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)
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Third-Party Plaintiff, v. PB INVESTMENT HOLDINGS LTD., *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. 195)[1] (the "TPC") of third-party plaintiff Senior Health Insurance Company of Pennsylvania ("SHIP") pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

SHIP's 471-paragraph TPC articulates three distinct claims of fraud and fiduciary breach. First, SHIP claims it was misled by Beechwood and its managers—principally Mark Feuer, Scott Taylor, and David Levy (collectively, with Beechwood, the "Primary Actors")—into entering into three separate investment advisory agreements (IMAs) in May 2014, June 2014, and January 2015. The basis for this claim is SHIP's assertion that the Primary Actors did not volunteer to SHIP that the majority shareholders of Beechwood were trusts for the benefit of family members of the Platinum co-founders, including David Bodner. (TPC ¶¶ 83-102) (the "Inducement Claim").

Second, SHIP alleges that during the course of Beechwood advising SHIP pursuant to the IMAs, the Beechwood managers used false valuations to inflate the calculation of principal on account, which enabled Beechwood to make distributions that, according to SHIP, should not have been made if correct valuations had been used. SHIP avers that those distributions deprived SHIP of its principal and constitute monetary damage. (TPC ¶¶ 232-320) (the "Valuation Claim").

Third, SHIP claims that a number of transactions engaged in by the investment managers at Beechwood were designed to take value or assets from Beechwood, and these transactions inflicted independent damage upon SHIP. (TPC ¶¶ 321-366) (the "Transactional

[1] ECF citations refer to the *Cyganowski* docket, 18-cv-12018 (JSR). Capitalized terms not defined herein shall have the meanings ascribed to them in the TPC.

Claim"). SHIP alleges each of the Inducement Claim, Valuation Claim, and Transactional Claim as separate acts of fraud, and as acts that breached fiduciary duties owed to SHIP by Beechwood and the Primary Actors.

Because SHIP never had any communication or contact with David Bodner, it does not allege that Bodner himself defrauded SHIP, or breached a duty to SHIP. Nor does SHIP set forth any facts that connect Bodner to the calculation of asset values for purposes of the Valuation Claim, and SHIP does not connect Bodner in any way to the challenged transactions for the Transactional Claim.

The only effort in the TPC to implicate Bodner is through the Inducement Claim: that Bodner at some point was aware that the Beechwood managers did not disclose to SHIP the relationship between Beechwood and Platinum, or the ownership interest of Bodner and the other Platinum co-founders. The Inducement Claim relies solely on omission: the TPC is bereft of any actual misrepresentation by the Primary Actors, as the IMAs were silent as to ownership. In fact, while SHIP made a number of specific representations in the IMAs to Beechwood about SHIP (*see* Case No. 18-cv-6658, ECF No. 190-1 at ¶¶ 12(a)-(g)) ("Representations of the Client"), SHIP required almost no representations at all from Beechwood about Beechwood. (*Id.* ¶ 13) ("Representations of the Advisor").

SHIP points to no document or specific conversation prior to entering into the IMAs in which ownership was misrepresented. The most SHIP can conjure is that the trusts owned by the families of Bodner, Huberfeld, and Nordlicht used "non-descript names" that "were designed to deceive investors." (TPC ¶ 86). Of course, SHIP does not allege that it ever asked the Primary Actors who the trustees or beneficiaries were behind the "non-descript" trusts, each of which was labeled by number only (1-20). There is no suggestion that the trusts were

named in a deceptive manner, for example, that the Bodner family trusts were called the Smith family trusts. It was always open to SHIP to ask who the individuals were behind the numbered trusts, and SHIP never asked.

