

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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: IN RE PLATINUM-BEECHWOOD LITIGATION, : Master Docket No. 18-CV-6658 (JSR)
:

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MELANIE L. CYGANOWSKI, as Equity : Index No. 18-CV-12018 (JSR)
Receiver for PLATINUM PARTNERS :
CREDIT OPPORTUNITIES MASTER :
FUND LP, PLATINUM PARTNERS :
CREDIT OPPORTUNITIES FUND (TE) :
LLC, PLATINUM PARTNERS CREDIT :
OPPORTUNITIES FLIND LLC, :
PLATINUM PARTNERS CREDIT :
OPPORTUNITIES FUND :
INTERNATIONAL LTD., PLATINUM :
PARTNERS CREDIT OPPORTUNITIES :
FLIND INTERNATIONAL (A) LTD., and :
PLATINUM PARTNERS CREDIT :
OPPORTUNITIES FUND (BL) LLC, :

Plaintiffs,

v.

BEECHWOOD RE LTD., *et al.*,

Defendants.

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SENIOR HEALTH INSURANCE COMPANY OF : Index No. 18-CV-12018 (JSR)
PENNSYLVANIA, :

Crossclaimant,

v.

BEECHWOOD RE LTD., B ASSET MANAGER :
LP, B ASSET MANAGER II LP, BEECHWOOD :
RE HOLDINGS, INC., BEECHWOOD :
BERMUDA LTD., BEECHWOOD BERMUDA :
INTERNATIONAL LTD., BEECHWOOD :
BERMUDA INVESTMENT HOLDINGS, LTD., :
BAM ADMINISTRATIVE SERVICES LLC, :
FEUER FAMILY TRUST, and TAYLOR-LAU :

| | |
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| FAMILY TRUST, | : |
| | : |
| Crossclaim Defendants. | : |
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| SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, | : Index No. 18-CV-12018 (JSR) |
| | : |
| | : |
| Third-Party Plaintiff, | : |
| | : |
| | : |
| v. | : |
| | : |
| PB INVESTMENT HOLDINGS LTD., | : |
| BEECHWOOD CAPITAL GROUP, LLC, B | : |
| ASSET MANAGER GP LLC, B ASSET | : |
| MANAGER II GP LLC, MSD | : |
| ADMINISTRATIVE SERVICES LLC, | : |
| PLATINUM MANAGEMENT (NY) LLC, N | : |
| MANAGEMENT LLC, MARK NORDLICHT, | : |
| MURRAY HUBERFELD, DAVID BODNER, | : |
| ESTATE OF URI LANDESMAN, NAFTALI | : |
| MANELA, JOSEPH SANFILIPPO, DANIEL | : |
| SMALL, ELLIOT FEIT, DAVID STEINBERG, | : |
| EZRA BEREN, DAVID OTTENSOSER, WILL | : |
| SLOTA, BERNARD FUCHS a/k/a BERISH | : |
| FUCHS, DANIEL SAKS, HOKYONG KIM a/k/a | : |
| STEWART KIM, BEECHWOOD TRUST NO. 1, | : |
| BEECHWOOD TRUST NO. 2, BEECHWOOD | : |
| TRUST NO. 3, BEECHWOOD TRUST NO. 4, | : |
| BEECHWOOD TRUST NO. 5, BEECHWOOD | : |
| TRUST NO. 6, BEECHWOOD TRUST NO. 7, | : |
| BEECHWOOD TRUST NO. 8, BEECHWOOD | : |
| TRUST NO. 9, BEECHWOOD TRUST NO. 10, | : |
| BEECHWOOD TRUST NO. 11, BEECHWOOD | : |
| TRUST NO. 12, BEECHWOOD TRUST NO. 13, | : |
| BEECHWOOD TRUST NO. 14, BEECHWOOD | : |
| TRUST NO. 15, BEECHWOOD TRUST NO. 16, | : |
| BEECHWOOD TRUST NO. 17, BEECHWOOD | : |
| TRUST NO. 18, BEECHWOOD TRUST NO. 19, | : |
| BEECHWOOD TRUST NO. 20 a/k/a THE | : |
| DAVID I LEVY BEECHWOOD TRUST, | : |
| BEECHWOOD ASSET MANAGEMENT | : |
| TRUST I, BEECHWOOD ASSET | : |
| MANAGEMENT TRUST II, BEECHWOOD RE | : |
| INVESTMENTS, LLC SERIES A, | : |

