UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PLATINUM-BEECHWOOD LITIGATION	Consolidated Case No. 18-cv-6658 (JSR)
MELANIE L. CYGANOWSKI, as Equity Receiver for PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC, Plaintiffs, v. BEECHWOOD RE LTD., et al. Defendants.	Civil Action No. 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.	

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,

Third-Party Plaintiff,

v.

PB INVESTMENT HOLDINGS LTD., et al.,

Third-Party Defendants.

THIRD-PARY DEFENDANT WILL SLOTA'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF THIRD-PARTY PLAINTIFF SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA PURSUANT TO FED R. CIV. P. 9(b) and 12(b)(6)

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Defendant Will Slota ("Slota"), by his undersigned attorneys, respectfully submits the following memorandum of law in support of his motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Third-Party Complaint (the "TPC")[1] of third-party plaintiff Senior Health Insurance Company of Pennsylvania ("SHIP").

PRELIMINARY STATEMENT

The TPC describes an extensive and intricate Ponzi scheme devised by a small group of individuals in early 2013 and collapsing in 2016. While the pleading stretches across four hundred and nine paragraphs of factual allegations, there are just a handful of references to Slota, many of which allege no action on his part, in a period beginning no earlier than November 2013 and ending at the latest in May 2014. The TPC fails even to meet the pleading requirements of Federal Rule of Civil Procedure 8, let alone the higher standard of Rule 9(b) that applies to the fraud-based claims that predominate in this action. Those few allegations of particular actions on his part present no facts that could support the claims against him. There are no allegations of fact that show "actual knowledge" of Slota or his "substantial assistance" to any wrongful act towards SHIP sufficient to sustain the aiding and abetting fraud and breach of fiduciary duty counts. The conspiracy count duplicates the aiding and abetting counts and must be dismissed. There is no allegation as to how he was enriched. The TPC describes nothing more than an individual without notice of the alleged wrongful acts by corporate principals. Each count and the TPC as a whole must be dismissed as to him.

STATEMENT OF FACTS

The following statement of facts is taken (and in some places directly quoted) from the TPC without conceding the truth of the allegations. As set forth below, the alleged facts do not

[1] The formulations "TPC [number]" and "TPC [fn]" refer, respectively, to a paragraph in the TPC and a footnote in the TPC.

support the causes of action as pleaded against Slota. With only a few exceptions identified below, the references to him appear in impermissible group pleadings.

The crossclaims and third-party claims in the TPC arise out of an alleged conspiracy conceived by Mark Nordlicht, Murray Huberfeld, David Bodner, David Levy, Mark Feuer, and Scott Taylor, and allegedly carried out by the Platinum Entities,[2] the Beechwood Entities,[3] and a broad group of alleged Co-Conspirators[4] who allegedly took steps "to gain and retain, by means of artifice and fraud, access to the reserves of SHIP and other insurance companies in order to perpetuate the Ponzi-like scheme being carried out by Platinum[5] and to otherwise enrich themselves and their related parties (the "Platinum-Beechwood Scheme")." TPC 1. "In essence, the Platinum-Beechwood Scheme focused on the formation by Platinum of the Beechwood[6] enterprise, consisting of reinsurance companies and related investment management and servicing entities that appeared to be wholly independent of Platinum, to be well capitalized, and to be run by competent, prudent, and experienced insurance and investment professionals, but were, in reality, Platinum puppets." TPC 2. "As envisioned, the enterprise ("Beechwood") would (and did) target primary insurers with long-tail policy obligations that were required to maintain very large reserves and were seeking reinsurance options or better investment opportunities than

