UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Case No. 18 Civ. 6658 (JSR)
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY, Third-Party Plaintiffs, v. MARK NORDLICHT, ET AL., Third-Party Defendants.	Case No. 18 Civ. 12018 (JSR)

THIRD-PARTY DEFENDANT DANIEL SAKS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE THIRD-PARTY COMPLAINT

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Third-Party Defendant Daniel Saks ("Saks") respectfully submits this memorandum of law in support of his Motion to Dismiss the Third-Party Complaint (Dkt. No. 204) ("TPC") filed by Plaintiffs Washington National Insurance Company and Bankers Conseco Life Insurance Company (collectively, "CNO").

PRELIMINARY STATEMENT

CNO brings this third-party action against Saks and numerous other entities and individuals in an apparent attempt to shift attention from its own alleged diversion of assets to itself from various Platinum Partners Credit Opportunities funds (collectively "PPCO"), as alleged in the First Amended Complaint ("PPCO FAC") brought by Melanie L. Cyganowski, the Receiver for PPCO (the "PPCO Receiver"). The PPCO Receiver alleges that CNO, an insurer "detrimentally burdened by the long-term care insurance portfolios that were proverbial albatrosses around their necks" (PPCO FAC ¶ 8), purposely placed its assets with Beechwood Re (together with the other Beechwood entities, "Beechwood") knowing "the close ties binding the Platinum Funds and Beechwood entities" (*id*.) and that it did so because Beechwood "not only offered terms that could not be refused, it was also the only game in town." (*Id.*) The PPCO Receiver further alleges that CNO, in tandem with certain Platinum and Beechwood owners "not working for the companies that they were obligated to serve, but rather solely for themselves" (*Id.* ¶ 13), directed Beechwood to structure and implement transactions with PPCO that were allegedly improperly designed to prefer CNO over PPCO to PPCO's detriment. (*Id.* ¶¶ 8-13).

The TPC asserts myriad RICO, fraud and fiduciary duty claims, along with related secondary liability claims, against the PPCO co-defendants, and also against a host of new third-party defendants. One such addition is Saks, a non-owner and non-investor employee of

Beechwood's asset management arm, B Asset Manager LP ("BAM"), from September 2014 through December 2015.

The TPC does not allege that Saks ever made any affirmative misrepresentation to CNO. The TPC instead faults Saks for his alleged silence regarding the relationship between certain investment positions and Platinum or its owners and investors. However, CNO fails to sufficiently allege that Saks had an individual duty to disclose those alleged facts or that he gained anything from his alleged omissions. In these circumstances, Saks' alleged silence does not give rise to a claim of personal liability against him under any of the legal theories articulated in the TPC.

CNO also fails to identify any injury Saks caused, which is fatal to each and every one of its causes of action. CNO acknowledges that Saks began working for Beechwood well after the formation of the reinsurance relationship in February 2014, and left well before CNO recaptured the reinsured liabilities in September 2016—the only times at which CNO alleges damage. CNO's alleged injuries, which reflect contract damages, consist of (1) the initial payments made by CNO to Beechwood under the Reinsurance Agreements in early 2014, (2) an alleged shortfall in the amounts re-paid to CNO upon cancellation of the Reinsurance Agreements in 2016, and (3) attorneys' fees associated with cancelling the Reinsurance Agreements in 2016. Saks' alleged intermediate conduct in late 2014 and in 2015 is not alleged to have caused any of those damages. At most, the TPC alleges that CNO delayed terminating the Reinsurance Agreements in part because of Saks' alleged omissions, but it sets forth no allegations showing that such delay caused any injury. For example, CNO does not allege facts showing that the assets in its reinsurance trust were worth more before Saks began managing those assets than after. Nor does

CNO allege facts showing that any of the specific investments that Saks supervised using trust assets lost money.

As further detailed below, the TPC should be dismissed as to Saks in its entirety.

STATEMENT OF FACTS

Saks began working at BAM in late 2014, after working for 6 months at Platinum Management (NY) LLC ("Platinum Management") from March 2014 through September 2014. (Ex. A, Decl. of Daniel Saks ("Saks Decl."), ¶ 2; TPC ¶ 504.) Saks is alleged to have replaced David Levy as CIO for BAM by late 2014 or early 2015. (TPC ¶¶ 504, 632.) When Saks arrived at Beechwood, the Reinsurance Agreements between CNO and Beechwood were already in effect; they were signed in February 2014 (TPC ¶ 489), before Saks worked at either Platinum or Beechwood. Saks joined Beechwood only after resigning from Platinum (Saks Decl. ¶¶ 4-5); the allegations that he "wore both [Platinum and Beechwood] hats simultaneously," (TPC ¶ 632), and "continue[d] to act for Platinum" after joining Beechwood (TPC ¶ 504); are not plausible given his specific employment dates, which CNO cannot dispute.[1]