BEECHWOOD RE INVESTMENTS, LLC :
 SERIES B, BEECHWOOD RE INVESTMENTS, :
 LLC SERIES C, BEECHWOOD RE :
 INVESTMENTS, LLC SERIES D, :
 BEECHWOOD RE INVESTMENTS, LLC :
 SERIES E, BEECHWOOD RE INVESTMENTS, :
 LLC SERIES F, BEECHWOOD RE :
 INVESTMENTS, LLC SERIES G, :
 BEECHWOOD RE INVESTMENTS, LLC :
 SERIES H, BEECHWOOD RE INVESTMENTS, :
 LLC SERIES I, ROAD HOLDINGS, LLC, :
 LAWRENCE PARTNERS, LLC, MONSEY :
 EQUITIES, LLC, WHITESTAR LLC, :
 WHITESTAR LLC II, WHITESTAR LLC III, :
 PLATINUM CREDIT HOLDINGS, LLC, :
 MARK NORDLICHT GRANTOR TRUST, :
 DAHLIA KALTER, MICHAEL JOSEPH :
 NORDLICHT, KEVIN CASSIDY, :
 BEECHWOOD GLOBAL DISTRIBUTION :
 TRUST, FEUER FAMILY 2016 ACQ TRUST, :
 and TAYLOR-LAU FAMILY 2016 ACQ :
 TRUST, :
 :
 Third-Party Defendants :
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**MEMORANDUM OF LAW IN SUPPORT OF DAVID OTTENSOSER’S PARTIAL
 MOTION TO DISMISS THIRD-PARTY COMPLAINT OF SENIOR HEALTH
 INSURANCE COMPANY OF PENNSYLVANIA**

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TABLE OF CONTENTS

INTRODUCTION..... 1
LEGAL STANDARD 1
ARGUMENT..... 2
CONCLUSION 4

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| Cases | |
| <i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)..... | 2 |
| <i>Briarpatch Ltd. v. Phoenix Pictures, Inc.</i> , 373 F.3d 296 (2d Cir. 2004)..... | 2 |
| <i>Corsello v. Verizon New York, Inc.</i> , 18 N.Y.3d 777 (2012)..... | 2 |
| <i>Mills v. Polar Molecular Corp.</i> , 12 F.3d 1170 (2d Cir. 1993)..... | 2 |
| <i>Royal Host Realty, LLC v. 793 Ninth Ave. Realty, LLC</i> , 192 F. Supp. 3d 348 (S.D.N.Y. 2016)..... | 2 |
| Other Authorities | |
| Fed. R. Civ. P. 12(b)(6)..... | 1 |
| Fed. R. Civ. P. 8(a) | 1, 2 |
| Fed. R. Civ. P. 9(b)..... | 2 |

We respectfully submit this memorandum of law in support of David Ottensoser's partial motion to dismiss certain causes of action in the Third-Party Complaint ("SHIP" ECF No. 195 in Index No. 18-CV-12018 (JSR) and "Beechwood" ECF No. 390 in Master Docket No. 18-CV-6658) (the "SHIP TPC") filed by Senior Health Insurance Company of Pennsylvania ("SHIP") pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

INTRODUCTION

SHIP alleges four counts against Ottensoser in the SHIP TPC, including one for unjust enrichment (Count Seven).¹ However, Ottensoser was not an owner of any of the various Beechwood Entities,² just as he was not an owner of Platinum Management (NY) LLC, and the SHIP TPC does not allege otherwise. Accordingly, the SHIP TPC lacks sufficient factual allegations to support an inference that Ottensoser shared in any allegedly ill-gotten monies that the owners of those entities received. In fact, while SHIP alleges dozens of other specific persons and entities who were supposedly unjustly enriched at SHIP's expense, nowhere in the TPC does SHIP allege Ottensoser received any of those funds, let alone allege that Ottensoser was unjustly enriched at SHIP's expense. For these reasons, just as this Court dismissed the unjust enrichment claim against Ottensoser in the related Trott Litigation,³ it should dismiss SHIP's unjust enrichment claim against Ottensoser here.