[2] Defined in the TPC as Platinum Management (NY) LLC, Beechwood Re Investments, LLC, and N Management LLC. TPC fn 1.
[3] Defined as Beechwood Re, Ltd., Beechwood Bermuda International, Ltd., B Asset Manager, L.P., B Asset Manager II, L.P., MSD Administrative Services LLC, Beechwood Re Holdings, Inc., Beechwood Bermuda, Ltd., BAM Administrative Services LLC, Beechwood Capital Group, LLC, B Asset Manager GP LLC, and B Asset Manager II GP LLC. TPC fn 2.
[4] Defined as twenty individuals, including Slota, and numerous corporate entities, including the Beechwood Entities. TPC fn 3.
[5] Defined as "the entire Platinum enterprise, which includes the Platinum Entities and the Platinum Insiders." TPC fn 4. The TPC defines "Platinum Insiders" as a group of fifteen individuals, including Slota. TPC fn 4.
[6] Defined as "the entire Beechwood enterprise, which includes the Beechwood Advisors, the Beechwood Entities, and the Beechwood Insiders." TPC fn 5. The Beechwood Insiders are various individual third-party defendants (not including Slota) and non-parties. TPC fn 7.

were widely available." *Id*. "Under these arrangements, Beechwood would (and did) gain access to, and discretionary investment control over, hundreds of millions of dollars in reserves supporting policies obligations." *Id*. "That control would (and did) enable Platinum to surreptitiously and secretly direct those reserve funds into Platinum investments, to use the reserves to rescue Platinum from its own bad investments, and to charge excessive, unearned and duplicative management fees and other compensation for so-called investment related services." *Id*. "The economic benefit of the Platinum-Beechwood Scheme would flow to the Co-Conspirators through a vast network of entities that served as the alter egos of their respective founders." *Id*.

There are no allegations showing any control over or use of those reserves by Slota and no allegation of any benefit flowing to him.

A. The alleged Platinum-Beechwood scheme.

"[I]n early 2013, Nordlicht, Huberfeld, Bodner, and Levy[7]…entered into a conspiracy with Feuer, Taylor, and Beechwood Capital Group to establish a reinsurance company, cross-claim defendant Beechwood Re, Ltd. ("Beechwood Re"), and to use it as a vehicle to fraudulently induce insurers to entrust funds to Beechwood through reinsurance agreements or other contractual arrangements." TPC 63. "Beechwood would then invest those funds at the direction of Platinum, keeping Platinum afloat, generating fees, and enriching all of the Co-Conspirators." TPC 63.

"SHIP was introduced to Beechwood Re in late 2013, and in 2014 and 2015 SHIP entered into three Investment Management Agreements (the "IMAs") with Beechwood Bermuda International Ltd., Beechwood Re, and B Asset Manager LP (collectively, the "Beechwood

[7] This group of four designated itself "the Nordlicht Group" at the time at which they entered into the conspiracy with Feuer, Taylor, and Beechwood Capital Group. TPC 63.

Advisors"), respectively." TPC 6. Through these IMAs, along with certain deals outside of the IMAs, SHIP—to its detriment—invested $320 million with the three Beechwood Advisors and related companies." *Id*.

"The relationship between Platinum and Beechwood was not disclosed to SHIP or other insurers." TPC 75. "To the contrary, the Co-Conspirators fabricated an entirely false narrative about the ownership and operation of Beechwood, as well as the process and procedures it allegedly employed in vetting and making investments on behalf of its clients, and went to extraordinary lengths to hide the relationship between Beechwood and Platinum." *Id*. "Beechwood presented itself to the investor world and to SHIP as a new and independent entity founded and funded by its principals – Feuer, Taylor, and Levy – when in fact it was Platinum's vehicle to steer as it saw fit." *Id*.

"[A] key element of the Platinum-Beechwood Scheme was for Beechwood to allow Platinum to direct the use of Beechwood's clients' funds, including making investments directly in Platinum Funds or enabling Platinum to cash out of non-performing or overvalued investments, by selling them to Beechwood clients." TPC 76. "For the Platinum-Beechwood Scheme to succeed, it was imperative that investors never learn that Platinum and its insiders owned Beechwood and controlled Beechwood's investment decision and that virtually all key Beechwood personnel were either Platinum employees or loyal first to Platinum." TPC 77.

"The Co-Conspirators agreed that Beechwood would misrepresent the persons who owned and controlled Beechwood, making sure never to divulge that Nordlicht, Huberfeld, or Bodner controlled Beechwood and had substantial ownership interests in the many Beechwood Entities, particularly including Beechwood Re." TPC 78. "To that end, they created a complex and elaborate ownership structure with the intent of confusing interested parties." *Id*.