Like Saks, BAM Chief Risk Officer Stewart Kim was also an employee of Platinum and then, later, of Beechwood. (TPC ¶ 170.) When Saks resigned from BAM at the end of 2015,

[1] The TPC makes numerous allegations, including as to Saks' employment dates, that are apparently derived from the complaint filed by the Joint Official Liquidators ("JOLs") of Platinum Partners Value Arbitrage Fund, LP ("PPVA") in the action *Trott v. Platinum Management (NY) LLC*, No. 18 Civ. 10936 (S.D.N.Y.). (*See, e.g.*, TPC ¶ 504 (citing the PPVA complaint).) However, the JOLs now admit that Saks' start date at Platinum Management is March 2014, and that they do not presently have information regarding his end date at Platinum Management or his dates of employment at BAM. (Plaintiffs' Memorandum of Law in Opposition to Moving Defendants' Second Round of Motions to Dismiss, dated May 13, 2019 at 11, 31, 35-36 (Dkt. 351) (accepting March 2014 start date and failing to address the other employment dates sworn to by Saks)). Saks submits on this motion his declaration regarding his dates of employment filed in his motion to dismiss submitted in *Trott* on May 10, 2019 (Dkt. No. 317) to ensure consistency in the record. By addressing this specific information now, Saks does not concede the correctness of any other allegations in the SAC and reserves all rights, including the right to challenge all of the incorrectly pleaded information at an appropriate time.

Dhruv Narain replaced Saks as CIO. (TPC ¶ 580.) The TPC refers to "the troika" of Saks, Kim and Narain collectively and interchangeably in its conclusory allegation that CNO "repose[d] their trust and confidence in the troika's expertise and prudency" in investing CNO's funds under the Reinsurance Agreements. (TPC ¶ 644.) Meanwhile, CNO alleges that these three and other Beechwood employees acted not in the interests of Beechwood and CNO, but for the benefit of and at the behest of certain Platinum and Beechwood owners. (*See, e.g.*, TPC ¶ 606.) [redacted]

In September 2016, nine months after Saks left Beechwood, CNO terminated the Reinsurance Agreements and recaptured the reinsurance trust assets and concomitant liabilities that had been ceded to Beechwood under the contracts. (TPC ¶ 473.) According to CNO, ***at that time***, the value of the reinsurance trust assets was insufficient to cover the value of the recaptured liabilities, as required by the Reinsurance Agreements. (TPC ¶¶ 603, 668.)

ARGUMENT

The TPC fails to state a claim against Saks under any of the many theories of liability it articulates, most of which are versions of fraud claims that require pleading with particularity under Rule 9(b). The claims asserted against Saks include civil RICO, 18 U.S.C. § 1962(c) (Count I), RICO conspiracy, 18 U.S.C. § 1962(d) (Count II), fraudulent inducement and fraud (Count III), aiding and abetting fraud (Count VII), breach of fiduciary duty (Count XI), aiding and abetting breach of fiduciary duty (Count XII), contribution and indemnity for claims brought by the PPCO Receiver (Count XVIII), and unjust enrichment (Count XIX). For each of the causes of action alleged against Saks that relies on the existence of a fraud, CNO must "(1) specify the statements that [it] contends [are] fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). Because none of the claims against Saks meet this standard, the TPC should be dismissed in its entirety as to Saks.

I. CNO Fails to State a RICO Claim

The TPC asserts a claim against Saks as a participant in a RICO enterprise by virtue of his employment at the investment advisor for Beechwood Re, the alleged RICO enterprise. (TPC ¶¶ 784-793.) The RICO statute makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). A civil RICO claim requires the plaintiff to plead that each defendant involved in the RICO enterprise engaged in at least two "predicate acts" of "racketeering activity," which is defined by statute to include various criminal conduct. 18 U.S.C. § 1961. Because the predicate acts must demonstrate a "pattern" of conduct by the RICO defendants, courts require the plaintiff to plead the elements of

a scheme with either "closed-ended continuity" or "open-ended continuity." Because the alleged enterprise is no longer active, the relevant concept here is "closed-ended continuity," which requires that the predicate acts be related and extend over a "substantial period of time." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). The Second Circuit has "never held a period of less than two years to constitute a 'substantial period of time.'" *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008). RICO claims predicated solely on wire fraud or mail fraud, as here, are subject to a heightened pleading standard that disallows group pleading. *Gross v. Waywell*, 628 F. Supp. 2d 475, 493, 495 (S.D.N.Y. 2009). Additionally, in order to plead a RICO enterprise, it is a "requirement in this Circuit" that the enterprise cannot simply perform the specific predicate acts; instead, the enterprise must engage in a "*course* of fraudulent or illegal conduct separate and distinct from the alleged predicate racketeering acts themselves." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004). Finally, following the enactment of the PSLRA, there is a bar against RICO claims premised on facts that could give rise to a violation of the securities laws. 18 U.S.C. § 1964(c).

