UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION — 18-cv-6658 (JSR)

MELANIE L. CYGANOWSKI, as Equity Receiver for PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, *et al.*,

Plaintiffs,

v.

BEECHWOOD RE LTD., *et al.*,

Defendants.

— 18-cv-12018 (JSR)

WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY,

Third-Party Plaintiffs,

v.

MARK NORDLICHT, *et al.*,

Third-Party Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY THIRD-PARTY DEFENDANT DAVID BODNER TO DISMISS THIRD-PARTY COMPLAINT

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Third-party defendant David Bodner respectfully submits this memorandum of law in support of his motion to dismiss the Third-Party Complaint (ECF No. 75)[1] (the "TPC") of third-party plaintiffs Washington National Insurance Company ("WNIC") and Bankers Conseco Life Insurance Company ("BCLIC," and, together with WNIC, "Conseco") pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

Conseco faces claims by the PPCO Receiver[2] that it engaged in securities fraud and RICO violations, was unjustly enriched by PPCO, and received fraudulent transfers from PPCO. In turn, Conseco alleges in the TPC that Bodner engaged in RICO violations, aided and abetted a fraud on Conseco, and aided and abetted a breach of fiduciary duty by others who owed such a duty to Conseco. Conseco also seeks common law indemnity and contribution from Bodner for the Receiver's claims.

The TPC fails to state a claim against Bodner. Conseco complains of a "conspiracy" and a "scheme" by which Conseco was misled into investing with Beechwood without knowledge that Beechwood and Platinum were "integrated," but Conseco fails to connect Bodner to any actionable conduct.

Bodner was an investor in Beechwood through family trusts. But he never had any contact or communication of any kind with anyone at Conseco. There is not a single fact alleged in the TPC to support the conclusory assertions that Bodner directed, supervised, or assisted any conduct by others that allegedly harmed Conseco, or had anything at all to do with Conseco. Conseco complains that Beechwood did not disclose Bodner's ownership interests in

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[1] ECF citations refer to the *Cyganowski* docket, 18-cv-12018 (JSR).

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the TPC.

Beechwood, but Conseco never alleges that Bodner had any duty to Conseco to volunteer that information, that Bodner was even aware that such information was not disclosed to Conseco, or that Bodner knew such information was of interest to Conseco. Just as there are no communications between Bodner and Conseco, there are no communications between Bodner and the Beechwood managers—principally alleged as Mark Feuer, Scott Taylor, and David Levy—regarding any contacts that they were having with Conseco regarding ownership.

Likewise, Conseco's ill-conceived claims for indemnity and contribution must be dismissed, for at least two reasons: first, Conseco fails to plead a substantive cause of action against Bodner, and second, because the Receiver's claims against Conseco are federal statutory claims, intentional torts, unjust enrichment, and fraudulent conveyance, none of which is subject to common law indemnity or contribution as a matter of law.

Thus, Conseco cannot sustain a claim against Bodner.

RELEVANT FACTUAL ALLEGATIONS

Conseco asserts two RICO counts, and alleges that Bodner aided and abetted a fraud and breach of fiduciary duty by others. Conseco does not allege that Bodner personally made any misrepresentations or omissions to Conseco. The TPC alleges that he: (i) contributed initial capital to Beechwood in or about September 2013 (TPC ¶ 547-48); (ii) held an ownership interest in Beechwood (TPC ¶ 542); (iii) "met periodically to steer" and "direct the activity of the Co-conspirators" throughout 2014 and 2015 (TPC ¶ 605), and (iv) received an email from his secretary in July 2015 (TPC ¶ 482). Not one of these allegations establishes the requisite substantial assistance required for the aiding and abetting claims, and does not otherwise state a claim on the other causes of action.

ARGUMENT

I. Conseco's RICO Claims Against Bodner Should Be Dismissed

In Counts One and Two of the TPC, Conseco asserts claims against Bodner for violations of certain provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d). These claims should be dismissed, as they are either barred by the Private Securities Litigation Reform Act (the "PSLRA"), 18 U.S.C. § 1964(c), or they fail to state a claim against Bodner.

A. Conseco's RICO Claims Are Barred by the PSLRA

Conseco alleges that Bodner and other defendants violated Section 1962(c) by conducting the affairs of alleged RICO enterprises through a pattern of mail and wire fraud (TPC ¶¶ 784-93), and that Bodner and other defendants violated Section 1962(d) by conspiring to violate Section 1962(c) (TPC ¶¶ 794-99). Conseco's RICO claims against all defendants are barred by the PSLRA.