SHIP may argue that the Primary Actors should have known or did know that SHIP would have been interested in knowing who the other owners were (even though SHIP never asked), and that this failure to disclose constituted a fraudulent omission and breach of fiduciary duty. But, in order to hold Bodner liable for the Primary Actors' alleged non-disclosure, it was incumbent upon SHIP to set forth with particularity facts that plausibly show (i) that at or about the time the non-disclosure occurred, Bodner knew this disclosure would not be made; (ii) that Bodner knew that a duty to volunteer his family's ownership of the trusts had arisen in the context of the Primary Actors' interactions with SHIP; and (iii) that Bodner provided substantial assistance to the Primary Actors to assist their non-disclosure. There are no facts in the TPC to support any of these elements. SHIP's single piece of evidence purporting to establish Bodner's knowledge is an email sent to him on July 29, 2015, more than a year after SHIP had entered into its first IMA with Beechwood. The July 29, 2015 email from Bodner's shared secretary, sent to Bodner alone, does not refer to SHIP in any manner, and does not in any way supply a factual basis upon which Bodner could be held liable for the Primary Actors' alleged non-disclosure to SHIP. And it in no way supports an allegation that Bodner provided substantial assistance.

Finally, as a separate and independent basis to dismiss the Inducement Claim, the TPC fails to plead any damage flowing from the mere fact that SHIP was induced to hire Beechwood as investment advisor. The damage that SHIP identifies in its TPC flows from the Valuation Claim (that Beechwood took improper distributions of capital when, according to

SHIP, using correct valuations would not have contractually allowed a distribution) and from the Transactional Claim (that a number of specific transactions caused SHIP direct damage). With respect to the latter claims, the damage that is alleged flows from transactions or distributions made following the entry into the IMAs, from separate and intervening acts of fraud or fiduciary breaches by the Primary Actors, not in any respect aided or abetted by Bodner.

Bodner has no connection to any monetary harm alleged in the TPC.

Accordingly, SHIP cannot sustain a claim against Bodner. The TPC should be dismissed as against him.

RELEVANT FACTUAL ALLEGATIONS

The TPC alleges that Bodner: (i) [redacted] (TPC ¶¶ 29, 72); (ii) held an ownership interest in Beechwood (TPC ¶ 78); (iii) [redacted] (TPC ¶ 24); and (iv) received an email from his secretary in July 2015 (TPC ¶ 114). SHIP does not allege that Bodner personally made any misrepresentations or omissions to SHIP, or that Bodner ever had any contacts with SHIP whatsoever.

Not one of these allegations establishes either the actual knowledge or substantial assistance required for the aiding and abetting claims, the agreement required for the civil conspiracy claim, or that Bodner was unjustly enriched in any respect.

ARGUMENT

I. SHIP Has No Claim That Bodner Aided and Abetted a Fraud on SHIP

In Count One of the TPC, SHIP alleges that Bodner aided and abetted the Primary Actors' three acts of fraud (TPC ¶¶ 410-18). SHIP fails to state a claim against Bodner for aiding and abetting any of them.

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 Federal Rule of Civil Procedure 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. Furthermore, substantial assistance "require[es] that the plaintiff allege that the acts of the aider and abettor proximately caused the harm upon which the primary liability is predicated," meaning that the substantial assistance must be "the cause that directly produces an event and without which the event would not have occurred." *Ritchie Capital Mgmt., L.L.C. v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 338 (S.D.N.Y. 2015) (emphasis added). "[A]llegations amounting to but-for causation are insufficient" for pleading substantial assistance. *Id*. at 339. Where "a defendant owes no direct fiduciary duty to the plaintiff, mere inaction cannot constitute substantial assistance." *SPV OSUS Ltd. v. AIA LLC*, No. 15-cv-619 (JSR), 2016 U.S. Dist. LEXIS 69349, at *19 (S.D.N.Y. May 26, 2016) (Rakoff, J.), *aff'd sub nom. SPV OSUS Ltd. v. UBS AG*, 882 F.3d 333 (2d Cir. 2018).