A. CNO fails to identify the RICO predicate acts with requisite specificity

RICO plaintiffs must plead the circumstances surrounding a civil RICO claim with particularity under Federal Rule of Civil Procedure 9(b), including the predicate acts. *See First Capital Asset Mgmt.*, 385 F.3d at 178. Specifically, the Plaintiff must "allege facts showing the date and time of each [predicate] transaction as well as its fraudulent nature." *Pieper v. Benerin, LLC*, 972 F. Supp. 2d 321, 333 (E.D.N.Y. 2013). The TPC does not meet this standard as to any defendant, and certainly not as to Saks. CNO alleges only that "each Defendant perpetrated and agreed to perpetrate numerous predicate acts of racketeering activity identified under 18 U.S.C. § 1961(1), specifically, mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343." (TPC ¶

789.) The TPC otherwise does not establish the elements of any mail or wire fraud, and thus the civil RICO claim should be dismissed.

B. CNO does not meet the heightened standard imposed on RICO claims premised purely on mail and wire fraud

CNO's civil RICO claim against Saks is particularly deficient in light of the heightened standard for RICO claims predicated solely on mail fraud or wire fraud. Such claims must be "particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it," *Gross*, 628 F. Supp. 2d at 493 (quoting *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000)), and courts have thus rejected the availability of group pleading because of the increased scrutiny such claims require, *see, e.g.*, *Gross*, 628 F. Supp. 2d at 495. Because "use of the mail or wires is not inherently criminal," and "virtually every ordinary fraud is carried out in some form by means of mail or wire communication," *Gross* held that increased scrutiny of such claims was necessary to prevent "transforming garden-variety common law actions into federal cases." *Id.* at 493 (citing *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000)); *see also Cont'l Petroleum Corp. v. Corp. Funding Partners, LLC*, No. 11 Civ. 7801, 2012 WL 1231775, at *4 (S.D.N.Y. Apr. 12, 2012); *In re General Motors LLC Ignition Switch Litig.*, Nos. 14-MD-2543 and 14-MC-2543, 2016 WL 3920353, at *11 (S.D.N.Y. July 15, 2016). Due to the ubiquity of wire communications, "courts hold that a multiplicity of mailings 'may be no indication of the requisite continuity of the underlying fraudulent activity'" and thus do "not necessarily translate into a 'pattern' of racketeering activity." *Gross,* 628 F Supp. 2d at 493-94 (quoting *U.S. Textiles, Inc. v. Anheuser-Busch Cos., Inc.*, 911 F.2d 1261, 1266 (7th Cir. 1990) and collecting cases). Thus, a plaintiff predicating a RICO claim purely on wire fraud must plead "details regarding the alleged predicate acts in which each particular defendant was directly or indirectly involved or

had responsibility, as well as information concerning where, when and by which defendant any representations involved in the alleged fraudulent scheme constituting deception of Plaintiffs were communicated by use of the mail and/or wires, and how such statements actually deceived Plaintiffs." *Gross*, 628 F. Supp. 2d at 494-95. Group pleading is not sufficient. *Id.* CNO does not even attempt to meet this standard.

C. Saks' alleged omissions occurred over less than two years

Because Saks was employed by Beechwood and involved in its operations for only slightly more than one year, CNO does not state a civil RICO claim against him. Within the Second Circuit, RICO claims under Section 1962(c), like those here, focus "on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise." *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987). The TPC states that Saks began working at Beechwood in "late 2014." (TPC ¶ 504.) The TPC further alleges that Saks "left the Platinum-Beechwood conspiracy at the end of 2015." (TPC ¶ 579.) Moreover, even considering Saks prior employment at Platinum, which lasted for 6 months, between March 2014 and September 2014, Saks Decl. ¶ 2, Saks cannot have fulfilled the two-year continuity requirement for predicate acts in conjunction with the enterprise. *See Spool*, 520 F.3d at 184.