"Immediately upon receiving SHIP's money, the Co-Conspirators, led by Nordlicht, set about funneling money into investments aimed at propping up illiquid investment positions Platinum funds were invested in with the aim of enriching the Co-Conspirators, against the best interests of SHIP, to whom they owed a fiduciary duty." TPC 235.

[redacted]

"Huberfeld was arrested on June 8, 2016 in connection with attempting to bribe a union official to invest in Platinum." TPC 23. "His arrest created a domino effect that eventually led to the revelation of the Platinum-Beechwood Scheme." *Id*. "Over the course of the next several months, SHIP gradually began to uncover misrepresentations and omissions by Beechwood and the pervasive cover-up of Beechwood's disastrously harmful and unsuitable investment of SHIP assets and its favoring of its own interests and those of its affiliates over the interests of its client, SHIP." TPC 407. "As SHIP recovered asset after asset that did not possess anything approximating the inflated values that Beechwood and Platinum had assigned them, and as SHIP learned that much of its funds had not been "invested" on its behalf at all – but rather was converted to the purposes of the Platinum-Beechwood Scheme – it became painfully obvious

[8] Three of the Beechwood Entities. TPC 6.

that the Beechwood Advisors had breached their contractual obligations under the IMAs to satisfy the guaranteed investment return and to return SHIP's invested principal intact." *Id*.

B. The very few references to Slota.

[redacted]

[redacted] "WNIC" and "BCLIC" are other insurers who contracted with Beechwood. TPC 75.

[10] B Asset Manager I and B Asset Manager II, collectively. TPC 16.

[redacted]

As the Platinum-Beechwood Scheme unfurled, the number of Co-Conspirators who worked for both Platinum and Beechwood grew,

[11] Identified as one of Beechwood's clients. TPC 80.
[12] Citation to the Washington National Insurance Company third-party complaint.
[13] Although the TPC alleges here that Nordlicht congratulated Slota "for making eight fraudulent agreements with a prime broker in order to open the CNO trust accounts," there is no explanation as to what those accounts were, why they were fraudulent, or even how they are relevant to SHIP. This passive reference to Slota is insufficient to state a claim against Slota with any alleged scienter of Nordlicht's master scheme or substantial assistance to it.

> as did the number of individuals who were shuttled back and forth between the two integrated companies. These individuals included Co- Conspirators Nordlicht, Levy, Slota, Ottensoser, Small, Manela, Saks, Beren, and Kim. Most of them had both Beechwood and Platinum email addresses, and many even had offices in both Platinum's and Beechwood's headquarters, including, but not limited to, Nordlicht, Levy, Saks, and Beren. The Co-Conspirators showed little concern with using their Beechwood and Platinum email addresses interchangeably for conducting Beechwood business, unless of course they were communicating with Beechwood clients, in which case they were extremely careful to use only their Beechwood email addresses.

TPC 124.

[redacted]

The TPC describes Beechwood using SHIP's money "in loans or other investments in which Platinum Entities, Beechwood Entities, and their owners had direct or indirect interests and loans to companies in which various Platinum Funds had taken large stakes through equity or debt investments." TPC 239. [redacted]

[redacted]

[redacted]

[redacted] In conclusory fashion, the TPC can only muster the allegation that:

[15] Quotation mark appears in the TPC.

> Daniel Saks, Stewart Kim, Mark Nordlicht, Murray Huberfeld, David Bodner, Naftali Manela, Joseph SanFilippo, Daniel Small, Ezra Beren, David Ottensoser, Will Slota, Uri Landesman, David Steinberg, Elliot Feit and Bernard Fuchs all took overt actions to facilitate one or more of the above listed investments. Each of the Third-party Defendants named in this paragraph had actual knowledge of the Platinum-Beechwood Scheme. Each of the Third-party Defendants named in this paragraph had actual knowledge about the distressed nature of the assets underlying the transactions which they facilitated. Each of the Third-party Defendants named in this paragraph had knowledge of the fiduciary duty owed to SHIP by Beechwood, and each took overt actions to help Beechwood to breach those duties with respect to the transactions they helped facilitate.

