

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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IN RE PLATINUM-BEECHWOOD	:	18-cv-06658 (JSR)
LITIGATION	:	
	:	
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SENIOR HEALTH INSURANCE COMPANY	:	18-cv-12018 (JSR)
OF PENNSYLVANIA,	:	
	:	
Third-Party Plaintiff,	:	
	:	
-against-	:	
	:	
PB INVESTMENT HOLDINGS LTD., <i>et al.</i> ,	:	
	:	
Third-Party Defendants	:	
	:	
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NOTICE OF DEFENDANT’S MOTION TO DISMISS

PLEASE TAKE NOTICE, that upon the Memorandum of Law in Support of Defendant’s Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6), dated June 19, 2019, Defendant Hokyong Kim moves this Court, before the Honorable Jed S. Rakoff, U.S. Courthouse, 500 Pearl Street, New York, New York, 10007-1312, at a date and time to be determined by the Court, for an order pursuant to Federal Rule of Civil Procedure 12(b)(6), granting Defendant’s motion to dismiss plaintiffs’ third party complaint with prejudice.

PLEASE TAKE FURTHER NOTICE that SHIP’s opposition papers to this Motion are due on or before July 3, 2019; Kim’s reply, if any, is due on or before July 17, 2019; and the Court shall hear oral argument on July 31, 2019 at 10:00 AM.

Dated: New York, New York
June 19, 2019

Law Office of Stewart J. Kong

By: /s/ Stewart J. Kong

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Third-Party Plaintiff,	:	
-against-	:	
PB INVESTMENT HOLDINGS LTD., <i>et al.</i> ,	:	
Third-Party Defendants	:	
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**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 May 15, 2019, third party complaint (“TPC”) by Senior Health Insurance Company of Pennsylvania (“SHIP”) under Federal Rule of Civil Procedure 12(b)(6).

STATEMENT OF FACTS

The following relevant facts are taken from the TPC.

SHIP brought this TPC against third party defendant Stewart Kim (“Kim”) who worked as a senior manager for Platinum Management in New York (“Platinum”), and then as a chief risk officer for Beechwood Re Ltd (“Beechwood Re”) and B Asset Manager, LP (“BAM”), for a period covering 2013 through February 2017. *See* Decl. of Stewart Kim (“Kim Decl.”), ¶¶ 1 and 2.

The TPC alleges that Kim “misrepresented himself and other Platinum Management employees to WNIC and BCLIC as the Chief Risk Officer for Beechwood Re and BAM.” Also alleged is that Kim had actual knowledge of all aspects of the over-arching Platinum-Beechwood Scheme and took material steps to further its ill goals, to the detriment of SHIP. TPC ¶ 44. Other than very sparse references to Kim in the TPC, the best that the TPC can do to attribute liability to Kim is to conveniently “group” him into other defendant groups like “Co-Conspirators” and “Beechwood Insider,” without tying Kim to any overt act that would suggest his involvement in any alleged wrongdoing.

The TPC attempts to attribute liability to Kim for the alleged actions of a group in which he rarely participated. The TPC fails to allege that Kim had knowledge of or was knowingly participating in any of the alleged wrongdoing. The TPC rarely mentions Kim at all throughout its document and when in fact mentioned, mere conclusory assertions are made as to Kim. For example, in TPC ¶ 44, “Kim aided and abetted certain of the Beechwood Entities, Feuer, Taylor,

Levy, and Narain’s breach of fiduciary duties to SHIP, aided and abetted fraud on SHIP, to SHIP’s detriment, and played a key role in the conspiracy.” Not only does this assertion fail to identify which of the Beechwood Entities Kim allegedly aided and abetted but it stops there without describing what key role Kim played in the alleged conspiracy. In fact, there is not a single factual allegation made against Kim to indicate his key role in anything described in the four TPC counts against Kim (Counts One, Two, Five, and Seven).

Furthermore, 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. In fact, Kim earned nothing more than a pay check with no incentive pay whatsoever. Kim Decl., ¶ 3.

Given Kim’s lack of involvement in any of the alleged wrongdoing, the TPC at best is trying to attribute liability to Kim merely by his association with a larger group of third-party defendants. Consequently, the TPC against Kim should be dismissed in its entirety with prejudice and without leave to replead.

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).

The TPC sets forth four counts of liability against Kim: (1) aiding and abetting fraud, (2) aiding and abetting breach of fiduciary duty, (3) civil conspiracy, and (4) unjust enrichment. After a thorough review of the TPC, Kim asserts that there is not a single particularized

allegation in the TPC as required by Federal Rule of Civil Procedure 9(b), even suggesting that he aided and abetted, conspired, or was unjustly enriched.

SHIP also relies on impermissible group pleading. Throughout the TPC, SHIP includes Kim into a group called “Co-Conspirators” and “Beechwood Insider” without tying Kim to any overt acts done by him or written statements that could remotely justify application of the group pleading doctrine. See TPC ¶¶ 1 and 4. See *In re Alstom SA Securities Litigation*, 406 F. Supp. 2d 433, 450 (S.D.N.Y. 2005).

Group pleading may be appropriate only “where the defendants are a narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document.” *Elliot Assocs., L.P. v. Hayes*, 141 F. Supp 2d 344, 354 (S.D.N.Y. 2000) (citation omitted). No such facts are alleged against Kim except that he worked as a senior manager at Platinum and then as a chief risk officer for Beechwood entities. These allegations do not particularize what Kim did or did not do to be considered a participating member of the two TPC groups, “Co-Conspirators” and “Beechwood Insiders.”