A. SHIP Fails to Allege an Underlying Fraudulent Inducement

The TPC fails to state a claim that Bodner aided and abetted the Inducement Claim—*i.e.*, the claim that the Primary Actors fraudulently induced SHIP to enter into the IMAs through nondisclosure of Bodner's ownership interests—because SHIP has not alleged an

underlying fraudulent inducement. First, SHIP has not alleged a primary fraud; and second, SHIP has alleged no damages in connection with Inducement Claim, as distinct from the Valuation Claim and Transactional Claim, with which SHIP has made no effort to connect Bodner.

In order to state a claim for fraudulent inducement, "a plaintiff must allege: (1) a material representation of fact, (2) that the representation was false, (3) the defendant made the statement with intent to deceive plaintiff, (4) the plaintiff justifiably relied upon the statement, and (5) plaintiff suffered pecuniary damages as result of the reliance." *Brook v. Simon & Partners, LLP*, No. 17 Civ. 6435 (GBD), 2018 U.S. Dist. LEXIS 81904, at *22 (S.D.N.Y. May 14, 2018). Where the alleged fraud consists of a material omission rather than an affirmative misrepresentation, the plaintiff must allege "(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 the 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), *aff'd*, 2 F. App'x 109 (2d Cir. 2001). An alleged omission "does not constitute fraud unless there is a fiduciary relationship between the parties" creating a duty to disclose the omitted information. *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 356, 777 N.Y.S.2d 62, 66 (1st Dep't 2004). Allegations that an investor was induced into a transaction on false pretenses do not state a claim for common-law fraud without demonstrating a pecuniary loss proximately caused by the inducement. *See, e.g.*, *Druck Corp. v. Macro Fund Ltd., IIU*, 290 F. App'x 441, 444–45 (2d Cir. 2008); *see also Brook*, 2018 U.S. Dist. LEXIS 81904, at *22 (dismissing plaintiff's claims for failure to plead damages).

SHIP has not alleged that the Primary Actors made any affirmative misrepresentations to SHIP or that the Primary Actors had a duty to disclose any material information they purportedly omitted regarding Beechwood's ownership. Nor has SHIP provided any allegations to show that the Primary Actors knew disclosing Bodner's ownership interest would have deterred SHIP from entering the IMAs. SHIP claims that Beechwood's "ownership split and non-descript names were designed to deceive investors, allowing Beechwood to claim that it was a new and independent venture owned by Feuer, Taylor, and Levy . . . [redacted]" (TPC ¶ 86). Implicit in this allegation is that SHIP never asked Beechwood who the individuals behind the trusts were because such information was not of interest to SHIP. Indeed, the IMAs contain no representations by Beechwood as to who owned the trusts or who Beechwood's shareholders were, demonstrating further that SHIP is only now attempting to construe this information as material to its decision to enter the IMAs, when in May/June 2014 and January 2015, when it negotiated and executed the IMAs, SHIP did not care enough to ask.

SHIP has also failed to allege any damages resulting from the Primary Actors' purported fraudulent inducement. To the extent SHIP has any fraud-related losses arising out of its relationship with Beechwood, the losses would have been caused by the conduct alleged in the Valuation Claim and the Transactional Claim, with which the TPC fails connect Bodner in any respect. SHIP was not damaged by the Primary Actors' purported failure to disclose to SHIP that Bodner and others held ownership interests in Beechwood, and does not allege

otherwise. SHIP has not set forth any allegations whatsoever to demonstrate that it was damaged simply by entrusting its assets to a company in which Bodner was a passive owner.

Thus, SHIP has alleged no material omission or damage associated with any fraudulent inducement, and has no claim for fraudulent inducement. SHIP's aiding and abetting claim against Bodner must fail in the absence of a primary fraud.

