusively Disproves Excelsior's Allegation that Wessely Would Have Allowed Allen to Sign a Reaffirmance

Finally, the undisputed record conclusively disproves Excelsior's speculative allegations that Allen would have signed a reaffirmance of the guaranties. In its pleadings and before this Court, Excelsior relies heavily on the snippet of Wessely's testimony in the underlying litigation discussed above. App.'s Br. at 42-43; *see supra* p. 46. The rest of Wessely's testimony – some of which he gave under questioning from Excelsior's counsel in this litigation – directly and conclusively disproves Excelsior's theory that Wessely would have allowed Allen to sign a reaffirmance.

First, Wessely testified on direct examination that, even if he did not at the time know all the details of the law, he was in 2006 generally aware that a guarantor can be released of his obligations if the underlying loans are modified:

> Mr. Burstein: I just want to ask you a couple of questions about what you understood in 2006 about the law of New York. . . . If, for example, I were to lend you a hundred dollars and Mr. Reade guaranties that he will pay it back on January 1st . . . [and] say that you and I decide that your payment of the note doesn't have to be made on January 1st, but can be made on February 1st. . . Your understanding of New York law is in that situation, Mr. Reade would no longer be responsible under the guaranty if he did not know that there had been a change in the terms of the note?

> Mr. Wessely: Generally that would be the case, subject to – the law on guaranties isn't – is complex.
>
> Mr. Burstein: But generally that's your understanding of the law?
>
> Mr. Wessely: Yes.

R. 99.

Second, Wessely also unambiguously testified that, during his representation of Allen prior to the underlying litigation, he in fact argued Allen's position "that the guaranties were not valid because – specifically because the notes had been extended without – or modified without Mr. Allen's knowledge or consent," stating, "I discussed it a number of times. . . I discussed it with Mr. Neiman and Mr. Devine." R. 100. In fact, Wessely testified that he decided not to attend a meeting with K&L attorneys in 2006 so he could "keep in reserve any claims that we have with regard to the possible Allen guaranties," and stated that of "all the claims that we were keeping in reserve," "[c]learly the extension [of the loans] was one of those." R. 100-102.

Third, and perhaps most fatal to Excelsior's causation allegations, Wessely unambiguously testified that he would not have allowed Allen to sign a letter reaffirming the guaranties, and said so to Allen and others:

> Mr. Burstein: Well, why didn't you just say, I don't know the facts; I'm not having my client sign any letter that says anything about the guaranties being in effect?
>
> Mr. Wessely: And that's exactly what I said to Bob Allen.

> Mr. Burstein: . . . Oh, that's what you said to Bob Allen. You objected to it to Bob Allen?
>
> Mr. Wessely: Yes.
>
> Mr. Burstein: Well, let's --
>
> Mr. Wessely: And I told Chris Devine and Bob Neiman that as well.

R. 104; *see also* R. 103 ("I wasn't willing to have Bob [Allen] sign anything that indicated what the status of the notes were.").

Thus, Wessely's actual trial testimony demonstrates the inherent incredibility of Excelsior's allegation that Allen would have "reaffirmed" the guaranties if asked, and that Wessely would have allowed him to do so.

F. Conclusion

The Motion Court correctly found that Excelsior's allegation that Allen would have signed a "reaffirmance" of the guaranties was too speculative to allege causation adequately. It is undisputed that if Allen had signed such a reaffirmance, he would have been waiving a defense to the enforceability of the guaranties – a defense that he did in fact rely on in the ensuing litigation – at a time when litigation over those guaranties was imminent and inevitable. Excelsior cannot overcome the speculativeness of that allegation by making the equally speculative allegation – which is disproven by the record below – that Allen and his lawyer would have agreed to a reaffirmance in ignorance of its legal import, and without

investigating its effect on Allen's rights. Because Excelsior cannot meet its burden of adequately pleading causation, the Motion Court's Order should be affirmed.

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Respectfully submitted,

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