D. CNO's RICO claim is precluded by the PSLRA

Even if CNO were to properly state the elements of a RICO claim, it is nevertheless precluded. The Private Securities Litigation Reform Act ("PSLRA") precludes the assertion of civil RICO claims based in whole or in part on fraud connected to the purchase or sale of securities. *See* 18 U.S.C. § 1964(c). The PSLRA bar applies as long as the "alleged conduct could form the basis of a securities fraud claim against *any* party—be it against, or on behalf of, the plaintiff, defendants or a non-party." *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*,

286 F. Supp. 3d 634, 644 (S.D.N.Y. 2017) (emphasis in original). Here, CNO is a defendant in this same action in which it brings a third-party complaint—based on largely the same alleged facts—where the PPCO Receiver has alleged violations of the securities laws. *See, e.g.*, Dkt. No. 209, 18 Civ. 6658 (S.D.N.Y.), ¶¶ 309-321 (alleging violations of Section 10(b), Rule 10b-5 and Section 20 of the '34 Act). The civil RICO claim should be dismissed for this reason as well.

II. CNO Fails to State a RICO Conspiracy Claim

CNO also brings a claim against Saks for RICO conspiracy, (TPC ¶¶ 794-799), which requires both a substantive RICO violation, as well as "some factual basis for a finding of a conscious agreement among the defendants." *Picard v. Kohn*, 907 F. Supp. 2d 392, 400 (S.D.N.Y. 2012) (Rakoff, J.). Because the TPC alleges neither a substantive RICO violation nor a conscious agreement between Saks and the other RICO conspiracy defendants, dismissal of this claim is appropriate. Furthermore, because CNO alleges no injury resulting from any act Saks performed in furtherance of the RICO conspiracy, it has no standing to bring a RICO conspiracy claim against Saks. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990).

A. The RICO Conspiracy claim should be dismissed for failure to plead a substantive RICO violation

The Second Circuit has long held that failure to plead a substantive RICO violation against any defendant is fatal to a claim for RICO conspiracy at the motion to dismiss stage. *See First Capital Asset Mgmt.*, 385 F.3d at 182; *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996). As explained above, CNO's substantive RICO claim against Saks fails for numerous reasons, including several that apply in equal force to all defendants: the failure to allege a single predicate act with specificity; the failure to meet the heightened pleading standard

for mail and wire fraud predicates; and the bar by the PSLRA. The RICO conspiracy claim should be dismissed on that basis alone.

B. CNO does not allege any agreement between Saks and the other defendants

The TPC likewise fails to identify any agreement between Saks and any other defendants that are alleged to be part of the RICO enterprise. "[I]t is essential to a conspiracy claim to allege that the defendant was party to an unlawful agreement." *Hecht v. Commerce Clearing House, Inc.*, 713 F. Supp. 72, 77 (S.D.N.Y. 1989), *aff'd* 897 F.2d 21 (2d Cir. 1990). In order to bring an outsider into a RICO enterprise through a RICO conspiracy claim, the plaintiff must allege "some factual basis" allowing the court to infer a "conscious agreement" between the outsider and the civil RICO defendants. *Picard*, 907 F. Supp. 2d at 400. Furthermore, the "agreement" giving rise to a RICO conspiracy must be an agreement by the defendant to commit two or more predicate acts himself. *See Hecht*, 713 F. Supp. at 77 (citing *United States v. Teitler*, 802 F.2d 606, 613 (2d Cir. 1986) and *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir. 1988)). The TPC alleges no agreement between Saks and any other alleged RICO defendant, let alone that Saks agreed to perform two or more predicate act as part of such agreement.

C. CNO does not allege an overt act in furtherance of the conspiracy by Saks, nor injury arising out of the overt act, and thus it has no standing to bring a RICO conspiracy claim against Saks.

Finally, to establish standing to bring a RICO conspiracy claim against Saks, CNO must establish that: (1) Saks performed an overt act; (2) that overt act qualifies as a RICO predicate act; (3) the overt act furthered the RICO conspiracy; and (4) the RICO predicate act injured CNO. *Hecht*, 897 F.2d at 25. As to the first element, the TPC fails to allege ***any*** overt act on the part of Saks. Although CNO alleges that Saks [redacted] it does not identify any affirmative misrepresentation by Saks. Rather, CNO alleges

that Saks [redacted], which is not an overt act. As to the second element, there is no allegation of any specific facts that would allow an inference that any of Saks' conducts satisfies the elements of any RICO predicate. As to the third element, because CNO alleges no overt act by Saks, the TPC necessarily does not establish that any act by Saks furthered the RICO conspiracy. And finally, as to the fourth element, the TPC fails to articulate any cognizable theory through which it was damaged by Saks' conduct. Accordingly, even if CNO could state a claim for RICO conspiracy—and it cannot—it has no basis to assert that claim against Saks.

