UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	18-cv-06658 (JSR)
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY	18-cv-12018 (JSR)
Third-Party Plaintiffs,	
-against-	
MARK NORDLICHT, *et al.,*	
Third-Party Defendants	

DEFENDANT HOKYONG KIM'S A/K/A STEWART KIM'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE THIRD PARTY COMPLAINT

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Defendant Stewart Kim ("Kim"), by and through his counsel, The Law Office of Stewart J. Kong, moves to dismiss the March 27, 2019, third party complaint ("TPC") by Washington National Insurance Company ("WNIC") and Bankers Conseco Life Insurance Company ("BCLIC") under Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

Washington National Insurance Company ("WNIC") and Bankers Conseco Life Insurance Company ("BCLIC") brought this third party complaint ("TPC") against third party defendant Stewart Kim ("Kim") who worked for Platinum Management in New York ("Platinum") up until the beginning of 2014, when he started working for Beechwood Re Ltd and B Asset Manager, LP (collectively "Beechwood").

The TPC attempts to attribute liability to Kim for the alleged actions of a group in which he had de minimus involvement. The TPC at best suggests through insufficient factual allegations, innuendo, and conclusory arguments that Kim was involved in a grand scheme to defraud WNIC and BCLIC by leveraging their trust assets. Notably, the TPC makes allegations against the other third party defendants, Mark Nordlicht, Murray Huberfeld, David Bodner, David Levy, Rick Hogdon, Will Slota, Daniel Small, David Leff, Naftali Manela, David Ottensoser, Daniel Saks a/k/a Danny Saks, Paul Poteat and Dhruv Narain with far greater specificity than against Kim.

The TPC allegations against Kim fail in every instance by attributing statements allegedly made by a group of two or more third party defendants to Kim individually, when Kim in fact was only copied on most, if not all email communications. Most important here is that the TPC fails to allege that Kim had knowledge of or was knowingly participating in any of the alleged fraudulent schemes to leverage WNIC and BCLIC trust assets. A careful reading of the TPC

will show that Kim never played an instrumental role or substantially assisted in the alleged dealings handled by members of the other third party defendants. Consequently, the TPC against Kim should be dismissed in in its entirety with prejudice and without leave to replead.

STATEMENT OF FACTS

The following relevant facts are taken from the TPC.

Kim worked for Platinum and then for Beechwood starting in late 2013. (*see* TPC at ¶ 505). The TPC alleges that Kim was involved in a fraudulent scheme to leverage WNIC's and BCLIC's trust assets yet fails to sufficiently specify the nature or context of Kim's involvement. In fact, every factual assertion involving Kim individually is legally insufficient to establish that Kim had any knowledge of wrongdoing. For example, the TPC describes a meeting including members of the Control Group held on November 8 (year unknown) but refers to Kim merely for the convenience of group pleading. Even though Kim was not present at this November 8th meeting, the TPC still refers to "Stewart Kim (who may not have been present at the meeting)…." (TPC at ¶ 577).

In fact, the TPC alleges no specific individual actions by Kim but associates Kim with the alleged actions of and statements purportedly made by Daniel Saks ("Saks") and other third party defendants. Although the TPC asserts that Kim was communicating with WNIC and BCLIC regularly, it never once alleges that Kim individually made misleading statements to WNIC and BCLIC or acted in any other way except that he communicated regularly with WNIC and BCLIC (*Id.* at ¶¶ at 579, 580). Rather, the TPC conveniently attributes statements allegedly made by Saks to Kim.

Clearly, Kim was a "puppet" taking orders from others in the Control Group. The TPC states in part, "None of the Co-conspirators disclosed to WNIC or BCLIC that Nordlicht and

Narain were acting as puppeteers, determining Kim's future employment …." (*Id.* at ¶580). Consistent with this statement, the TPC utterly fails to describe Kim's specific role in any of the Platinum or Beechwood transactions underlying this action. Also consistent with the above statement is the failure of the TPC to allege that Kim had any knowledge of the alleged schemes to defraud WNIC and BCLIC.

The TPC alleges that WNIC and BCLIC relied on alleged misrepresentations of a group in which Kim was associated but fails to specify Kim's individual role in the alleged scheme to induce WNIC and BCLIC to enter certain re-insurance agreements. In fact, the TPC fails to allege that Kim had any knowledge of the re-insurance agreements or the circumstances in which Kim is alleged to have misrepresented himself. (*Id.* at ¶ 581).

