UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-JSR
MELANIE L. CYGANOWSKI, as Equity Receiver for PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC, Plaintiffs, v. BEECHWOOD RE LTD., *et al.*, Defendants.	18-cv-12018-JSR

THIRD-PARTY DEFENDANT MURRAY HUBERFELD'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF BANKERS CONSECO LIFE INSURANCE COMPANY AND WASHINGTON NATIONAL INSURANCE COMPANY

Third-Party Defendant Murray Huberfeld ("Huberfeld") respectfully submits this memorandum of law in support of his motion (the "Motion") to dismiss the third-party complaint ("TPC") of Bankers Conseco Life Insurance Company ("BCLIC") and Washington National Insurance Company ("WNIC", together with BCLIC, the "TPPs") pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

For brevity, Huberfeld respectfully incorporates herein and joins with the motion to dismiss the TPC of Third-Party Defendant David Bodner (including the recitations of applicable law set

forth in that motion), as well as the motions by all other moving Cross-Claim or Third-Party Defendants on the same or similar grounds. A brief recitation of the facts and argument most relevant to the TPPs' claims directed to Huberfeld are set forth below.

RELEVANT FACTS

A. The Alleged Conspiracy

The TPPs allege that [redacted][1] [redacted]. (TPC ¶ 532.) The purported agreement was to "establish a reinsurance company, Beechwood Re, and use it as a vehicle for fraudulently inducing insurers to hand over funds to Beechwood, via reinsurance agreements or otherwise, so that Beechwood could use those funds to keep Platinum afloat." (TPC ¶ 532.) According to the TPPs, [redacted] (TPC ¶ 534.)

B. The Group Pleading Allegations That Indirectly Reference Huberfeld

In 2013, the TPPs were "in the market to reinsure certain blocks of their long-term care business." (TPC ¶ 536.) The TPPs aver that in May 2013, "Feuer and Taylor presented themselves under the name of Beechwood Capital and represented that they were developing a 'new entrant into the life and health reinsurance market,' Beechwood Re." (TPC ¶ 536.) Feuer and Taylor, the TPPs allege, "held themselves out as legitimate businessmen" who would "prudently invest and

[1] Capitalized terms not otherwise defined shall have the same meaning as in the TPC.

manage [the TPPs'] reinsurance trust funds. Ultimately, both WNIC and BCLIC entered into a reinsurance agreement with Beechwood Re (the Reinsurance Agreements) . . . ." (TPC ¶ 536.)

The TPPs allege that Feuer, Taylor, and Levy (and only those parties) "induced WNIC and BCLIC to enter into the Reinsurance Agreements with a pack of lies," which "centered on four subjects": "(a) who owned Beechwood Re and the other Beechwood entities; (b) Beechwood Re's capital; (c) how Beechwood Re would invest the assets that WNIC and BCLIC would transfer to Beechwood Re under reinsurance agreements; and (d) who would control and operate Beechwood Re and other Beechwood affiliates" (the "Inducement Fraud"). (TPC ¶ 537.) The TPPs signed their respective Reinsurance Agreements with Beechwood Re on February 10, 2014. (TPC ¶ 593.)

According to the TPPs, "[a]fter WNIC and BCLIC entered into their respective Reinsurance Agreements with Beechwood Re . . . the Co-conspirators continued perpetrating their frauds on WNIC and BCLIC." (TPC ¶ 604.) Specifically, the TPPs allege that the group styled as the "Co-conspirators" made continuing misrepresentations about: the ownership and control of Beechwood (TPC ¶¶ 611-615), Beechwood's capital (TPC ¶¶ 616-627), Beechwood's management team (TPC ¶¶ 628-636), and how Beechwood invested trust assets (TPC ¶¶ 637-652) (the "Continuing Fraud"). The TPC also alleges that [redacted] (TPC ¶¶ 605-606.)

C. The Scant Allegations Against Huberfeld Do Not Reference A Specific Instance Of Affirmative Conduct

The TPC alleges that Huberfeld was a Platinum co-founder and an individual who directed certain of Beechwood's investments of the TPPs' reinsurance trust assets. (TPC ¶¶ 481, 610, 644.) The TPPs also allege that Huberfeld was the beneficial owner of certain entities that had an equity

stake in Beechwood. (TPC ¶¶ 518, 520, 654-655.) According to the TPPs, [redacted] (TPC ¶¶ 588-589.) The TPPs also allege generally that "Nordlicht, Huberfeld, and Bodner were acutely aware of the need to attract significant sources of outside funding," but that "the world of institutional investors was closed to Platinum" and that the TPPs would not knowingly invest with Platinum, Nordlicht, Bodner, or Huberfeld. (TPC ¶¶ 524-528.)