The PSLRA provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c). This RICO amendment prevents a plaintiff from sustaining RICO claims, including claims for mail and wire fraud, where "the conduct giving rise to those predicate offenses amounts to securities fraud." *Blythe v. Deutsche Bank AG*, 399 F. Supp. 2d 274, 278 (S.D.N.Y. 2005). This is precisely the nature of Conseco's RICO claims.

Conseco claims that the purpose of defendants' alleged mail and wire fraud was to "establish a reinsurance company, Beechwood Re, and use it as the vehicle for fraudulently inducing insurers to hand over funds to Beechwood . . . so that Beechwood could use those funds to keep Platinum afloat." (TPC ¶ 532). The scheme was designed "to attract significant sources of outside funding [to Platinum], particularly from institutional investors such as insurers and

pension funds, to be able to continue to pay redemptions to investors and keep this Ponzi-esque scheme afloat." (TPC ¶ 524).

This Court dismissed substantially similar claims as barred by the PSLRA in *Senior Health Ins. Co. v. Beechwood Re Ltd.*, No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 67952 (S.D.N.Y. April 22, 2019) ("*SHIP*"), one of the consolidated cases arising out of the same purported scheme described by Conseco. In *SHIP*, the Court found that "SHIP's allegations are barred by the [PSLRA] insofar as the gravamen of SHIP's mail and wire fraud claims is that Beechwood funneled SHIP's assets to Platinum." *Id*. at *30. The Court relied on the Supreme Court's opinion in *SEC v. Zandford*, 535 U.S. 813 (2002), as "instructive . . . if not dispositive." *Id*. at *29. In *Zandford*, the Supreme Court held that the respondent had engaged in securities fraud "by selling his customer's securities and using the proceeds for his own benefit without the customer's knowledge and consent," 535 U.S. at 815, explaining:

> The securities sales and respondent's fraudulent practices were not independent events. This is not a case in which, after a lawful transaction had been consummated, a broker decided to steal the proceeds and did so. Nor is it a case in which a thief simply invested the proceeds of a routine conversion in the stock market. Rather, respondent's fraud coincided with the sales themselves.

Id. at 820. The allegations by Conseco here are no different. Just like the Second Amended Complaint in the SHIP case, the TPC alleges that Conseco's "funds were obtained [by Beechwood and Platinum] precisely for the purpose of acquiring the securities." 2019 U.S. Dist. LEXIS 67952, at *29.

Moreover, Conseco's allegations are precisely the sort of claims Congress meant to place outside the scope of actionable conduct under RICO in enacting the PSLRA. *See, e.g.*, *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 n.11 (2d Cir. 2011) (finding "conduct undertaken to keep a securities fraud Ponzi scheme alive" to be "integrally related to

the purchase and sale of securities" and thus covered by the PSLRA); *Picard v. Kohn*, 907 F. Supp. 2d 392, 396 (S.D.N.Y. 2012) (Rakoff, J.) (finding that the PSLRA bars RICO claims for "attracting investors to supposedly diversified investment funds that, in reality, did nothing more than feed money into Madoff Securities"). Conseco's RICO claims should be dismissed as to all defendants pursuant to the PSLRA.

B. Conseco's Section 1962(c) Claim Fails to Allege a Pattern by Bodner

In addition to being barred by the PSLRA, the Section 1962(c) claim fails because Conseco has not alleged that Bodner conducted the purported enterprise's affairs "through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The RICO legislation defines "pattern of racketeering activity" to "require[] at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added). Like the other elements of a Section 1962(c) claim, the pattern requirement of at least two predicate acts "must be established as to each individual defendant." *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001); *accord First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 180 (2d Cir. 2004) ("[W]e evaluate the RICO allegations with respect to each defendant individually."); *McLaughlin v. Anderson*, 962 F.2d 187, 192 (2d Cir. 1992) ("[T]he bare minimum of a RICO charge is that a defendant personally committed or aided and abetted the commission of two predicate acts."). The two or more predicate acts must also be pleaded with particularity under Federal Rule of Civil Procedure 9(b), *Satinwood*, 385 F.3d at 178, meaning that the allegations must "state the contents of the communications, who was involved, where and when they took place, and explain why they were fraudulent." *Knoll v. Schectman*, 275 F. App'x 50, 51 (2d Cir. 2008).