III. CNO Fails to State a Claim for Breach of Fiduciary Duty Against Saks

CNO's allegation that Saks breached a fiduciary duty to CNO under the Reinsurance Agreements (*see* TPC ¶¶ 866-72) likewise cannot stand. A fiduciary relationship arises between two parties where "confidence is reposed on one side and there is resulting superiority and influence on the other." *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 503 (S.D.N.Y. 2011) (Rakoff, J.) (quoting *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991)). Where a fiduciary duty arises because of a contract between two corporate entities, individual employees of the corporate entity owing the fiduciary duty do not owe their own personal fiduciary duties unless they establish a "*personal* relationship of trust and confidence" with their employer's contractual counterparty. *Krys v. Butt*, 486 F. App'x 153, 156 (2d Cir. 2012) (emphasis added).

[redacted] Any such allegations would have to be plead with particularity to be credited, which is not done here.

CNO alleges that Saks and other defendants breached their fiduciary duty of loyalty by engaging in a series of allegedly "non-arm's-length transactions." (TPC ¶ 869.) This is insufficient. To allege a violation of the duty of loyalty, a plaintiff must allege personal self-dealing, namely that he placed his own personal interests above those to whom he had a duty of undivided loyalty. *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (1989). Here, CNO fails to allege a sufficient personal relationship and fails to allege any self-interested transaction by Saks.

A. The TPC makes clear that CNO did not repose trust and confidence in Saks personally, and thus Saks owed no duty to CNO in his individual capacity

TPC does not allege a single fact allowing an inference that CNO placed trust and confidence in Saks personally. If anything, CNO makes affirmative allegations that it did *not* place trust and confidence in Saks personally. CNO does not allege that its relationship with Beechwood changed in any significant way in the transition from Levy, to Saks and Kim, and then to Narain and Kim as its investment managers. Through each of these investment managers, CNO conducted business with Beechwood pursuant to the Reinsurance Agreements; there is no allegation that any of the CNO entities took any unique action while Saks was CIO to establish a personal relationship of trust and confidence with him in particular. To the contrary, the TPC emphasizes the interchangeability of Beechwood's various investment managers by labeling three of them—Saks, Narain, and Kim—as a "troika," (TPC ¶ 644). CNO fails to state a breach of fiduciary duty claim against Saks because it does not sufficiently allege that Saks himself ever established a "personal relationship of trust and confidence," and therefore his own fiduciary relationship, with CNO. *Krys*, 486 F. App'x at 156.

B. The TPC fails to allege a breach of the duty of loyalty against Saks because it does not allege Saks had any personal financial interest in the transactions

Each of the alleged breaches of fiduciary duty identified in the TPC regards allegedly "non-arm's-length transactions," (TPC ¶ 869), which CNO contends were "the product of self-

dealing." (TPC ¶ 924.) These allegations implicate Saks' duty of loyalty to CNO. The duty of loyalty prohibits explicit self-dealing and requires the fiduciary to avoid "situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Birnbaum*, 539 N.E.2d at 576. The TPC fails to adequately allege that Saks breached his duty of loyalty by either means. First, CNO fails to allege any direct self-interest by Saks in any of his transactions at Beechwood. Second, CNO fails to allege any "personal interest" of Saks that would cause any kind of conflict or appearance of self-dealing. *Birnbaum* itself identifies the classic case of indirect personal interest, in which the defendant's wife sought to benefit from a transaction even though the defendant did not benefit directly. *Id.* No such allegations are present here, and thus the breach of fiduciary duty claims against Saks must fail.

IV. CNO Fails to State a Fraud Claim Against Saks

CNO also asserts that Saks' alleged failure to disclose to CNO the true nature of the relationship between Platinum and Beechwood entities gives rise to claims for fraud and fraudulent inducement against Saks. (TPC ¶¶ 800-807.) This is incorrect. A claim of common-law fraud requires "a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 165 (1st Dep't 2003). A claim of fraudulent inducement requires the same elements, except that the defendant's representation must have "induced [plaintiff] to enter into an agreement." *Barron Partners, LP v. LAB123, Inc.*, 593 F. Supp. 2d 667, 670 (S.D.N.Y. 2009) (Rakoff, J.). Where a fraud claim is premised on omissions, a plaintiff must specify "(1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled plaintiff; and (4) what defendant obtained through the fraud." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000). A claim

of fraud by omission must also generally be accompanied by "the existence of a fiduciary relationship requiring disclosure of the unknown facts." *Connaughton v. Chipotle Mexican Grill, Inc.*, 23 N.Y.S.2d 216, 220 (1st Dep't 2016); *see also United States v. Szur*, 289 F.3d 200, 211 (2d Cir. 2002); *In re Refco, Inc. Sec. Litig.*, 759 F. Supp. 2d 301, 316 (S.D.N.Y. 2010) (Rakoff, J.) ("Where the fraud is based on an alleged *omission* of material fact . . . the plaintiff must show that the defendant had a duty to disclose.") (emphasis in original). These elements are not met as to Saks.