TPC 378. The claimed "overt action" and "knowledge" are not even described, let alone particularized.

C. Allegations concerning Slota and "Co-Conspirators" in the TPC.

Notwithstanding the lack of specific allegations regarding Slota's knowledge and/or conduct in furtherance of the alleged scheme, the TPC nonetheless asserts four causes of action against Slota: (1) aiding and abetting fraud (Count One)(TPC 410-18), (2) aiding and abetting breach of fiduciary duty (Count Two)(TPC 419-28), civil conspiracy (Count Five)(TPC 445-53), and unjust enrichment (Count 7)(TPC 461-66). Count One pleads conclusorily:

> As detailed throughout this pleading, Co-Conspirators and Platinum founders Nordlicht, Huberfeld, and Bodner enlisted Levy, Feuer, and Taylor in 2013 to assist in the formation of Beechwood, a seemingly legitimate, independent insurance company designed specifically to procure funds from insurers such as SHIP and other institutional investors in order to feed cash-hungry Platinum and perpetuate the Platinum-Beechwood Scheme. Co-Conspirators Steinberg, SanFilippo, Slota, and Ottensoser also were instrumental in Beechwood's formation and understood its deceitful purpose.

TPC 412. Although he is alleged to be "instrumental," there are no other references to Slota in Count One that cure the deficiencies in the fact section of the TPC. As discussed more fully at Point I, Count One must be dismissed.

Count Two pleads conclusorily:

> As detailed throughout this pleading, Co-Conspirators and Platinum founders Nordlicht, Huberfeld, and Bodner enlisted Levy, Feuer, and Taylor in 2013 to assist in the formation of Beechwood, a seemingly legitimate, independent insurance company designed specifically to procure funds from insurers such as SHIP and other institutional investors in order to feed cash-hungry Platinum and perpetuate the Platinum-Beechwood Scheme. Co-Conspirators SanFilippo, Slota, Steinberg, and Ottensoser also were instrumental in the Beechwood Entities' formation.

TPC 421. There are no other references to Slota. Count Two must be dismissed for the same reasons as Count One.

Counts Five and Seven are even worse. They make no reference to Slota by name at all; they state only that they are asserted against the "Co-Conspirators," specifying no particular act or omission by any particular third-party defendant, let alone Slota.

ARGUMENT

POINT I

THE AIDING AND ABETTING FRAUD COUNT MUST BE DISMISSED AS TO SLOTA

It is well-settled that:

> …[A] claim of aiding and abetting fraud requires a plaintiff to plead pursuant to Rule 9(b), Fed.R.Civ.P., the existence of a fraud, a defendant's knowledge of the fraud, and a defendant's substantial assistance to advance the commission of the fraud. With respect to a defendant's knowledge of the fraud, the actual knowledge of the fraud may be averred generally. Pleading knowledge in the alternative with an allegation of reckless disregard is insufficient to allege a claim. The substantial assistance prong is fulfilled where a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed.

> Substantial assistance requires a plaintiff to allege that the action of the aider and abettor proximately caused the harm on which the primary liability is predicated. The injury suffered by the plaintiff must be a direct or reasonably foreseeable result of the conduct.

In re WorldCom, Inc. Securities Litigation, 382 F. Supp.2d 549, 560 (S.D.N.Y. 2005) (internal citations and punctuation omitted). Assuming but not conceding that SHIP has adequately pleaded Count One against defendants other than Slota, it has still failed to plead Count One sufficiently against him, specifically the knowledge and substantial assistance elements.

As to the knowledge element, the TPC does not sufficiently plead that Slota was aware that he was participating in a fraud against SHIP, assuming only for the sake of argument that there was a fraud.

> Although [Fed.R.Civ.P. 9(b)] permits a plaintiff to plead knowledge 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. The Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context. Thus, although Rule 9(b) permits knowledge to be averred generally, plaintiffs must still plead the events which they claim give rise to an inference of knowledge.