Conseco does not allege that Bodner committed two or more acts of wire or mail fraud, the predicate acts on which Conseco's RICO claims are premised. In the TPC's 457 paragraphs, Conseco has connected Bodner to only one wire communication, an email sent to

him in July 2015 by his secretary. (TPC ¶ 472). A single email communication does not amount to a pattern of racketeering activity, and thus fails to establish the "bare minimum of a RICO charge." *McLaughlin*, 962 F.2d at 192. Nor is the email itself an act of fraud. According to Conseco, it was a "secret correspondence" between the alleged co-conspirators; it defrauded no one. (TPC ¶ 472). Conseco thus identifies no predicate acts by Bodner. Conseco's Section 1962(c) claim should be dismissed as to Bodner.

C. Conseco's Section 1962(d) Claim Should Be Dismissed

To the extent Conseco's Section 1962(c) claim is dismissed, the Section 1962(d) conspiracy claim must also be dismissed. *See Knoll*, 275 F. App'x at 51 ("[A]ny claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient."). In any event, Conseco has failed to state a claim for RICO conspiracy under Section 1962(d).

In order to state a Section 1962(d) claim, "a plaintiff must allege as to each alleged co-conspirator: (1) an agreement to join the conspiracy; (2) the acts of each co-conspirator in furtherance of the conspiracy; (3) that the co-conspirator knowingly participated in the same." *Nasik Breeding & Research Farm Ltd. v. Merck & Co.*, 165 F. Supp. 2d 514, 541 (S.D.N.Y. 2001). "[M]ere knowledge of a scheme, even coupled, with personal benefit, is not enough to impose liability for a RICO conspiracy." *Id.* Rather, the plaintiff must demonstrate with "specificity" that the defendants "consciously agreed to commit predicate acts." *Adelphia Communs. Corp. v. Bank of Am., N.A.*, Adv. No. 03-04942 (REG), 2007 Bankr. LEXIS 2851, at *78 (Bankr. S.D.N.Y. Aug. 17, 2007).

Conseco does not allege any facts to show that Bodner agreed to join the purported RICO conspiracy. Instead, Conseco points to an "agreement" that was allegedly "negotiated" in March 2013 by Nordlicht, Huberfeld, Feuer, and Taylor – not by Bodner.

(TPC ¶ 534). Conseco does not allege that Bodner was either copied on or mentioned in the email purportedly memorializing this agreement (because he was not). The assertion that Bodner knew about the agreement is wholly unsupported by anything in the TPC. Similarly, Conseco's reliance on the July 2015 email—an email sent to Bodner more than a year after Conseco was allegedly fraudulently induced to enter the Reinsurance Agreements (TPC ¶ 482)—fails to demonstrate that Bodner "consciously agreed to commit predicate acts." *Adelphia*, 2007 Bankr. LEXIS 2851, at *78. Also conspicuously absent from the TPC are any allegations of any acts Bodner took in furtherance of the alleged conspiracy. Conseco has failed to plead the necessary elements of its Section 1962(d) claim, so it should be dismissed.

II. Conseco's Aiding and Abetting Claims Against Bodner Should Be Dismissed

In Counts Seven and Twelve of the TPC, Conseco alleged that Bodner aided and abetted fraud (TPC ¶¶ 835-43) and aided and abetted breaches of fiduciary duty (TPC ¶¶ 873-79). Because Conseco has failed to plead these claims with the particularity required by Rule 9(b), they should be dismissed.

A. Conseco's Aiding and Abetting Fraud Claim Is Not Pleaded With Particularity

To state a claim for aiding and abetting fraud, a plaintiff must allege "(1) a fraud; (2) the defendant's actual knowledge of the fraud; and (3) the defendant's substantial assistance to the fraud." *Silvercreek Mgmt. v. Citigroup, Inc.*, 248 F. Supp. 3d 428, 442 (S.D.N.Y. 2017). These elements must be pleaded with particularity in accordance with Rule 9(b). *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014). Although knowledge may be pleaded generally, "'generally' is merely a relative term that allows knowledge to be pleaded with less particularity than is required for the pleading of fraud; 'generally' is not the equivalent of conclusorily." *Id.* Substantial assistance occurs "where a defendant affirmatively assists, helps conceal, or by virtue

of failing to act when required to do so enables the fraud to proceed." *Silvercreek*, 248 F. Supp. 3d at 443.