A. There can be no fraudulent inducement claim against Saks because he was not employed by Beechwood when the Reinsurance Agreements were signed

As an initial matter, the fraudulent inducement claim against Saks must fail because Saks had no involvement in the operations of Beechwood at the time the Reinsurance Agreements were signed. The TPC alleges that Saks began working at Beechwood and interacting with CNO in "late 2014." (TPC ¶ 579.) The Reinsurance Agreements were signed in February 2014. (TPC ¶ 489.) A claim of fraudulent inducement requires that the defendant's actions caused plaintiff to "enter into an agreement." *Barron Partners*, 593 F. Supp. 2d at 670. Accordingly, because the relevant agreements were all consummated more than 6 months before Saks joined Beechwood, the fraudulent misrepresentation claim against Saks should be dismissed.

B. Because Saks owed no fiduciary duty to CNO, he cannot be liable for fraud by omission

The TPC does not identify a single affirmative misrepresentation by Saks; thus, he could only be liable to CNO for fraud by omission. As discussed above, CNO pleads no facts suggesting that it established a personal relationship of trust and confidence, and therefore a fiduciary relationship, with Saks in particular. Saks cannot be primarily liable for fraud by omission, because a fraud claim premised on a defendant's omissions is actionable only in the

presence of "a fiduciary relationship requiring disclosure of the unknown facts." *Connaughton*, 23 N.Y.S.2d at 220.

C. CNO pleads no injury proximately caused by Saks' alleged omissions

CNO pleads no facts sufficient to show that any conduct by Saks was a proximate cause of harm to CNO. CNO's theory as to Saks' liability for fraud appears to be that CNO did not "terminate the[Reinsurance Agreements] sooner or take other actions to ameliorate the damages that WNIC or BCLIC were incurring." (TPC ¶ 805.) Elsewhere, CNO alleges that, when the Reinsurance Agreements were, in fact, canceled in September 2016, "Beechwood Re's assets were wholly inadequate to cover its obligations to WNIC and BCLIC under the Reinsurance Agreements." (TPC ¶ 815.) To establish Saks as the proximate cause of this injury, CNO must at a minimum plead facts allowing an inference that the assets contained in their reinsurance trusts were greater when Saks took over responsibility for them than when CNO ultimately terminated the Reinsurance Agreements. No such allegation appears in the TPC, and thus CNO has not alleged facts sufficient to show that Saks was a proximate cause of harm to CNO.

D. CNO pleads no benefit to Saks from the alleged omissions

The TPC also fails to allege "what [Saks] obtained through the fraud." *Odyssey Re*, 85 F. Supp. 2d at 293. As set forth in *Odyssey Re*, "an inference of intent must entail allegations of "concrete benefits that could be realized by one or more of the ... nondisclosures alleged." *Id.* (citing *Chill v. Gen. Elec. Co.,* 101 F.3d 263, 268 (2d Cir. 1996)). Notably, "[t]he motive to maintain the appearance of corporate profitability, or the success of an investments[sic], will naturally involve benefit to a corporation, but does not 'entail concrete benefits'." (*Id.* (quoting *Chill*, 101 F.3d at 268)). An increase to individual employment compensation is also insufficient to satisfy the requirement that a concrete benefit be alleged. *Acito v. IMCERA Grp. Inc.,* 47 F.3d

47, 54 (2d Cir. 1995) (if scienter could be pleaded on the basis of a desire to increase compensation, virtually every company in the United States would face fraud liability).

The TPC is completely devoid of any allegations regarding any benefit to Saks from the alleged fraud. Saks is not alleged to have been an owner of Platinum or Beechwood or an individual investor in assets managed by Platinum or Beechwood. The only compensation he received was employment compensation, and even that is not specifically alleged to have been increased as to him by virtue of the alleged fraud. This alone should require dismissal of these claims.