Krys v. Pigott, 749 F.3d 117, 129 (2nd Cir. 2014) (internal citations, punctuation, and quotation marks omitted). The TPC does not allege any basis for an awareness on Slota's part of the alleged wrongful intention of any cross-claim defendant or third-party defendant to perpetrate a fraud by inducing SHIP to enter into the IMAs or otherwise.

Count One pleads as to Slota:

> 412. As detailed throughout this pleading, Co-Conspirators and Platinum founders Nordlicht, Huberfeld, and Bodner enlisted Levy, Feuer, and Taylor in 2013 to assist in the formation of Beechwood, a seemingly legitimate, independent insurance company designed specifically to procure funds from insurers such as SHIP and other institutional investors in order to feed cash-

> hungry Platinum and perpetuate the Platinum-Beechwood Scheme. Co-Conspirators Steinberg, SanFilippo, Slota, and Ottensoser also were instrumental in Beechwood's formation and understood its deceitful purpose.

There is nothing more than that one reference to Slota in Count One. The balance of Count One does not mention Slota at all.

> 414. Nordlicht, Huberfeld, and Bodner were principally responsible for communicating with the other Co-Conspirators to coordinate the Co-Conspirators' perpetration of the Platinum-Beechwood Scheme, as outlined in this pleading, the PPVA Complaint, the PPCO Complaint, the SEC Complaint, the Criminal Indictments, and the CNO Pleading. Indeed, Nordlicht and Levy received real-time updates and requests for direction from their Co-Conspirators, including Manela, Feit, Saks and their Platinum-Beechwood colleagues regarding how and where SHIP's funds would be invested. This same information was not shared with SHIP. Through these communications, it is evident that the Co-Conspirators used SHIP's assets to further their own interests and to maintain their scheme, without regard for SHIP's interests. The scheme that they orchestrated spanned years and claimed numerous victims, including institutional investors such as SHIP and CNO, as well as individual investors, and comprised many facets and countless sham transactions, including the sampling of transactions detailed in this pleading and other complaints filed in the consolidated actions.
>
> 415. As detailed throughout this pleading, each of the other Co-Conspirators knowingly and directly participated in, and played a principal role in consummating, some or all of these fraudulent transactions, ultimately resulting in the transfer of $320 million away from SHIP for the benefit of Beechwood, Platinum, and their related parties. The Co-Conspirators had direct knowledge of Platinum's undisclosed connections to Beechwood, and knew that the valuations assigned to the assets in which SHIP's funds were invested were unsupported, false, and misleading. Numerous Co-Conspirators, including Nordlicht, Manela, Kim, Beren, and Saks, served in dual roles at Platinum and Beechwood and were directly involved in the valuation of, or transactions related to, various Platinum investments into which SHIP's funds ultimately were invested.
>
> 417. The Co-Conspirators' knowing and substantial assistance in connection with the – Platinum-Beechwood Scheme proximately

caused SHIP's damages because it was reasonably foreseeable that their conduct and the scheme in which they knowingly participated would, among other things, cause SHIP: (i) to be fraudulently induced into entering the IMAs with Beechwood; (ii) not to terminate the IMAs sooner or to take other actions that might mitigate the damages that SHIP suffered while the IMAs remained in effect; (iii) pay to Beechwood tens of millions of dollars in performance fees to which it was not entitled under the IMAs; and (iv) incur millions of dollars in expenses in connection with the termination of the IMAs and efforts to recoup the monies and assets lost as a result of the fraudulent scheme.

418. Accordingly, as a direct and proximate result of the Co-Conspirators' knowledge, participation, and substantial assistance in the fraudulent Platinum-Beechwood Scheme with the Platinum Insiders and Beechwood Insiders, SHIP suffered damages in an amount to be determined at trial. Furthermore, in light of the intentional, deliberate, and malicious nature of the Co-Conspirators' substantial assistance in connection with the fraud, SHIP is entitled to punitive damages.

[redacted]

[redacted]

In the absence of these essential elements, Count One is clearly defective as to Slota and must be dismissed as to him.