The TPC asserts that Kim and the Control Group breached their fiduciary duties to WNIC and BCLIC by "investing re-insurance trust assets in Platinum controlled funds and entities in non arm's length transactions designed to benefit themselves and Platinum." (*Id.* at ¶ 609). The TPC does not allege that Kim had knowledge of the non-arm's length transactions that were allegedly self dealing in nature or that he had access to Platinum controlled funds. In fact, the TPC does not allege that Kim ever held an ownership interest or invested any of his own money in any Platinum or Beechwood entity.

The TPC alleges that when WNIC and BCLIC questioned the investments of their trust assets made by Beechwood, "Saks, Kim and Narain invariably inveighed upon WNIC and BCLIC to repose their trust and confidence in the troika's expertise and prudency." (TPC at ¶ 644). The TPC provides weak examples of alleged fraudulent conduct by Saks and Kim on February 15, 2015, February 16, 2015, December 20, 2015, and February 18, 2016, all of which fail to specify how the communication was made and by whom it was made. (*Id.*). Again, the

TPC does not allege with sufficient specificity that Kim individually made any affirmative statements to WNIC and BCLIC about the prudency of investments or that Kim had knowledge of any alleged scheme to defraud these third party plaintiffs. In most of these alleged instances of fraud, the TPC merely ropes in Kim as part of the alleged over-arching scheme to defraud by attributing to Kim representations made by others. In short, the TPC infers Kim's association with the inner circle of key players of alleged wrong doing by Kim's receipt of emails in which he was just copied.

The TPC also alleges that Beechwood formed an "investment committee," led by "Levy and Taylor (and then Saks and Taylor, after Levy left), and was making decisions as to how the trust assets were being invested." (*Id.* at ¶ 645). Although the TPC asserts that "March 11, 2014 emails among Nordlicht, Slota, Kim, and Levy say it all," (*Id.*) it fails to allege with specificity Kim's knowledge or knowing participation in any of the alleged instances of wrongdoing by the "investment committee." In fact, the TPC doesn't even allege that Kim was a member of the "investment committee." Thus, when "Nordlicht pulled the strings," (TPC at ¶ 645) Kim was merely a puppet who had no knowledge of the alleged wrongful schemes at Platinum and Beechwood. Consistent with the above, the TPC never alleges Kim's knowing participation in the orchestration of any alleged fraudulent investment schemes by Platinum and Beechwood.

The factual allegations made against the other third party defendants or Control Group in this action describe their orchestrating or instrumental roles to an extent that far exceeds the alleged role Kim had in any alleged wrongdoing. Therefore, the TPC is trying to attribute liability to Kim merely by his association with the larger group of third party defendants.

LEGAL STANDARD

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, "to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). If the Plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Bell Atlantic Corp*, 550 U.S. at 547 (127 S.Ct. 1955).

Claims sounding in fraud must be "stated with particularity." Fed.R.Civ.P. 9(b). "The purpose of Rule 9(b) is to protect the defending party's reputation, to discourage meritless accusations, and to provide detailed notice of fraud claims to defending parties." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir.1994). The Plaintiff must specifically describe the acts or statements alleged to be fraudulent and provide some factual basis that creates a plausible inference of fraudulent intent.

Under Rule 9(b), a plaintiff pleading fraud based on deceptive conduct "must specify what deceptive or manipulative acts were performed, which defendants performed them, when the acts were performed, and the effect the scheme had on [plaintiffs]." *In re Parmalat Sec. Litig*., 383 F.Supp.2d 616, 622 (S.D.N.Y.2006). As the Second Circuit has stated:

Although malice, intent, knowledge and other condition of mind of a person may be averred generally, this leeway is not a license to base claims of fraud on speculation and conclusory allegations. Plaintiffs must allege facts that give rise to a strong inference of fraudulent intent, which may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.

It is also well established that a party does not comply with Rule 9(b) when it engages in "group pleading," making allegations against a group of defendants generally instead of pleading the specifics of a fraud claim against each defendant individually. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). *Javier v. Beck*, 2014 WL 3058456, at *12 (S.D.N.Y. July 3, 2014). Group pleading is improper because each defendant "is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged," and "blanket references to acts or omissions by all defendants" fail to do so. *Fernandez* v. *UBS AG*, 222 F.Supp 3d 358,388 (S.D.N.Y. 2016).

