UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Civil Action No. 1:18-cv-00658
MELANIE L. CYGANOWSKI, AS RECEIVER, BY AND FOR PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, *et al.*, *Plaintiffs*, v. BEECHWOOD RE LTD., *et al.*, *Defendants*.	Civil Action No. 1:18-cv-12018
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY, *Cross-Claim and Third-Party Plaintiffs*, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, *Cross-Claim and Third-Party Defendants*.	

REPLY MEMORANDUM OF LAW OF PB INVESTMENT HOLDINGS LTD. IN FURTHER SUPPORT OF ITS MOTION TO DISMISS CNO'S CROSS-CLAIMS AND THIRD-PARTY COMPLAINT

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PB Investment Holdings Ltd., as successor-in-interest to Beechwood Bermuda Investment Holdings Ltd. ("PBIHL"), submits this reply brief in support of its motion to dismiss the Cross-Claims and Third-Party Complaint (the "Complaint") filed by Washington National Insurance Company and Bankers Conseco Life Insurance Company (collectively, "CNO").

ARGUMENT

Of the 456 numbered paragraphs that comprise the Complaint, only three specifically mention PBIHL or its predecessor BBIHL. (*See* Compl. ¶¶ 517, 518 & 814.) The generalized and conclusory group pleadings regarding "Beechwood," "Beechwood Bermuda," and the "Co-Conspirators" are inadequate to state a claim against PBIHL.

The extent of CNO's allegations against PBIHL consists of: (1) identifying PBIHL's predecessor as "a reinsurance and wealth management company domiciled in Bermuda that issued wealth management products for Beechwood entities" (*id.* ¶ 517); (2) collectively referring to PBIHL's predecessor and two other entities as "Beechwood Bermuda" (*id.* ¶ 518); and (3) alleging that capital that should have been used to support Beechwood Re's obligations to CNO was "diverted" or "shifted" to "Beechwood Bermuda" in 2014 (*id.* ¶¶ 517 & 814). The Complaint does nothing more than allege guilt by association for PBIHL.[1] Accordingly, CNO's claims against PBIHL should be dismissed with prejudice.

I. THE GROUP PLEADING RULE BARS CNO'S CLAIMS.

CNO claims that group pleading is permissible because it "is necessitated by the Defendants' fraudulent activity. Each defendant was part of an intricate, albeit 'really integrated'

[1] CNO argues in its Opposition Brief that PBIHL was simultaneously a "ringleader" of the fraudulent scheme and "merely [an] alter ego[] of (and asset protection device[] for) the kingpins of the conspiracy" (Opp. at 4 & 43), even though the allegations are silent in this respect.

(the Co-Conspirators' words) Platinum-Beechwood conspiracy." (Opp. at 4.) CNO explains that its group pleading focuses on "those Defendants who were the ringleaders of the fraud." (*Id.*)

First, CNO does not, and cannot, allege that PBIHL was a primary actor in the events made the basis of the Complaint. Rather, and as CNO readily concedes, the Complaint is rife with instances where CNO identifies the primary actors as Nordlicht, Huberfeld, Bodner, Levy, and others. (*See, e.g.*, Compl. ¶¶ 480 – 482 & 489.) CNO presents nothing in its Opposition Brief to suggest how the Complaint's mere three mentions of PBIHL translate into PBIHL being one of "the ringleaders of the fraud." (Opp. at 4.)

Second, CNO considers but fails to properly apply the Court's April 11, 2019 opinion in the *Trott* case. The April 11 opinion explained that group pleading is appropriate for those defendants who are "alleged to have been a high-level corporate insider." (Apr. 11, 2019 Op. at 45.) The Court did not accept group pleading as applied to claims regarding individual fraudulent conduct. In fact, the Court dismissed the claims against certain "Beechwood Entities" for "impermissible group pleading" that lacked specific allegations. (*Id.* at 34 – 35.)

Third, on June 21, 2019, the Court dismissed PBIHL from the *Trott* case. In that opinion, the Court noted that PBIHL was "named in a single paragraph of the SAC, and [was] not charged with any specific wrongdoing." (June 21 Op. at 58.)

And so it is here. CNO contends the "Co-Conspirators" "diverted" funds to "Beechwood Bermuda," who then induced CNO into not acting. (*See, e.g.*, Compl. ¶¶ 625 & 814.) These allegations are general, vague and conclusory.[2] Every allegation that appears to contemplate

[2] The allegations here do not single out PBIHL for specific wrongdoing. Rather, they focus on the conduct of Beechwood Re, "Beechwood," and the "Co-Conspirators." (*See id.* ¶¶ 617 – 622.)

PBIHL references it collectively as part of "Beechwood," "Beechwood Bermuda" or the "Co-Conspirators." Therefore, the Complaint fails to give PBIHL fair notice of the claims against it.

II. CNO'S FRAUD-BASED CLAIMS SHOULD BE DISMISSED.

A. Fraudulent Inducement and Fraud.

The fraudulent inducement and fraud claim turns upon Defendant Taylor making a statement ostensibly "on behalf of all Beechwood entities" (Opp. at 34) as "President of Beechwood Bermuda" (*id.* at 35) (citing Compl. ¶ 623). The group pleading regarding "Beechwood Bermuda" notwithstanding, CNO still fails to satisfy Rule 9(b)'s requirements.