Conseco's claim fails on the first prong—it does not allege what fraudulent misrepresentation or omission Bodner purportedly aided and abetted. Instead, the TPC's charging paragraph for Count Seven (TPC ¶ 836) confusingly references a "conspiracy" and a "scheme," without referring to any specific fraudulent statement or omission to Conseco by any primary actor. That paragraph alleges that Bodner "aided and abetted the fraudulent conspiracy" in that he "directed every aspect of the fraudulent scheme," and alleges that the "conspiracy they directed"—referring to Nordlicht, Huberfeld, and Bodner—"directly encompassed numerous tentacles." (TPC ¶ 836) Conseco did not, however, plead a claim for civil conspiracy in Count Seven; it alleged aiding and abetting a fraud, *i.e.*, that Bodner provided substantial assistance to a primary actor who made a particularized misrepresentation or fraudulent omission. Conseco resorts to this broad conspiracy language because it cannot connect Bodner to any specific misrepresentation or omission in the TPC.

For example, in paragraph 541, Conseco alleges that Taylor told Conseco that an entity called "Beechwood Re" was owned by Taylor, Feuer, and Levy. Conseco says Taylor's statement was "knowingly false" because "Beechwood was funded, owned and controlled by private equity in the persons of Nordlicht, Huberfeld and Bodner." (TPC ¶¶ 541-42). But Conseco never connects Bodner to the alleged misrepresentation. The TPC does not allege that Bodner knew about Taylor's statement to Conseco, and does not allege that he assisted Taylor in making that alleged false statement.

In paragraphs 544 to 549, Conseco alleges that Feuer, Taylor, Levy, and Rick Hodgdon made specific written misrepresentations to Conseco about Beechwood's capitalization

structure, telling Conseco that Beechwood had $100 million in capital but concealing that the capital took the form of a demand note. Nowhere in any of these paragraphs, or anywhere else in the TPC, is it alleged that Bodner knew about these interactions or misrepresentations, or that he assisted them in any way.

Another example is the "leveraging scheme" alleged in paragraphs 552 to 561. Conseco claims that Beechwood Re pledged a first priority security interest in certain trust assets to Conseco, only to learn later that Beechwood entered a prime brokerage agreement with Nomura Securities, pursuant to which Nomura was also given a first priority lien on the same assets. In those paragraphs, the TPC references communications among Nordlicht, Feuer, Taylor, Levy, and many others. Bodner is never mentioned. He had no connection to this alleged fraud.

Critically, Conseco does not allege any act of substantial assistance by Bodner. Conseco lumps in Bodner with Nordlicht and Huberfeld and alleges that the three of them "directed every aspect of the fraudulent scheme and met periodically to coordinate and direct the . . . fraudulent activities," and were "primarily responsible for communicating with the other Co-conspirators," a group defined to include at least a dozen other individuals. (TPC ¶¶ 836, 470 n.4). But these are mere conclusions. Not a single oral or written statement, or any fraudulent act, is attributed to Bodner's direction or supervision. There is not a single factual allegation suggesting that Bodner was a person of authority among the group of individuals with whom Conseco had interaction, or the entities with which Conseco transacted. Conseco does not allege a single statement or communication made by Bodner to another so-called co-conspirator, nor does Conseco explain in any Rule 9(b) detail how Bodner "directed every aspect of the fraudulent scheme." (TPC ¶ 836).

Conseco alleges that Bodner, along with Nordlicht, Huberfeld, Levy, Feuer, and Taylor, "met periodically to steer the Co-conspirators" on sixteen dates throughout 2014 and 2015. (TPC ¶ 605). Conseco's allegation that Bodner attended these meetings in order to "steer the Co-conspirators"—as opposed to periodically attending business meetings with his co-investors and the business managers—is entirely conclusory and based on nothing. (TPC ¶ 605). Likewise, Conseco alleges that Bodner "secrete[d] ill-gotten gains" to the Beechwood Trusts established for his family's investments, but Conseco does not allege, even in the broadest terms, the details of these purported transactions, such as the dates or amounts. (TPC ¶ 788). Nor does Conseco allege how that conduct substantially assisted a fraud on Conseco.

Finally, Conseco employs impermissible group pleading here, where it includes Bodner among the list of Nordlicht, Huberfeld, and others. By "lumping all the defendants together . . . and providing no factual basis to distinguish their conduct," Conseco has failed to meet even the "minimum standard" of Federal Rule of Civil Procedure 8, let alone the heightened standard of Rule 9(b). *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001). Group pleading is only appropriate to attribute "particular statements or omissions" in group-published documents "to individual defendants even when the exact source of those statements is unknown." *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 405 (S.D.N.Y. 2010). No such group-published statements are alleged here.