ARGUMENT

I. THE STANDARD FOR PLEADING CIVIL RICO IS VERY HIGH

The Court should dismiss WNIC and BCLIC's RICO claims against Kim under 18 U.S.C. §§ 1962(c) and (d) (the "1962(c) claim" and "1962(d) claim") because plaintiffs have failed to meet the very high pleading standards for a civil RICO claim. Indeed, "RICO is a specialized statue requiring a particular configuration of elements. These elements cannot be incorporated loosely from a previous narration, but must be tightly particularized and connected in a complaint." *LeSavoy v. Lane,* 304 F. Supp. 2d 520, 532 (S.D.N.Y. 2004) (citations omitted). This is because "[c]ivil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device. Because the mere assertion of a RICO has an almost inevitable stigmatizing effect on those named as defendants, courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Katzman v. Victoria's Secret Catalogue,* 167 F.R.D. 649, 655 (S.D.N.Y. 1996); *see also Figueroa Ruiz v. Alegria,* 896 F.2d 645, 650 (1st Cir. 1990) ("In fairness to innocent parties, courts should strive to flush out frivolous

RICO allegations at an early state of the litigation" as these claims are "quasi-criminal in nature") (emphasis added); *Elsevier, Inc. v. W.H.P.R. Inc.,* 692 F. Supp.2d 297, 300 (S.D.N.Y. 2010) (same).

Kim asserts that WNIC and BCLIC have failed to meet this high standard.

II. THE PRIVATE SECURITIES LITIGATION REFORM ACT ("PSLRA") BARS RICO CLAIMS BASED ON SECURITIES FRAUD

Under section 107 of the Private Securities Litigation Reform Act ("PSLRA") – the section concerning civil RICO claims – "no person may rely upon any conduct that would have been actionable as securities fraud in the purchase and sale of securities" to establish a civil RICO claim. *18 U.S.C. § 1964(c)* (the "RICO Amendment"). The Second Circuit construed the phrase "any conduct" in the RICO Amendment broadly and held that any conduct that could serve as a basis for a securities fraud claim – even if plaintiff labels the conduct as another claim, such as mail and wire fraud or aiding and abetting securities fraud – cannot serve as a predicate act for a civil RICO claim under the RICO Amendment. *MLSMK Investment Co. v. JP Morgan Chase & Co.,* 651 F.3d 268, 278 (2d Cir. 2011). In the instant litigation, the third party defendants are being accused of securities fraud, allegedly inducing WNIC and BCLIC to entrust them with their trust assets. Therefore, the law is clear that any conduct by defendants to participate in or aid and abet Platinum's fraud falls squarely within the scope of the RICO exclusion. *See Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC,* 286 F. Supp. 3d 634, 643 (S.D.N.Y. 2017). Thus, the WNIC and BCLIC civil RICO claims against Kim should be dismissed.

III. PLAINTIFFS FAIL TO SATISFY THE ELEMENTS OF A CIVIL RICO CLAIM UNDER 18 U.S.C. § 1962(c)

Plaintiffs fail to satisfy the pleading requirements of a 1962(c) claim. "Although on a motion to dismiss a court must accept all factual allegations as true and draw all inferences in the plaintiff's favor, dismissal is appropriate if the plaintiff can prove no set of facts that would entitle him to relief." *Levy v. Southbrook Intern Invs., Ltd.,* 263 F.3d 10, 14 (2d Cir. 2001).

To state a claim under 18 U.S.C. § 1962(c), Plaintiffs must allege that they were injured by Defendant's "(1) conduct (2) of an enterprise (3) through a pattern of (4) racketeering activity." *Sedima, S.P.L.R. v Imrex Co., Inc.,* 473 U.S. 479, 496 (1985) (citing the required elements and noting that plaintiff "must, of course, allege each of these elements to state a claim.") (emphasis added); *see also Cedar Swamp Holdings, Inc. v. Zaman,* 487 F.Supp.2d 444, 449 (S.D.N.Y. 2007) (quoting *Azrielli v. Cohen Law Offices,* 21 F.3d 512, 520 (2d. Cir. 1994) (requiring same elements). Third party plaintiffs have not satisfied these elements with respect to Kim.