Critically, the main thrust of the TPPs' allegations against Huberfeld rely [redacted]. Namely:

- [redacted] (TPC ¶ 569);
- [redacted] (TPC ¶ 503);
- A February 2014 communication from Feuer and Taylor to Nordlicht and Huberfeld "to notify them that" the TPPs had invested in Beechwood (TPC ¶ 604);
- A July 29-30, 2015 email chain sent from the address of a secretary of Bodner and Huberfeld to David Bodner (TPC ¶ 482);
- [redacted] (TPC ¶ 486);

The TPC does not contain a single allegation that Huberfeld *sent* any communications, or otherwise made any statements himself to the TPPs. (*See generally* TPC.) The remaining

allegations against Huberfeld cannot be fairly regarded as factual. Rather, the only remaining averments directed to Huberfeld are either conclusory, attempt to include him as being involved in or participating in a group act in an undescribed or unidentified way, or label or characterize him as an influencer of others' behavior, but without any factual basis. (*See, e.g.*, TPC ¶¶ 524-525, 530, 605-606, 610, 644, 653-655.)

D. The Claims Against Huberfeld

The TPPs allege six claims against Huberfeld: for Civil RICO and RICO conspiracy (Counts 1 and 2); for aiding-and-abetting the Co-conspirators' alleged fraudulent conspiracy and Beechwood's alleged breaches of fiduciary duty (Counts 7 and 12); for indemnity and/or contribution in relation to the TPPs' potential liability to the PPCO Receiver (Count 18); and for unjust enrichment/constructive trust (Count 19).

ARGUMENT

Huberfeld respectfully incorporates herein and joins with the arguments of Third-Party Defendant David Bodner in support of his motion to dismiss the TPC (including the recitations of applicable law set forth in that motion), as well as arguments of all other moving Cross-Claim or Third-Party Defendants on the same or similar grounds. A brief recitation of the arguments most relevant to the TPPs' claims directed to Huberfeld are set forth below.

I. The RICO Claims Are Barred By The PSLRA

Counts 1 and 2 allege RICO violations against Huberfeld under 18 U.S.C. 1962(c) and (d). (*See* TPC ¶¶ 784-793, 794-799.) Section 107 (the "RICO Amendment") of the Private Securities Litigation Reform Act ("PSLRA"), however, bars RICO claims premised on "any conduct that would have been actionable as fraud in the purchase or sale of securities." 18 U.S.C. 1964(c). The RICO Amendment applies when "the fraud itself [is] integral to the purchase and sale of the

securities in question." Opinion, dated April 23, 2019, *In re Platinum-Beechwood Litigation*, 18-cv-6658, ECF Doc. No. 292 (the "SHIP Opinion") at 20-24 (citing *Leykin v. AT&T Corp.*, 423 F. Supp. 2d 229, 241 (S.D.N.Y. 2006)).

Here, the TPPs allege that Huberfeld engaged in a conspiracy to induce the TPPs to transfer funds to Beechwood in order to funnel those assets into Platinum-related securities. (*See, e.g.*, TPC ¶ 532.) In the SHIP Opinion, the Court held identical conduct to be barred by the RICO Amendment. (SHIP Opinion at 21 (holding that SHIP's RICO claims, which allege that "defendants funneled SHIP's assets into Platinum-related securities," were barred by the RICO Amendment).) For the same reasons that the Court dismissed the plaintiff's claims in the SHIP Opinion, the TPPs RICO claims against Huberfeld alleged in the instant action must also be dismissed.

II. The TPC's Allegations Are Insufficient To State Claims For Aiding-And-Abetting Fraud And Breach Of Fiduciary Duty

"To establish liability for aiding and abetting fraud under New York law, the plaintiffs must show (1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." Opinion, dated April 11, 2019, *In re Platinum-Beechwood* Litigation, ECF Doc. No. 225 (the "Trott Opinion") at 26 (*citing Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014)). Aiding-and-abetting liability also requires that the defendant provide "substantial assistance" in the fraud. *Id.* Similarly, "[a] claim for aiding and abetting a breach of fiduciary duty requires, *inter alia*, that the defendant knowingly induced or participated in the breach." *Id.* at 24 (citing *Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2012) ("Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty.").

Here, the TPPs' claims do not meet the strictures of Rule 9(b) because they do not sufficiently allege facts demonstrating that Huberfeld engaged in any acts of affirmative assistance sufficient to state claim for aiding-and-abetting fraud or breach of fiduciary duty. Namely, the TPC does not contain a single factual allegation that Huberfeld himself engaged in any wrongful act or omission. Instead, the TPC alleges that Huberfeld is a member of two groups – [redacted] – and without identifying any specific facts evidencing affirmative conduct, asserts that by virtue of otherwise innocuous acts ([redacted]) he is legally responsible for the sprawling scheme purportedly carried out by those groups.

The only relevant facts directed to Huberfeld are that he was the beneficial owner of certain entities that had an equity stake in Beechwood, [redacted]. Those averments are simply not sufficient to support claims for aiding-and-abetting fraud and breach of fiduciary duty. Because the Amended Complaint is bereft of a single relevant statement, act, or omission by him that supports the aiding-and-abetting claims, they must be dismissed.