Conseco has failed to plead that Bodner had actual knowledge of or substantially assisted the alleged fraud. Count Seven should be dismissed.

B. Conseco's Aiding and Abetting Breach of Fiduciary Duty Claim Is Not Pleaded With Particularity

To state a claim for aiding and abetting breach of fiduciary duty, a plaintiff must show "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly

induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2d Cir. 2006). These elements must be pleaded with particularity. *Krys*, 749 F.3d at 129.

Conseco alleges that Nordlicht, Huberfeld, and Bodner aided and abetted certain Beechwood entities in breaching their purported fiduciary duties to Conseco "by instructing and directing" the Beechwood entities "as to the 'Platinum related stuff' into which the Beechwood entities and their principals should invest WNIC's and BCLIC's trust assets." (TPC ¶ 875). Conseco repeats its claim that Nordlicht, Huberfeld, and Bodner "secrete[d] their ill-gotten gains" to the Beechwood Trusts and Beechwood Series they established. (TPC ¶ 878).

Again, Conseco relies on impermissible group pleading. In addition, Conseco does not allege a single transaction that Bodner instructed or directed the Beechwood entities to make. Throughout the TPC, Conseco alleges that it was Nordlicht, Huberfeld, Levy, Danny Saks, Stewart Kim, and Dhruv Narain who directed Beechwood's conduct, not Bodner. (TPC ¶¶ 566-67, 644). Indeed, the reference to "Platinum related stuff" was made by Narain, not Bodner. (TPC ¶ 643). Bodner had no role in investing Beechwood's reinsurance assets, and the TPC provides nothing more than the barest conclusory allegations to suggest otherwise. Moreover, Conseco's allegation that Bodner secreted proceeds of the fraud to the Beechwood Trusts and Beechwood Series is entirely generic and conclusory.

Conseco's claim that Bodner aided and abetted breach of fiduciary duties is not pleaded with the particularity required by Rule 9(b), nor does it meet the minimum pleading standards of Rule 8. Count Twelve should be dismissed.

III. Conseco's Unjust Enrichment Claim Should Be Dismissed

In Count Nineteen, Conseco asserts a claim for unjust enrichment against Bodner. (TPC ¶¶ 923-26). To state a claim for unjust enrichment, a plaintiff must show that "(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). But an unjust enrichment claim "is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012) ("To the extent these [contract] claims succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects."). Furthermore, "courts in New York state and in this District have found that the existence of a valid and binding contract governing the subject matter at issue in a particular case . . . preclude[s] a claim for unjust enrichment even against a third party non-signatory to the agreement." *SHIP*, 2019 U.S. Dist. LEXIS 67952, at *33-34 (quoting *Law Debenture v. Maverick Tube Corp.*, No. 06 Civ. 14320 (RJS), 2008 U.S. Dist. LEXIS 87438, at *35 (S.D.N.Y. Oct. 15, 2008)). Unjust enrichment requires particularized pleading where the underlying conduct alleged is fraudulent in nature. *Tyman v. Pfizer, Inc.*, No. 16-CV-06941 (LTS) (BCM), 2017 U.S. Dist. LEXIS 212879, at *23 (S.D.N.Y. Dec. 27, 2017).

As a threshold matter, the TPC does not allege with Rule 9(b) specificity that Bodner was enriched at Conseco's expense—or that he was enriched at all. The TPC alleges that "many of the individual Defendants named herein were unjustly enriched as agent for, or on behalf of, the entities that they established to secrete their ill-gotten gains," but this is a conclusory invention, unsupported by a single well-pleaded sentence in the TPC. (TPC ¶ 924). Not one transaction described in the TPC is alleged to have enriched Bodner.

Moreover, Conseco's unjust enrichment claim against Bodner is subsumed by its breach of contract claim against Beechwood Re. The subject matter of Conseco's unjust

enrichment claim is governed by its Reinsurance Agreements with Beechwood Re, and Conseco has asserted a claim against Beechwood Re for breach of those contracts. (TPC ¶¶ 861-65). "The existence of an express agreement bars a quasi contract claim concerning the subject matter covered by that express agreement. This rule applies even when a plaintiff asserts claims based in quasi contract against a non party to the express agreement." *Law Debenture,* 2008 U.S. Dist. LEXIS 87438, at *36 (citation omitted).

Count Nineteen should be dismissed against Bodner.

IV. **Conseco's Indemnity and Contribution Claim Should Be Dismissed**

In Count Eighteen, Conseco claims that to the extent it is found to have any liability to the PPCO Receiver, Bodner must either indemnify Conseco or contribute to the PPCO Receiver's recovery. (TPC ¶¶ 919-22). Conseco is incorrect as a matter of law.