A. Plaintiffs fail to allege a pattern of racketeering against Kim

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 about 35 instances of criminal conduct. 18 U.S.C. § 1961. Since the plaintiffs' RICO claims are predicated solely on wire fraud or mail fraud, such claims 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). It is also 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). The TPC has not alleged anything like this against Kim and thus has failed to show that Kim was engaged in at least two predicate acts of racketeering activity. Moreover, the TPC fails to allege that Kim was engaged in any course of conduct that differed from what was alleged against him.

B. Plaintiffs fail to allege Kim's "conduct" in this RICO claim

To satisfy 18 U.S.C. § 1962(c)'s conduct requirement, Plaintiffs must allege that Kim participated in the "operation and management" of the alleged enterprise – a standard confirmed by the Supreme Court, *See Reves v. Ernst & Young,* 507 U.S. 170, 183 (1993) (holding that the "operation or management" standard is confirmed by the "legislative history" of civil RICO). "In this Circuit, the 'operation and management' test is an extremely rigorous test." *See U.S. Fire Ins. V. United Limousine Service, Inc.,* 303 F. Supp. 2d 432, 451 (S.D.N.Y. 2004); *see also Redtail Leasing, Inc. v. Belleza,* 2001 WL 863556, at *4 (S.D.N.Y. Jan. 21, 1999) (The operation and management test is "a very difficult test to satisfy"). Indeed, "[t]here is a substantial difference between actual control over an enterprise and association with an enterprise in ways that do not involve control; only the former is sufficient under *Reves* because the test is not involvement but control." *U.S. Fire Ins.,* 303 F. Supp. 2d at 451; *see also West 79th Street v. Congregation Kahl Michas Church,* 2004 WL 2187069, *14 (S.D.N.Y. 2004) (dismissing complaint which "contains no factual allegations concerning the degree of discretionary authority or control" exercised by defendants); *Biofeedtrac, Inc. v. Kolinaor Optical Enter. & Consultants, S.R.L.,* 832 F. Supp. 585, 591 (E.D.N.Y. 1993) ("liability under § 1962(c) may not be imposed on one who merely 'carries on' or 'participates' in an enterprise's affairs") (quoting the Supreme Court in *Reves*).

The TPC fails to allege any "authority" or "control" by Kim over any Platinum or Beechwood assets. In fact, Plaintiff's do not offer any evidence supporting an allegation that Kim had control over any company assets or had direct involvement with the way trust assets were invested. In fact, the TPC fails to describe Kim's role in any detail except that he was simply a "senior manager" at Platinum and "Chief Risk Officer" at Beechwood. Consequently, the TPC fails to allege Kim's conduct in this RICO claim.

C. Plaintiffs fail to allege how Kim was the proximate cause of injury to WNIC and BCLIC

Plaintiffs have failed to allege causation against Kim. The RICO statute "limits standing to plaintiffs whose injuries were both factually and proximately caused by the RICO violation." *In re Am. Express Co. Shareholder Litig.,* 39 F.3d 395, 399 (2d Cir. 1994) (citations omitted); *see also Vicon Fiber Optics v. Srivo* 201 F. Supp. 2d 216, 219 ("a predicate act does not proximately cause an injury if it merely further, facilitates, permits, conceals an injury that happened or could have happened."); *West 79th St.* 2004 WL 2187069, at *4 (S.D.N.Y. 2004) ("To state a claim for civil damages under RICO, a plaintiff has a twofold pleading burden …. Plaintiff must allege that the defendant has violated the substantive RICO statute … [and] that plaintiff …. was injured in his or her business or property by reason of the violation of Section 1962."). The Second Circuit applies a two-prong test to determine the existence of proximate cause." *Gilfus v. Vargason,* 2006 WL 2827658, at *6. First, Plaintiff's injury must result from the defendant's racketeering activity or commission of the RICO predicate acts. *Baisch v. Gallina,* 346 F.3d 366, 373 (2d. Cir. 2003) ("[A] plaintiff does not have standing under RICO if he suffered an injury that was indirectly (and hence not proximately) caused by the racketeering activity.") Second, the Court must determine whether the defendants' acts were "a substantial factor in the sequence of responsible causation,' and whether the plaintiff's injury was

reasonably foreseeable or anticipated as a natural consequence." *Baisch,* 346 F.3d at 373-74 (citations omitted).