B. SHIP Fails to Allege Substantial Assistance or Actual Knowledge By Bodner in Connection with any of the Three Theories of Fraud

SHIP does not set forth any allegations of Bodner's actual knowledge or any act of substantial assistance by Bodner in connection with any of the Primary Actors' three frauds. SHIP repeatedly lumps in Bodner with Nordlicht and Huberfeld and alleges that the three of them "exercised significant control over Beechwood's day-to-day business" (TPC ¶ 413); were "involve[d] in" and "orchestrat[ed] . . . numerous fraudulent transactions involving monies entrusted to Beechwood by SHIP and other investors" (TPC ¶ 413); "were principally responsible for communicating with the other Co-Conspirators"—a group defined to include more than 30 other individuals and entities—"to coordinate the Co-Conspirators' perpetration of the Platinum-Beechwood Scheme" (TPC ¶ 414); and directed the "Beechwood Insiders" to "aggressively encourage[] SHIP to participate in these fraudulent transactions" (TPC ¶ 416). 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 are no facts—only conclusory assertions—suggesting that Bodner was a person of authority among the group of individuals with which SHIP had interaction, or the entities with which SHIP transacted.

SHIP's allegations are nothing more than impermissible group pleading. By "lumping all the defendants together . . . and providing no factual basis to distinguish their conduct," SHIP 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.

SHIP alleges only one specific communication by Bodner to another so-called Co-Conspirator, [redacted]

Finally, SHIP's allegation that Bodner substantially assisted the purported fraudulent inducement by concealing his ownership interest in Beechwood through "a web of entities and trusts . . . named and designed specifically to obscure [his] role" goes nowhere. (TPC ¶ 413). Bodner's non-disclosure of his family ownership to SHIP, where he had no contact with SHIP and owed no duty to SHIP, is not an act of "concealment" by any definition. SHIP's failure to inquire as to who owned those entities and trusts, or to seek a contractual representation about Beechwood's owners, demonstrates that Beechwood's ownership was not of any interest to SHIP. SHIP has not alleged that Bodner was aware of such nondisclosures, and has offered no facts that he substantially assisted.

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

II. SHIP's Aiding and Abetting Breach of Fiduciary Duty Claim Should Be Dismissed

In Count Two of the TPC, SHIP alleges that Bodner aided and abetted the Primary Actors' breaches of fiduciary duties (TPC ¶¶ 419-28). Again, SHIP's failure to allege knowledge or substantial assistance defeat this claim.

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.

SHIP's allegations in support of this claim are identical to those set forth in its claim for aiding and abetting fraud. Again, SHIP relies on impermissible group pleading and the barest conclusory allegations to attempt to state a claim against Bodner. SHIP has failed to plead, under either a Rule 8 or Rule 9(b) standard, that Bodner knew that fiduciary duties owed by others to SHIP were allegedly being breached, much less that Bodner "knowingly induced or participated in the breach." *Lerner*, 459 F.3d at 294.

SHIP's claim that Bodner aided and abetted breach of fiduciary duties should be dismissed.

III. SHIP's Civil Conspiracy Claim Should Be Dismissed

Count Five of the TPC alleges that Bodner and others "conspired" to commit the three frauds against SHIP and to breach fiduciary duties owed to SHIP. (TPC ¶¶ 445-53). SHIP fails to state a claim on either theory.

It is well-settled that "there is no such independent tort as conspiracy" recognized under New York law; rather, an allegation of civil conspiracy can only "connect nonactors, who might otherwise escape liability, with the acts of their coconspirators." *Burns Jackson Miller*

Summit & Spitzer v. Lindner, 88 A.D.2d 50, 72, 452 N.Y.S.2d 80, 93-94 (2d Dep't 1982) *aff'd*, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983). Thus, to state a claim for civil conspiracy, SHIP "must demonstrate the underlying tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and, (4) resulting damage or injury." *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 119 (S.D.N.Y. 2009). The "overt act typically must be an affirmative act; mere inaction is sufficient." *Ritchie*, 121 F. Supp. 3d at 339 (internal quotation marks omitted). Where a claim of civil conspiracy "involves a conspiracy to breach a fiduciary duty, all members of the alleged conspiracy must independently owe a fiduciary duty to the plaintiff." *Pope v. Rice*, No. 04 Civ. 4171 (DLC), 2005 U.S. Dist. LEXIS 4011, at *42 (S.D.N.Y. Mar. 14, 2005).