V. CNO's Aiding and Abetting Claims Likewise Fail

CNO also alleges secondary liability claims against Saks for aiding and abetting fraud, (TPC ¶¶ 835-843), and aiding and abetting breach of fiduciary duty, (TPC ¶¶ 873-879.) To establish liability for aiding and abetting fraud, 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." *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014). For the purposes of an aiding and abetting claim, knowledge is subjective and requires that the defendant actually knew of the fraudulent scheme, "not mere notice or unreasonable awareness." *Samuel M. Feinberg Testamentary Tr. v. Carter*, 652 F. Supp. 1066, 1082 (S.D.N.Y. 1987). Aiding and abetting breach of fiduciary duty likewise requires that the defendant had "actual knowledge of the breach of duty" and "knowingly induced or participated in the breach." *Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2012). Courts have rejected attempts to draw a distinction between culpable conduct for aiding and abetting fiduciary duty liability, and aiding and abetting fraud. *See, e.g.*, *Hongying Zhao v. JPMorgan Chase & Co.*, No. 17 Civ. 8570, 2019 WL 1173010, at *5 n.6 (S.D.N.Y. Mar. 13, 2019); *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 533 (S.D.N.Y. 2009).

A. Saks could not have aided and abetted the alleged fraudulent inducement, as all of the conduct occurred before Saks was affiliated with either Platinum or Beechwood

For the same reasons that Saks cannot be liable for fraudulent inducement, he cannot be liable for aiding and abetting that same conduct. CNO and Beechwood Re signed the Reinsurance Agreements in February 2014, and the negotiation of those agreements necessarily occurred before that. (TPC ¶ 489.) Per the TPC, Saks only joined Beechwood and began corresponding with CNO in "late 2014." (TPC ¶ 579.) Moreover, Saks did not even join Platinum until March of 2014. Saks Decl. ¶ 2. The TPC alleges no facts suggesting that Saks substantially assisted in the formation of the Reinsurance Agreements, nor that he had actual knowledge that the transaction was occurring, let alone allegedly fraudulent. Accordingly, the aiding and abetting claim against Saks should be dismissed with prejudice.

B. Substantial assistance cannot be established through inaction

Because CNO alleges no affirmative act by Saks that proximately caused any harm to CNO, there can be no aiding and abetting claim against him. A defendant substantially assists a breach of fiduciary duty or fraud "when the defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *SPV OSUS Ltd. v. AIA LLC*, No. 15 Civ. 0619, 2016 WL 3039192, at *6 (S.D.N.Y. May 24, 2016) (Rakoff, J.) (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 295 (2d Cir. 2006)). Where, as here, the defendant owes no direct fiduciary duties to the plaintiff, substantial assistance cannot be established by inaction. *Lerner*, 459 F.3d at 295; *SPV OSUS*, 2016 WL 3039192, at *8. The substantial assistance provided by the defendant must also be both an actual, but-for cause and a proximate cause of injury to the plaintiff. *See SPV OSUS*, 2016 WL 3039192, at *6. As Judge Kaplan wrote in *Fraternity Fund Limited v. Beacon Hill Asset Management LLC*, 479 F. Supp. 2d 349, 370 (S.D.N.Y. 2007), "substantial assistance is intimately related to the concept of proximate

cause," and "[w]hether the assistance is substantial or not is measured by whether the action of the aider and abettor proximately caused the harm on which the primary liability is predicated."

As discussed above, the TPC does not plead facts sufficient to show that Saks had a fiduciary duty to CNO, meaning that CNO must plead an affirmative act by Saks to support and aiding and abetting claim. Similarly, the TPC does not plead any affirmative act by Saks in connection with the alleged fraud or breach of duty. [redacted] Because fraud claims must be pled with particularity, including by "identify[ing] the speaker" and stating "where and when the statements were made," *Mills*, 12 F.3d at 1175, the general statement that [redacted] is insufficient.

Again, CNO does not plead any facts sufficient to show that any conduct by Saks was a proximate cause of harm to CNO. CNO's theory as to Saks' liability for aiding and abetting appears to be the same as it was for its primary fraud claim: that CNO did not "terminate [the Reinsurance Agreements] sooner or take other actions to ameliorate the damages that WNIC or BCLIC were incurring." (TPC ¶ 841.) As discussed above, this allegation, without more, is insufficient to plead that Saks' conduct proximately caused any injury to CNO.

C. CNO has not pled facts showing actual knowledge by Saks of any alleged fraud or breach of duty

The TPC also fails to plead facts indicating that Saks had actual knowledge of an alleged fraudulent scheme to disguise a controlling relationship between Platinum and Beechwood. [redacted]

[redacted] First, even resolving all inferences in favor of CNO, [redacted] does no more than provide circumstantial notice [redacted] which is itself insufficient to establish actual knowledge. *See Samuel M. Feinberg Testamentary Tr.*, 652 F. Supp. at 1082. Second, even if actual knowledge were established [redacted], the TPC identifies only [redacted] Accordingly, CNO has not adequately alleged that Saks had actual knowledge of any fraud or breach of duty and thereafter himself caused injury to CNO.