Here, Plaintiffs have failed to satisfy the Second Circuit's test. The plaintiffs have failed to plead "conduct" and a pattern of racketeering against Kim and failed to allege how Kim's involvement in emails, most of which he was copied on, was a racketeering activity or RICO predicate act. Most importantly, the TPC certainly fails the second prong of the Second Circuit test in that it does not allege that Kim was a "substantial factor in the sequence of responsible causation."

D. The TPC Fails to plead RICO enterprise

The TPC fails to plead a RICO enterprise because it fails to establish a course of conduct by an enterprise separate and apart from the component predicate acts. The Second Circuit has held that it is a "requirement in this Circuit" for a RICO plaintiff to allege a "course of fraudulent or illegal conduct separate and distinct from the alleged predicate racketeering acts themselves." *First Capital* 385 F.3d at 174. Here, the alleged predicate racketeering acts are just component parts of an alleged larger scheme to defraud WNIC and BCLIC. Because the TPC does not identify Kim as engaging in any larger or separate course of fraudulent or illegal conduct, it fails to plead RICO enterprise.

IV. BECAUSE PLAINTIFFS FAIL TO SATISFY THE ELEMENTS OF 18 U.S.C. § 1962(c), THEIR CLAIM UNDER § 1962(d) MUST ALSO FAIL

The WNIC and BCLIC 18 U.S.C. § 1962(d) claim fails because it requires a violation of § 1962(a), (b), or (c), which has not been sufficiently alleged against Kim. When a claim fails to please facts that satisfy the pleading requirements under Section 1962(c) – as is the case here – it necessarily dooms any claim Plaintiffs have under Section 1962(d). *See, e.g., West 79th St.,* 2004 WL 2187069, at *16. Since Plaintiffs have not sufficiently alleged all of the elements of a civil

RICO claim under 1962(c), their RICO conspiracy claim under 1962(d) should also be dismissed.

V. THE WAGONER RULE AND IN PARI DELICTO DOCTRINE BARS ALL PLAINTIFFS' CLAIMS AGAINST KIM

As an independent ground for dismissal of each of the claims made against Kim, the Second Circuit's *Wagoner* rule and the doctrine of *in pari delicto* each bar claims by a party engaged in equally wrongful or more wrongful conduct than another. The TPC alleges that the founders of Platinum and the principals of Beechwood were "audacious" and "calculating" yet plead facts regarding Kim that suggest only limited participation in isolated and non-related component transactions during limited periods of time. Consequently, all TPC claims against Kim should be dismissed.

VI. THE BREACH OF FIDUCIARY CLAIMS SHOULD BE DISMISSED

The TPC alleges that Kim personally owed fiduciary duties of loyalty and care to WNIC and BCLIC and breached those duties. (TPC ¶¶ 867-870). The TPC also alleges that "each of the Defendants sued on this claim repeatedly breached their fiduciary duties to WNIC and BCLIC by (a) repeatedly investing WNIC's and BCLIC's trust assets in non-arm's length transactions – including but not limited to, investments in Platinum-controlled funds and entities; (b) continuously and fraudulently treating and valuing the non-arm's length investments of trust assets as if they were made at arm's length; and (c) misrepresenting to WNIC and BCLIC that such investments of trust assets were made at arm's length. These allegations fail because the TPC does not specifically allege that Kim had any knowledge sufficient to trigger a fiduciary duty to WNIC and BCLIC. Moreover, the group pleading doctrine, requires dismissal of this breach of fiduciary claim simply because Kim was never part of a "narrowly defined group of

highly ranked officers or directors who participated in the preparation and dissemination of a published company document."

A fiduciary duty arises 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) (quoting *United States v. Chestman,* 947 F.2d 551, 568 (2d Cir. 1991)). The TPC does not allege any direct contractual, ownership, or other relationship through which Kim could be found to have "superiority and influence" over WNIC and BCLIC. The TPC does not allege that Kim had any pecuniary interest as an employee of Platinum and Beechwood other than to receive a paycheck. The TPC does not allege that Kim was a founder or principal of an entity involved with the formation of Beechwood entities. And it also does not allege that Kim had any of his own monies invested in Platinum or Beechwood assets. Therefore, the TPC assertion that Kim owed a fiduciary duty to WNIC and BCLIC fails as a matter of law.