POINT II

THE AIDING AND ABETTING BREACH OF FIDUCIARY DUTY COUNT MUST BE DISMISSED AS TO SLOTA

"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 (2nd Cir. 2006). The elements of aiding and abetting a breach of fiduciary duty and aiding and abetting fraud are substantially similar. *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 345 (2nd Cir. 2018). As with aiding and abetting fraud, these elements must be pleaded with particularity. *Krys*, 749 F.3d at 129.

The allegations that form the basis for this Count are substantially similar to those alleged in support of the claim for aiding and abetting fraud. TPC 420-28.

For the reasons stated above in response to Count One, SHIP has failed to allege facts sufficient under Rule 9(b) to state the elements of knowledge of a breach of fiduciary duty and substantial assistance in accomplishing it.

POINT III

THE CIVIL CONSPIRACY COUNT MUST BE DISMISSED AS TO SLOTA

Count Five consists of nothing more than vague conclusions that the Co-Conspirators conspired with other defendants to defraud SHIP and to breach those other defendants' fiduciary duties to SHIP. There is not a single factual allegation that supports those conclusions as to Slota.

> To state a claim for conspiracy to commit fraud, a plaintiff must allege "(1) an agreement among two or more parties, (2) a common objective, (3) acts in furtherance of the objective, and (4) knowledge." *Diamond State Ins. Co. v. Worldwide Weather Trading LLC*, No. 02 Civ. 2900, 2002 WL 31819217, at *4

(S.D.N.Y. Dec.16, 2002).

380544 Canada, Inc. v. Aspen Technology, Inc., 633 F. Supp.2d 15, 36 (S.D.N.Y. 2009).

> Though a claim for civil conspiracy is measured against the liberal pleading requirements of Federal Rule of Civil Procedure 8(a), and not the more rigorous requirements of Rule 9(b), merely conclusory allegations are insufficient. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n. 4 (2d Cir.1990) ("[T]he complaint must allege some factual basis for a finding of a conscious agreement among the defendants."); *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 123 (2d Cir.1981) ("The damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts. Accordingly, a bare conclusory allegation of conspiracy does not state a cause of action." (internal quotation marks and citations omitted)); *Fierro v. Gallucci*, No. 06–CV–5189, 2008 WL 2039545, at *16 (E.D.N.Y. May 12, 2008) ("[T]o survive a motion to dismiss, a complaint must contain more than general allegations in support of the conspiracy. Rather, it must allege the specific times, facts, and circumstances of the alleged conspiracy." (internal quotation marks omitted)); *Brownstone Inv. Group v. Levey*, 468 F. Supp.2d 654, 661 (S.D.N.Y.2007) (same); *see also Ciambriello v. County of Nassau*, 292 F.3d 307, 325 (2d Cir.2002) (finding allegations of conspiracy to violate plaintiff's constitutional rights too conclusory to survive motion to dismiss because plaintiff did "not provide[ ] any details of time and place, and he has failed to specify in detail the factual basis necessary to enable [defendants] intelligently to prepare their defense" (internal quotation marks and citations omitted)).

Medtech Products Inc. v. Ranir LLC, 596 F. Supp.2d 778, 794-95 (S.D.N.Y. 2008).

> A party may move to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) where the opposing party's complaint fails to state a claim upon which relief can be granted. While a court must accept as true all of the allegations contained in a complaint, that principle does not apply to legal conclusions. In other words, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.
>
> Next, a court must determine if the complaint contains sufficient factual matter which, if accepted as true, states a claim that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

> alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, a complaint is insufficient under Fed.R.Civ.P. 8(a) because it has merely alleged but not shown that the pleader is entitled to relief.

Amusement Industry, Inc. v. Stern, 693 F. Supp.2d 327, 337 (S.D.N.Y. 2010) (internal citation, quotation marks and brackets omitted).

Civil conspiracy cannot be maintained as an independent tort. *Senior Health Insurance Company of Pennsylvania v. Beechwood Re Ltd*, 345 F. Supp.3d 515, 531 (S.D.N.Y. 2018). A civil conspiracy claim must be dismissed when it duplicates another cause of action.