VI. CNO Fails to Sufficiently Allege Any Claim for Unjust Enrichment

CNO alleges, in wholly conclusory fashion, that Saks was unjustly enriched. (TPC ¶¶ 923-26.) A claim for unjust enrichment requires that the "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). Unjust enrichment does not serve as a replacement or alternative to a tort or breach of contract claim; rather, it provides redress in "unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012).

A. Unjust enrichment is inappropriately alleged against Saks as a duplicate of fraud and breach of contract claims

CNO has not alleged the "unusual circumstances" in which the unjust enrichment defendants committed no tort or breached no contract, but nevertheless ended up with money that is rightfully CNO's. Every element of damages that CNO has alleged in this action arises out of the contract between CNO and Beechwood, which Beechwood allegedly breached. Courts consistently hold that the "existence of . . . an express contract governing the subject matter of plaintiff's claims[] also bars the unjust enrichment cause of action as against the individual defendants, notwithstanding the fact that they were not signatories to that agreement." *Vitale v. Steinberg*, 764 N.Y.S.2d 236, 239 (1st Dep't 2003) (citing *Bellino Schwartz Padob Advs. v. Solaris Mktg. Grp.*, 635 N.Y.S.2d 587, 588 (1st Dep't 1995) and *Feigen v. Advance Capital Mgmt.*, 541 N.Y.S.2d 797, 799 (1st Dep't 1989)). CNO has also alleged tort claims against numerous individual defendants arising out of the same facts. Those are not the circumstances to which an unjust enrichment claim applies. As the *Corsello* court recognized, "[t]o the extent that these claims succeed, the unjust enrichment claim is duplicative; if the plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects. The unjust enrichment claim should be dismissed." *Corsello*, 967 N.E.2d at 1185.

B. CNO does not identify any enrichment of Saks

CNO makes no specific allegations of Saks' alleged enrichment, which also requires that the claim of unjust enrichment against him be dismissed. CNO does not identify any funds that ended up in Saks' possession. CNO's conclusory allegations of enrichment that include Saks are group-pled as to all defendants, (TPC ¶ 924), and should not be credited. *See, e.g.*, *Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352-53 (S.D.N.Y. 2018) (dismissing group-pled

unjust enrichment claim for "fail[ure] to plead that the Non-Sponsor Defendants specifically profited at Plaintiffs' expense").

VII. CNO Fails to Sufficiently Allege a Claim for Contribution and Indemnity

Finally, CNO brings a claim against Saks for "contribution and indemnity" in the event the PPCO Receiver obtains a judgment against CNO. (TPC ¶¶ 919-22.) A claim for common-law contribution allows a tort defendant to seek apportionment of liability among joint tortfeasors equal to the relative fault of each tortfeasor. *D'Ambrosio v. City of New York*, 435 N.E.2d 366, 369 (N.Y. 1982). A claim for common-law indemnification allows "one who was compelled to pay for the wrong of another to recover from the wrongdoer the damages paid to the injured party." *Id.* at 368. The party seeking indemnification must generally be "free from wrong" or, at minimum, passively negligent where there is another active tortfeasor. *See id.*

CNO has not pled that Saks is either a joint tortfeasor against PPCO, or an active tortfeasor against PPCO in a situation where CNO is charged with harm to PPCO but was blameless or passively negligent. Indeed, CNO does not plead that Saks caused any injury to PPCO at all. The thrust of the TPC is the complete opposite—that Saks, along with other Beechwood employees and owners, defrauded CNO for the *benefit* of PPCO. The TPC specifically alleges that Saks "furthered" the fraud against CNO "by using WNIC's and BCLIC's reinsurance trust assets as a piggybank for Platinum." (TPC ¶ 504.) That allegation cannot be squared with a claim for contribution or indemnity. The arguments made by the Beechwood Parties and Defendant David Bodner as to contribution and indemnity are largely similar, and Saks joins them except as to the Beechwood Parties' 12(b)(1) motion to dismiss for lack of jurisdiction in the presence of an arbitration clause, which is not applicable as to Saks. For all of these reasons, this claim should be dismissed.

CONCLUSION

For each of the foregoing reasons, Saks requests an order dismissing all of the claims asserted against him with prejudice and without leave to renew, as well as granting any further relief as the Court deems just and proper under the circumstances.

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BINDER & SCHWARTZ LLP

/s/ Wendy H. Schwartz
Wendy H. Schwartz
Gregory C. Pruden
366 Madison Avenue, Sixth Floor
New York, NY 10017
Tel: (212) 510-7008
Fax: (212) 510-7229
wschwartz@binderschwartz.com
gpruden@binderschwartz.com

Attorneys for Third-Party Defendant Daniel Saks