III. The TPC's Catch-All Claims Fail As A Matter Of Law

Count 18 asserts claims for indemnity and contribution against Huberfeld for any liability that the TPPs may be found to have as to the PPCO Receiver. (TPC ¶¶ 920-922.) The PPCO Receiver's claims against the TPPs, however, are premised upon the TPPs' intentional or fraudulent conduct. *See Cyganowski et al. v. Beechwood Re Ltd. et al.*, 18-cv-06658, First Amended Complaint, dated March 29, 2019 (the "Cyganowski FAC"), Doc. No. 209 (alleging claims against the TPPs for, *inter alia*, RICO violations (Counts 1, 2, and 3), securities fraud (Counts 4 and 5), aiding and abetting breach of fiduciary duty and fraud (Counts 6 and 7), and

fraudulent conveyance (Counts 13, 14, 15, 16, and 17).) It is well-settled that indemnification and contribution are not available for claims based upon such alleged intentional misconduct. *See Chamarac Properties v. Pike*, 86 Civ. 7919 (KMW), 1993 U.S. Dist. LEXIS 14593, at *24 (S.D.N.Y. 1993) (collecting cases barring indemnity for claims of RICO violations, fraud, and breach of fiduciary duty). Because the PPCO Receiver's claims against the TPPs are premised on the TPPs' own intentional misconduct, the TPPs' claims for indemnity or contribution against Huberfeld must be dismissed.

Count 19, asserting claims for unjust enrichment and constructive trust, must likewise be dismissed. The TPPs' equitable claims, sounding in the same alleged fraud as the claims for aiding-and-abetting fraud and breach of fiduciary duty, fail for lack of a properly particularized pleading. *See, e.g., Welch v. TD Ameritrade Holding Corp.*, No. 07 Civ. 6904 (RJS), 2009 U.S. Dist. LEXIS 65584, at *32-33 (S.D.N.Y. July 27, 2009) (holding that Rule 9(b) applied to unjust enrichment claim premised on alleged fraudulent actions). The claim also fails because the TPC does not sufficiently allege that the TPPs bestowed a benefit upon Huberfeld. *See M+J Savitt, Inc. v. Savitt*, No. 08 Civ. 8535 (DLC), 2009 U.S. Dist. LEXIS 21321, at *30 (S.D.N.Y. Mar. 17, 2009). "Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). Absent any allegations of dealings between the parties, their relationship is simply too attenuated to state a claim for unjust enrichment. *See id.*, *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, No. 15-CV-3538 (VSB), 2018 U.S. Dist. LEXIS 215143, at *74 (S.D.N.Y. Dec. 21, 2018) (dismissing unjust enrichment claim: "[a]lthough the nature of the relationship required to establish an unjust enrichment claim has not been clearly defined, the relationship is 'too attenuated' if the parties [are] not connected in a manner that 'could have

caused reliance or inducement,' or if they 'simply had no dealings with each other.'") (citations omitted). Here, the TPPs do not aver that Huberfeld had any relationship with the TPPs, let alone one that is not so attenuated as to support a claim for unjust enrichment or constructive trust. Accordingly, the TPPs' claim for unjust enrichment/constructive trust must also be dismissed.

IV. The TPPs' Claims Are Barred By The *In Pari Delicto* Doctrine

New York law strictly prohibits wrongdoers from suing other alleged wrongdoers. *See ICP Strategic Credit Income Fund Ltd. v. DLA Piper, LLP (US)*, 730 F. App'x 78, 81 (2d Cir. 2018) ("The *in pari delicto* doctrine prevents a party from seeking to recover against others for a wrong in which the party participated or is deemed through 'imputation' to have participated."). "Indeed, the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that . . . the defense applies even in difficult cases and should not be weakened by exceptions." *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010) (internal quotation marks omitted). Where, as here, the application of *in pari delicto* is readily apparent on the face of a complaint, resolving the issue on a motion to dismiss is appropriate. *See, e.g., In re Lehr Constr. Corp.*, 528 B.R. 598 (Bankr. S.D.N.Y. 2015); *In re Haven Indus., Inc.*, 462 F. Supp. 172 (S.D.N.Y. 1978).

Here, the TPPs are alleged to have been knowing accomplices in the same fraudulent conspiracy for which they now assert claims against Huberfeld. (*See generally* Cyganowski FAC.) The wrongful conduct alleged by the PPCO Receiver against the TPPS thus squarely bars the TPPs' claims against Huberfeld. *See, e.g., In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54, 65 n.13 ("The pleadings here leave us with no doubt that BLMIS – in whose shoes the Trustee stands – bore at least 'substantially equal responsibility' for the injuries the Trustee now seeks to redress.").

CONCLUSION

For all of the reasons set forth herein, as well as in the memoranda of law filed by Bodner and other similarly situated moving third-party defendants, the TPC should be dismissed with prejudice against Huberfeld.

Date: May 15, 2019

Respectfully submitted,

/s/ Jeffrey C. Daniels

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