LEGAL STANDARD

To survive a motion to dismiss, a complaint must satisfy Rule 8(a) by stating a claim for

¹ Although Ottensoser does not move to dismiss the other counts at this time, discovery will demonstrate that they are entirely devoid of any evidentiary support.

² Capitalized terms not defined herein shall have the meaning ascribed to them in the SHIP TPC.

³ See ECF No. 290 in Member Case Index No. 1:18-cv-10936 (JSR).

relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Iqbal*, 556 U.S. at 678 (citation omitted). Furthermore, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citation omitted).

Claims based on fraudulent conduct, such as SHIP’s unjust enrichment claim, must also be pled with specificity under Rule 9(b). Fed. R. Civ. P. 9(b) (“In alleging fraud . . . , a party must state with particularity the circumstances constituting fraud.”). *See Royal Host Realty, LLC v. 793 Ninth Ave. Realty, LLC*, 192 F. Supp. 3d 348, 357 (S.D.N.Y. 2016) (applying Rule 9(b) to unjust enrichment claim).⁴ SHIP’s pleading falls well short of satisfying the notice pleading requirements under Rule 8(a) and *Iqbal* and *Twombly*, let alone satisfying the heightened pleading standard under Rule 9(b).

ARGUMENT

Under New York law, to state a claim for unjust enrichment, a plaintiff must allege 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.” *See Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). In addition, a court may only grant relief for unjust enrichment “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.” *See Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012) (emphasis added).

⁴ To satisfy the specificity requirement applicable to its unjust enrichment claim, SHIP 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).

Here, the SHIP TPC is devoid of factual allegations supporting the existence of an equitable obligation running from Ottensoser to SHIP. While SHIP specifically alleges that other third-party defendants *might* have been enriched at its expense by virtue of their ownership interest in the Beechwood entities or as beneficiaries of various trusts, in contrast, nowhere in Count Seven (nor anywhere else in the SHIP TPC) does SHIP allege that Ottensoser (1) was enriched or (2) at SHIP's expense. *See, e.g.* SHIP TPC ¶¶ 462-466. Specifically, in Count Seven of the SHIP TPC, the only entities that are alleged to have “wrongfully obtained” monies from SHIP are “Feuer, Taylor, Levy, Nordlicht, Huberfeld, and Bodner, as *owners* of Beechwood . . . the BRILLC Series Entities, the BRILLC Series Members, and the 2016 Acquisition Trusts,” and the Feuer Family Trust, the Taylor-Lau Family Trust, Beechwood Trust No. 20, and Beechwood Trust Nos. 1-19. *Id.* ¶¶ 462-63. In contrast, Ottensoser is not alleged to have been an owner of any of the Beechwood entities, and he is not alleged to have been a beneficiary of any of the named trusts. Indeed, Ottensoser's name does not appear in the allegations under Count Seven.

SHIP's unjust enrichment claim against Ottensoser also cannot survive dismissal simply because it names Ottensoser as a “Co-Conspirator.” The SHIP TPC's claim for unjust enrichment is premised on “*the extent*” that individual Co-conspirators were “unjustly enriched in a manner that harmed SHIP.” But SHIP *does not* allege Ottensoser is a Co-Conspirator who received ill-gotten benefits. *See id.* ¶ 464.

Accordingly, because there is no allegation that Ottensoser, individually, benefited from any inequitable unjust enrichment at the expense of SHIP, SHIP's unjust enrichment claim fails as to Ottensoser and must be dismissed.

CONCLUSION

For all the foregoing reasons, and for all the reasons set forth in the motions and memoranda by all other moving Cross-Claim or Third-Party Defendants to the SHIP TPC and/or SHIP Crossclaim, David Ottensoser respectfully requests the Court enter an order dismissing Count Seven of the SHIP TPC as against him, with prejudice.

Dated: June 14, 2019

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