> A plaintiff may not 'reallege a tort asserted elsewhere in the complaint in the guise of a separate conspiracy claim.' *Aetna Cas. & Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 591 (2d Cir.2005); *accord Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.*, No. 99 Civ. 9623, 2007 WL 1040809, 2007 U.S. Dist. LEXIS 27001 (S.D.N.Y. Apr. 2, 2007) ("[W]here the acts underlying a claim of conspiracy are the same as those underlying other claims alleged in the complaint, the conspiracy claim is dismissed as duplicative."); *see also Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 251 (2d Cir.1985) ("Count 7 added no new allegations to those of counts 1–6 except to reiterate that [defendants] had conspired to commit the acts heretofore described ... [and therefore] Count 7 was properly dismissed ... as duplicative ....").

380544 Canada, Inc., 633 F. Supp.2d at 36. *See also Briarpatch Ltd. LP v. Phoenix Pictures, Inc.*, 312 Fed. Appx 433, 434 (2nd Cir. 2009).

As stated above, Count Five makes no reference to Slota by name. Instead it generically pleads a set of legal conclusions as to the "Co-Conspirators."

> As alleged in this pleading and in [various allegedly-related actions], the Co-Conspirators, the Beechwood Owner Trusts, the BRILLC Series Entities, and the BRILLC Series Members conspired with Beechwood, Feuer, Taylor, and Levy to commit fraud in the inducement against SHIP by fraudulently inducing

> SHIP to enter each of the three IMAs and in turn invest SHIP's funds pursuant to those IMAs, as well as by causing or inducing SHIP to enter into other investments.
>
> 447. The Co-Conspirators also conspired with Beechwood, Feuer, Taylor, and Levy to commit fraud against SHIP in connection with Beechwood's subsequent performance under the IMAs by misrepresenting the nature and performance of SHIP's investments, thereby causing SHIP to remain in unsuitable investments that favored the interests of the Co-Conspirators and their related parties over SHIP's best interests and to pay performance fees as well as continue to invest and not terminate the fraudulently induced IMAs or other investments.
>
> 448. The Co-Conspirators also conspired with Beechwood, Feuer, Taylor, and Levy to breach the fiduciary duties that Beechwood, Feuer, Taylor, and Levy owed to SHIP as SHIP's investment managers by engaging in transactions for the benefit of Beechwood and Platinum and to the detriment of SHIP, by denying SHIP access to full and accurate information about the nature and performance of its investments, and by claiming and collecting millions of dollars in performance fees from SHIP which were, in fact, unearned.
>
> 451. At all relevant times, therefore, each Crossclaim Defendant and Third-Party Defendant was a knowing and intentional participant in the conspiracy and agreed to pursue its aims.
>
> 452. Each Crossclaim Defendant and Third-Party Defendant also committed one or more overt acts in furtherance of the conspiracy, including, but not limited to, making fraudulent representations to SHIP concerning its investment strategy, fraudulently concealing material information from SHIP concerning the performance of its assets, egregiously and maliciously mishandling the assets that SHIP entrusted to Beechwood, or accepting ill-gotten benefits of the scheme. In addition, each Crossclaim Defendant and Third-Party Defendant committed one or more overt acts in furtherance of the Platinum-Beechwood Scheme, including, but not limited to: engaging in transactions designed to support the inflated valuations ascribed to Platinum and Beechwood-controlled investments, and engaging in transactions designed to conceal the "integration" between Platinum and Beechwood.

Even under the liberal standard of Federal Rule of Civil Procedure 8, this Count consists of nothing more than bare conclusory allegations of conspiracy. It does not allege the specific

times, facts, and circumstances as to any alleged participation by Slota in the purported conspiracy.

More fundamentally, this count arises out of exactly the same allegations as Counts One and Two. Under ordinary circumstances a claim for conspiracy to commit a tort would be dismissed as duplicative of a claim for aiding and abetting that tort. *Briarpatch*, 312 Fed. Appx. at 434 (dismissing conspiracy claim as duplicative of breach of fiduciary duty claim); *380544 Canada, Inc.*, 633 F. Supp.2d at 36 (dismissing conspiracy claim as duplicative of aiding and abetting fraud claim). However, the defect in this action is even greater, since SHIP has pleaded a conspiracy to aid and abet fraud and to aid and abet breach of fiduciary duty. Since conspiracy to commit a tort and aiding and abetting a tort are duplicative, this count is functionally the equivalent of conspiring to conspire. This count must fail as a matter of law.