The PPCO Receiver has asserted against Conseco a number of causes of action. These causes of action: (i) arise under federal statutes, including RICO and federal securities laws (Sections 10(b) and 20)); (ii) sound in fraud, including aiding and abetting fraud and breach of fiduciary duty; and (iii) include unjust enrichment and fraudulent conveyance claims. (ECF No. 83 ¶¶ 272-316, 322-340, 375-426). None of these claims is amenable to indemnification or contribution.

Courts will not permit indemnification or contribution claims that are based on federal causes of action where the federal statute in question does not explicitly or implicitly provide for such actions. *See, e.g., Friedman v. Hartmann*, 787 F. Supp. 411, 416 (S.D.N.Y. 1992) (applying the Supreme Court's reasoning in *Texas Industries, Inc. v. Radcliff Materials, Inc*., 451 U.S. 630, 638 (1981) to hold that the RICO statute does not give rise to a right to indemnification or contribution). As for the Receiver's federal securities claims against Conseco, "courts in the Second Circuit are generally in agreement that indemnification is not

available in a case where the party seeking indemnification has knowingly and willfully violated the federal securities laws[.]" *ResCap Liquidating Tr. Mortg. Purchase Litig. v. HSBC Mortg. Corp*. (USA) (*In re Residential Capital, LLC*), 524 B.R. 563, 594 (Bankr. S.D.N.Y. 2015) (citation and quotation marks omitted).

Furthermore, it is well-settled that "New York law . . . does not permit common law indemnification against intentional torts." *Barbagallo v. Marcum*, No. 11-CV-1358, 2012 U.S. Dist. LEXIS 66550, at *17 (E.D.N.Y. May 11, 2012). Of course, this includes fraud claims. *See, e.g.*, *Sierra Rutile Ltd. v. Katz*, No. 90 Civ. 4913 (JFK), 1995 U.S. Dist. LEXIS 15675, at *24 (S.D.N.Y. Oct. 24, 1995) (dismissing indemnification claim because the complaint "details intentional acts of fraud allegedly committed by each" alleged indemnitor). Where contribution is sought from a party on the basis of an intentional tort claim, the party seeking contribution must show the potential contributor's culpability. *See, e.g.*, *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 319, 324 (S.D.N.Y. 2010) (emphasis added) ("Contribution is a remedy available to any tortfeasor who pays more than its fair share of a judgment - as apportioned by the factfinder in terms of <u>relative culpability against other joint tortfeasors</u>."). Thus, a party seeking contribution for a fraud claim must allege the other party's culpability with particularity, as required under Rule 9(b). Conseco pleads <u>no</u> facts to show that Bodner is or could be liable to PPCO.

In addition, claims for indemnification and unjust enrichment "operate toward the same end — the equitable allocation of a loss." *United States ex rel. Ryan v. Staten Island Univ. Hosp. No*. 04-CV-2483 (JG) (CLP), 2011 U.S. Dist. LEXIS 51648, at *23 (E.D.N.Y. May 13, 2011). Thus, "[i]ndemnity, which is used to restore equity when one party is tasked with another's fault through operation of law, has no place where liability is imposed for unjust

enrichment or payment by mistake." *Id.* at *26. The TPC does not allege that Bodner played any role in Conseco receiving any property that belonged to PPCO; if Conseco has to give that property back to PPCO because a factfinder concludes that Conseco received it as a result of Conseco's unjust conduct (or as a fraudulent conveyance by PPCO), no equitable doctrine would require Bodner to indemnify Conseco or contribute toward its payment to PPCO.

Conseco states that if it is "found to have any liability to the PPCO Receiver, such liability will be" as a result of Bodner's conduct. (TPC ¶¶ 921, 922). This bare conclusion "provides no allegations that explain why [the party seeking indemnity] is entitled to indemnity," and should be dismissed. *Amusement Indus.*, 693 F. Supp. 2d at 325.

Count Eighteen should be dismissed against Bodner.

CONCLUSION

The TPC should be dismissed against Bodner.

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CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: */s/ Eliot Lauer*
Eliot Lauer
Gabriel Hertzberg
Julia G. Gumpper
101 Park Avenue
New York, New York 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559
Email: elauer@curtis.com
ghertzberg@curtis.com
jgumpper@curtis.com

Attorneys for Third-Party Defendant David Bodner

34734007