In fact, the TPC’s factual allegations against Kim are so sparse that it is only alleged that Kim “aided and abetted *certain* of the Beechwood Entities. . . .” without specifying which of the Beechwood Entities he alleged aided and abetted. TPC ¶ 44. In short, the TPC does not explain in non-conclusory terms what Kim specifically did to incur liability.

ARGUMENT

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

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

For the purposes of both 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 with specificity that Kim had knowledge of any alleged wrongdoing or provided substantial assistance to advance the wrongdoing.

Aiding and abetting breach of fiduciary duty 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 knowingly assisted in any way to advance such an alleged breach.

In sum and substance, the TPC fails to particularize any details supporting allegations of Kim’s involvement in any alleged wrongdoing while he was working for Platinum and Beechwood.

B. Plaintiff fails 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, thereby 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 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 assisting in a fraud or breach of fiduciary duty.

In short, the TPC fails to specify any overt acts by Kim that caused harm to SHIP. As such, and for the reasons set forth above, Counts One and Two must be dismissed as to Kim.

II. PLAINTIFF’S CIVIL CONSPIRACY CLAIM SHOULD BE DISMISSED

The TPC pleads a claim of civil conspiracy against Kim, despite not being named even once in this Count Five of the TPC. Rather than being mentioned by name, Kim is conveniently “grouped” into the group defined as “Co-Conspirators” and “Beechwood Insiders.” TPC ¶¶ 1 and 4.

In a claim of civil conspiracy, a third-party may be liable for the conduct of a tortfeasor if the following four things exist: “(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.” *Treppel v. Bioval Corp.*, No. 03 Civ. 3002, 2005 WL 2086339, at *5 (S.D.N.Y. Aug. 30, 2005). As to the third element, the TPC fails to plead specific knowledge by Kim that led to specific intentional wrongdoing by him. Kim’s conduct was not the cause of any injury to SHIP because the TPC doesn’t allege any specific

overt act by Kim to implicate him with any wrongdoing. Consequently, the fourth element is also not present in the TPC.

While the absence of each of these elements is alone sufficient to dismiss the claim for civil conspiracy as to Kim, the TPC most critically fails to plead an agreement involving Kim and fails to set forth specific facts that would support such an allegation.

To the extent plaintiffs argue that Kim's common employment at Platinum and/or Beechwood entities establishes a basis for a civil conspiracy claim, courts have rejected conspiracy agreements based solely on the defendants' common employment. *See, e.g., Schwartz v. Soc'y of N.Y. Hosp.*, 605 N.Y.S.2d 72, 73 (1st Dep't 1993); *Brownstone Inv. Grp. v. Levey*, 486 F. Supp. 2d 654, 661; *cf. Donini Int'l, S.p.A v. Satec (USA) LLC*, No. 03 Civ. 9471, 2004 WL 1574645, at *3-4 (S.D.N.Y. July 13, 2004) (common ownership of company not sufficient to establish agreement).

Moreover, 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 Ltd. v. Phoenix Pictures*, 312 Fed. Appx. 433, 434 (2d Cir. 2009) (dismissing conspiracy claim as duplicative of aiding and abetting fraud claim). The same should apply here as to Kim.

Also, "in order to sustain an allegation of civil conspiracy that 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, 2015). The TPC does not even attempt to establish that Kim independently owed a fiduciary duty to SHIP. Therefore, for the foregoing reasons, this count of civil conspiracy against Kim fails and must be dismissed.

III. PLAINTIFFS' UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED

Just as with the previous count for civil conspiracy, the plaintiffs' unjust enrichment claim also must fail. Just as with the previous claim, the TPC fails to name Kim even once in this count in stating that "Feuer, Taylor, Levy, Nordlicht, Huberfeld, and others were enriched at the expense of SHIP." TPC ¶ 462.

Plaintiff's 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 SHIP'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. Quite contrary to these allegations is the fact that Kim only received a pay check in connection with his employment at Platinum and Beechwood and that he never received any remuneration tied to the performance of any investments made by his employers. *See* Kim Decl. ¶ 3.

CONCLUSION

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

Dated: Queens, New York
June 19, 2019

THE LAW OFFICE OF STEWART J. KONG

/s/ Stewart J. Kong _____

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Attorney for Defendant Stewart Kim

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**THIRD PARTY DEFENDANT HOKYONG KIM'S A/K/A STEWART KIM'S
DECLARATION IN SUPPORT OF MOTION TO DISMISS**

HOKYONG KIM, a/k/a STEWART KIM, hereby declares under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. My name is Hokyong Kim, a/k/a Stewart Kim. I submit this declaration based on my own personal knowledge of my employment with Platinum Management (NY) LLC ("Platinum") and Beechwood Re, Ltd. and B Asset Manager, L.P. (collectively referred to as "Beechwood").

2. I was employed by the aforementioned entities for a contiguous period from 2013 through February 2017, during which time I only received compensation in the form of salary, between \$180,000.00 and \$250,000.00 annually.

3. At all times while working for Platinum and Beechwood, I never received any incentive based pay, commissions, or performance bonuses, other than a year end discretionary bonus that was *not* tied to the performance of any investments or portfolio.

I hereby declare that the foregoing is true and correct to the best of my knowledge.

Dated: 6/17/19


Hokyoung Kim/a/k/a Stewart Kim