An individual's employment as a corporate general partner does not, in general, suffice to impute liability for the general partner's breach of fiduciary duty to the individual employee. This Court has rejected the argument that "any high ranking corporate official is subject to personal liability for breach of fiduciary duty whenever the corporation breached a fiduciary duty." *In re Refco,* 826 F.Supp.2d at 512 (citing *Am. Fin. Int'l Grp. – Asia, LLC v. Bennett,* No. 05 Civ. 8988, 2007 WL 1732427, at *5 (S.D.N.Y. June 14, 2007) and *A.I.A. Holdings, SA v. Lehman Bros. Inc.,* No. 97 Civ. 4978, 1999 WL 47223, at *6 (S.D.N.Y. Feb. 3, 1999)); *see also Sergeants Benevolent Ass'n Annuity Fund v. Renck,* 19 A.D.3d 107, 116 (1st Dep't 2005). For instance, even where an individual who was "president, Chief Operating Officer and member of the board of directors" of a corporation that owed fiduciary duties to the plaintiff, and who "was an authorized signatory on [plaintiff's] bank and broker accounts; authorized wire transfers to

and from [plaintiff's] bank accounts; directly oversaw many of the services provided by the [corporate fiduciary] to [plaintiff]; and understood the [plaintiff's] business model," that was legally insufficient to find that the individual employee personally owed a direct fiduciary duty to the plaintiff. *In re Refco,* 826 F. Supp. 2d at511. *See also Gelfman v. Weeden Inv'rs, LP,* 792 A.2d 977, 992 n.24 (Del. Ch. 2001) (officers and directors of a corporate general partner owe only a "duty of loyalty derivatively" to the partnership, and only where the officers and directors who themselves owned a stake in the partnership "have acted in a way that is potentially advantageous to their personal interests and at the expense of the limited partners.").

The TPC does not allege that Kim ever held any ownership interest in any Platinum entity or invested any of his own money in Platinum. In fact, the TPC doesn't sufficiently allege that Kim was involved in any of the specific investment schemes allegedly perpetrated by Platinum and Beechwood. Most importantly, the TPC fails to alleges that Kim ever managed or had the authority to manage assets in WNIC's and BCLIC's trust accounts. Kim's role has already been described in the TPC as a senior manager or Chief Risk Officer without much more to add. This alone is insufficient to ascribe fiduciary duties to Kim. Therefore, the claims for breach of fiduciary duty and aiding and abetting breaches of fiduciary duty against Kim should be dismissed for failure to sufficiently allege a fiduciary duty to WNIC and BCLIC.

Even if Kim was found to have a fiduciary duty to WNIC and BCLIC, the TPC does not allege with specificity any individual acts in his role as a Platinum or Beechwood employee that would constitute a breach of fiduciary duty. While this Court recognized in its April 11, 2019 opinion that "the group pleading doctrine applies to breach of fiduciary claims that are rooted in fraud," (Dkt. No. 290 at 23), the Court has not previously had the opportunity to decide whether those group pleadings should to be imputed to Kim as a third party defendant. Unlike other

WNIC and BCLIC third party defendants, Kim is not alleged to be one of the "narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of" any representations by Platinum and Beechwood.

Under the group pleading doctrine, a group-published written statement may be imputed only to a "narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document." *Elliot Assocs., LP v. Hayes,* 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000). The TPC fails to identify Kim as a member of such a narrowly defined group. Moreover, the TPC does not allege that Kim had any motive to participate in any preparation or dissemination of documents.

Because the TPC fails to allege that Kim was involved in a key role for any particular investment scheme, the inclusion of Kim within the ambit of a group pleading would require significant widening of the "narrowly defined group of highly ranked officers or directors" the Court identified in its April 11 Opinion. *Elliot Assocs.,* 141 F. Supp. 2d at 354. Notably, the TPC alleges that most third party defendants were key players while such an allegation is not made against Kim.

It is for these reasons above that the claim for breach of fiduciary duty should also be dismissed as to Kim on the independent ground that Kim committed no breach of any such duty.