As discussed *supra* at I.A, SHIP has not stated a claim for fraudulent inducement by the Primary Actors. Therefore, to the extent SHIP claims that Bodner conspired to commit the Inducement Claim, SHIP has failed to plead the prerequisite underlying tort and the claim should be dismissed. *Burns*, 88 A.D.2d at 72.

Furthermore, as to the first prong of civil conspiracy, SHIP does not set forth any facts showing that Bodner agreed to defraud SHIP or breach fiduciary duties owed to SHIP. SHIP's only attempt to link Bodner to any such agreement fails. [redacted]

[redacted]

Likewise, SHIP's theory that Bodner conspired with others to "breach the fiduciary duties that Beechwood, Feuer, Taylor, and Levy owed to SHIP" (TPC ¶ 448) is defective because SHIP has not alleged that Bodner owed it a fiduciary duty, a necessary element of SHIP's claim. *Pope*, 2005 U.S. Dist. LEXIS 4011, at *42. To plead the existence of a fiduciary duty, SHIP would have to "plausibly allege[] the existence of a special relationship of confidence and trust" between it and Bodner. *PetEdge, Inc. v. Garg*, 234 F. Supp. 3d 477, 499 (S.D.N.Y. 2017). Such an allegation is not only lacking from the TPC, it would also contradict the TPC's entire premise that Beechwood intentionally hid from SHIP the fact that Bodner held ownership interests in Beechwood. SHIP cannot claim, on the one hand, that it never would have invested in Beechwood if Bodner's ownership interests had been disclosed and, on the other, that SHIP reposed trust and confidence in Bodner.

SHIP has failed to state a claim that Bodner conspired to defraud SHIP and breach fiduciary duties owed to SHIP. Count Five should be dismissed.

IV. SHIP's Unjust Enrichment Claim Should Be Dismissed

In Count Seven, SHIP asserts a claim for unjust enrichment against Bodner. (TPC ¶¶ 461-66). 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." *Senior Health Ins. Co. v. Beechwood Re Ltd.*, No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 67952, at *33-34 (S.D.N.Y. April 22, 2019) [hereinafter "*SHIP*"] (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 SHIP's expense, or that he was enriched at all. The TPC alleges that Bodner and a handful of other defendants were "direct or indirect beneficiaries of Performance Fees paid to the Beechwood Entities or monies earned from transactions in which Beechwood favored its own interests or Platinum's interests over SHIP's interests." (TPC ¶ 462). But this is a return to impermissible group pleading. SHIP does not allege with any specificity the performance fees of which Bodner was a direct or indirect beneficiary. Nor does SHIP point to even one transaction that allegedly enriched Bodner.

Moreover, SHIP's unjust enrichment claim against Bodner is subsumed by its breach of contract claims against BBIL, Beechwood Re, BAM, and BRILLC (collectively, the "IMA Parties"), all asserted in SHIP's operative Second Amended Complaint dated December 28, 2018 (Case No. 18-cv-6658, ECF No. 84, ¶¶ 282-317). The subject matter of

SHIP's unjust enrichment claim against Bodner is governed by its Investment Management Agreements with the IMA Parties, and thus SHIP must pursue its alleged damages through its existing breach of contract claims. *See, e.g.*, *Law Debenture,* 2008 U.S. Dist. LEXIS 87438, at *36 (citation omitted) ("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.") SHIP is well aware of this Court's position that SHIP "cannot state a claim for unjust enrichment based on the payment of contractually owed performance fees." *SHIP*, 2019 U.S. Dist. LEXIS 67952, at *32.

Count Seven should be dismissed against Bodner.

CONCLUSION

For the foregoing reasons, the TPC fails to state a claim against Bodner and should be dismissed.

Dated: June 14, 2019
New York, New York

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