Substantively, this Count does not plead any facts tending to support the existence of an agreement between Slota and any cross-claim defendant or third-party defendant to commit any tort, nor does it allege any overt act by Slota in furtherance of a conspiracy.

"As for breach of fiduciary duty, 'all members of the alleged conspiracy must independently owe a fiduciary duty to the plaintiff.'" *Senior Health Insurance Company of Pennsylvania*, 345 F. Supp.3d at 531. SHIP has not pleaded that Slota owed SHIP a fiduciary duty and therefore cannot plead a conspiracy to breach a fiduciary duty to SHIP.

Count Five fails as to Slota for multiple reasons and therefore must be dismissed as to him.

POINT IV

THE UNJUST ENRICHMENT COUNT MUST BE DISMISSED AS TO SLOTA

The unjust enrichment count is likewise defective as to Slota for multiple reasons and must be dismissed as to him.

> The essence of an unjust enrichment claim is that one party has received money or a benefit at the expense of another. To bring such a claim, the plaintiff must have bestowed the benefit on the defendant. It is not sufficient for defendant to receive some indirect benefit—the benefit received must be specific and direct to support an unjust enrichment claim.

M + J Savitt, Inc. v. Savitt, No. 08 Civ. 8535(DLC), *10, 2009 WL 691278 (S.D.N.Y. Mar. 17, 2009) (internal citations omitted).

Count Seven does not plead with any factual specificity that any persons other than Feuer, Taylor, Levy, Nordlicht, Huberfeld, Bodner, Kevin Cassidy, Michael Nordlicht, and various corporate entities and trusts (with no alleged connection to Slota) were enriched at the expense of SHIP. The Count does not refer to Slota whatsoever, nor do the factual allegations earlier in the TPC contain the required allegations: there is no allegation that SHIP conferred a benefit on Slota or that he was enriched in any way. Instead it pleads:

> To the extent that [the Co-Conspirators] received the proceeds of unearned Performance Fees or monies earned from transactions favoring Beechwood's or Platinum's interests over SHIP's and thus were enriched, and those proceeds are not recoverable or collectible from any other party, they were unjustly enriched in a manner that harmed SHIP and should be ordered to repay amounts they received, as a matter of equity.

There is not even an allegation that any of the Co-Conspirators was actually unjustly enriched.

Further, this Count simply repeats the TPC's consistent tactic of referring to the defendants collectively. Improper group pleading is insufficient to state a claim for unjust

enrichment and requires dismissal of the cause of action. *Gillespie v. St. Regis Residence Club*, 343 F. Supp.3d 332, 352 (S.D.N.Y. 2018).

Even under the low pleading threshold of Rule 8, a court may not credit "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Gillespie*, 343 F. Supp.3d at 339, *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "This pleading standard does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Geldzahler v. N.Y. Med. Coll.*, 663 F. Supp. 2d 379, 385 (S.D.N.Y. 2009). All the more so does an unjust enrichment claim require dismissal of a threadbare claim when, where as here, it is subject to Rule 9(b) because it is based on claims arising out of alleged fraud. *Tyman v. Pfizer, Inc.*, 16-CV-06941 (LTD)(BCM), 2017 WL 6988936, *19 (S.D.N.Y. Dec. 27, 2017).

CONCLUSION

For the foregoing reasons, each Count asserted against Slota, and the TPC in its entirety, should be dismissed with prejudice as against Slota.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing THIRD PARTY DEFENDANT WILL SLOTA'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT AND CROSS CLAIMS PURSUANT TO FED R. CIV. P. 9(b) and 12(b)(6) was electronically served on all counsel of record in the above-captioned matter by the EM/ECF system on this 14th day of June, 2019.

Respectfully submitted,

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