VII. THE TPC FAILS TO PLEAD SCIENTER TO SUPPORT A COMMON-LAW FRAUD CLAIM

The TPA also asserts claims against Kim for common law fraud. These claims also fail for the same reasons as WNIC and BCLIC's breach of fiduciary duty claims. Separately and independently, the common law fraud claim against Kim also fail because the TPC does not allege scienter as to Kim.

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). Where a claim of common law fraud is based 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). Furthermore, a common law fraud claim premised on an omission must 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.3d 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.). The TPC does not allege facts sufficient to establish that Kim possessed knowledge of any alleged wrongdoing. Also, the fact that the TPC does not allege any pecuniary incentive for Kim for prioritize his own interests or those of Platinum, leaves no factual basis for this Court to find that Kim owed any direct or derivative fiduciary duties to WNIC and BCLIC.

WNIC and BCLIC fraud claims violate the group pleading doctrine and Rule 9(b)'s particularity requirements, as the plaintiffs fail to allege with specificity for each representation and omission who made or failed to make it; when it was or should have been made; to whom it was or should have been made; why it was material and misleading; who specifically relied upon it; why that reliance was justified; and what damages resulted from such reliance.

In this Court's April 11 Opinion, while the group pleading doctrine can impute a false statement to a defendant, it "does not also transitively convey scienter." (Dkt. No. 290 at 23

(citing *Anwar v. Fairfield Greenwich Ltd.,* 728 F. Supp. 2d 372, 406 (S.D.N.Y. 2010)). In this case, the TPC fails to allege that Kim had knowledge of any false statements or misrepresentations.

Based on the foregoing, the plaintiffs' fraud claims against Kim should be dismissed.

VIII. THE AIDING AND ABETTING CLAIMS AGAINST KIM SHOULD BE DISMISSED

To establish liability for aiding and abetting fraud, the plaintiffs must show "(1) the existence of 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).

A. Plaintiffs fail to plead "knowledge" of fraud or breach of fiduciary duty.

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). The TPC does not allege anywhere that Kim had knowledge of any alleged fraudulent scheme or provided "substantial assistance to advance the fraud's commission."

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). Again, the TPC fails to plead that Kim had actual knowledge of a breach of duty or that he substantially assisted in any way to advance such an alleged breach.

Not even once does the TPC allege Kim's substantial involvement in any alleged wrongdoing while working for Platinum and Beechwood.

B. Plaintiffs fail to plead "substantial assistance" with respect to Kim

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, therby 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)). The substantial assistance provided by the defendant must also be both and actual, but for cause and a proximate cause of the 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 "whether the assistance is substantial or not is measured by whether the action of the aidor and abettor proximately caused the harm on which the primary liability is predicated." In this claim against Kim, substantial assistance has not been established because there are no factual assertions in the TPC relating to any action by Kim that could be considered as substantial assistance in a fraud or breach of fiduciary duty. The only creditable "conduct" attributed to Kim is his receipt of certain emails while there is not a single assertion that Kim was the author of any emails. The receipt of an email is neither the but-for nor the proximate cause of any harm to PPVA, and courts have dismissed aiding and abetting claims brought on that basis. *See Meeker v. McLaughlin,* No. 17 Civ. 5673, 2018 WL 3410014, at *9 (S.D.N.Y. July 13 2018).

IX. PLAINTIFFS' UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED

Plaintiffs' unjust enrichment claim requires a showing that 1) that the defendant benefitted; 2) at the plaintiff's expense; and 3) that equity and good conscience require restitution. *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000) (citation omitted). The TPC

alleges no facts suggesting that Kim had any motive to benefit himself at the plaintiffs' expense or that he stood to benefit from WNIC's and BCLIC's relationship with Beechwood. It also fails to allege that Kim had any pecuniary interest whatsoever in advancing any fraudulent schemes allegedly orchestrated by other third party defendants. Lastly, the doctrine of unclean hands applies here, emphasizing that plaintiffs should not receive an equitable remedy due to the plaintiffs acting unethically or in bad faith.

Because the same allegations of misconduct are being made against WNIC and BCLIC in this same action, the doctrine of unclean hands requires that the plaintiffs' claim against Kim for unjust enrichment should be dismissed.

CONCLUSION

Based on the above, Kim respectfully requests this Court to dismiss all claims in the TPC against Kim with prejudice and without leave to renew, and any further relief that the Court deems proper.

Dated: New York, New York
May 15, 2019

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