First, CNO appears to be arguing that Taylor, "as President of Beechwood Bermuda," was acting within the scope of his authority when making the statement at issue. However, at no point in the Complaint does CNO allege that Taylor was PBIHL's agent, had authority to act for or on behalf of PBIHL, was acting within the scope of his authority when making any statement to CNO, or was the conduit through which PBIHL engaged in any fraudulent conduct. The Complaint also does not assert vicarious liability for Taylor's acts or omissions as a theory of recovery against PBIHL. Combined with CNO's reliance on group pleading, the Complaint's allegations are insufficient.

Second, CNO argues that it has no obligation to allege that it conducted due diligence into Taylor's statement as part of pleading justifiable reliance. (Opp. at 40.) This is incorrect. In New York, "a sophisticated investor claiming that it has been defrauded has to allege that it took reasonable steps to protect itself against deception by, for instance, examining available financial information to ascertain the true nature of a particular transaction or facts averred." *IKB Int'l S.A. v. Morgan Stanley*, 142 A.D.3d 447, 449, 36 N.Y.S.3d (1st Dep't 2016) (citations omitted). The

Complaint makes no allegations about what diligence, if any, CNO made before investing with "Beechwood." Therefore, CNO's fraudulent inducement and fraud claim should be dismissed.

B. Aiding and Abetting.

CNO's aiding and abetting claims are still subject to dismissal because "a corporate insider cannot aid and abet another corporate insider." *In re Grumman Olson Indus., Inc.*, 329 B.R. 411, 425 (Bankr. S.D.N.Y. 2005). "[A] third-party relationship between the aider and abettor and the corporation is a necessary element in any such action." *Solow v. Stone*, 994 F. Supp. 173, 181 (S.D.N.Y.), *aff'd*, 163 F.3d 151 (2d Cir. 1998). Thus, these claims fail if PBIHL was an insider (since CNO contends that "all of [the Defendants] were insiders to the fraud" (Opp. at 6 – 7)).

Further, the Complaint lacks any factual allegations which tend to show that PBIHL had actual knowledge of any wrongful act, or that PBIHL provided substantial assistance to the commission of any of those allegedly wrongful acts. CNO contends that PBIHL and others "were merely alter egos of (and asset protection devices for) the kingpins of the conspiracy," so PBIHL and others "necessarily knew of" and "agreed to perpetuate" the fraud. (Opp. at 44 & 45.) CNO's alter ego allegations regarding PBIHL are non-existent. Even so, the Complaint only alleges that "Beechwood Bermuda" was the recipient of a transfer of funds in 2014. (Compl. ¶¶ 620 – 625.) This lack of particularity dooms the aiding and abetting claims.

III. CNO'S REMAINING CLAIMS SHOULD BE DISMISSED.

A. Civil RICO.

The Court has already found that similar claims advanced by SHIP were barred by the RICO Amendment. *See Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.* (*In re Platinum-Beechwood Litig.*), No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 67952, at *8 (S.D.N.Y Apr. 22, 2019). The Complaint alleges that Beechwood used reinsurance funds to purchase certain assets.

(*See* Compl. ¶ 625.) That falls within the RICO Amendment, as does conduct undertaken to keep a Ponzi scheme alive. *See Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012).

CNO also contends that the Complaint "details how [PBIHL]'s predecessor was instrumental in furthering the Defendants' fraudulent scheme." (Opp. at 12.) CNO then cites to the only three paragraphs of the Complaint where PBIHL is mentioned. (*Id.*) These allegations fail to show, with particularity, that PBIHL engaged in mail or wire fraud that is enough to constitute a pattern of racketeering activity. A civil RICO claim focuses "on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise." *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987). Simply tying PBIHL to a RICO enterprise is insufficient to allege a civil RICO claim. Further, the allegations that relate to PBIHL fail to meet the Second Circuit's two-year continuity requirement. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008).

B. Fraudulent Conveyance.

CNO asserts that it must only "plead details as to how the *transferor*—Beechwood Re here—committed the fraud." (Opp. at 52) (emphasis in original). CNO should re-read the *Zanani* opinion that it cites. The Court in *Zanani* dismissed a cause of action based on Debtor and Creditor Law § 276, which the plaintiff asserted against the *transferee*, for failure to allege the *transferee* "intentionally 'hinder[ed], delay[ed], or defraud[ed] present or future creditors." *Zanani v. Meisels*, 78 A.D.3d 823, 825, 910 N.Y.S.2d 533 (2d Dep't 2010). CNO's failure to plead its fraudulent conveyance claim "with the requisite specificity" relegates this claim to dismissal.

C. Contribution and Indemnity.

CNO's arguments appear to focus on Beechwood Re and the individual defendants. (*See* Opp. at 54 – 60.) Nevertheless, CNO's arguments fail to the extent they relate to PBIHL.

First, CNO's contribution claim is subject to the particularity requirements of Rule 9(b) since CNO seeks contribution for fraudulent conduct in connection with the underlying "Platinum-Beechwood conspiracy." *See A.I.A. Holdings, S.A. v. Lehman Bros.*, No. 97 Civ. 4978 (LMM), 1998 U.S. Dist. LEXIS 4175, at *25 – 26 (S.D.N.Y. Mar. 27, 1998). CNO says grounds for contribution are "readily apparent within the four corners of the Receiver's FAC and CNO's Complaint." (*Id.* at 55.) The Complaint generally alleges that, "should [CNO] be found to have any liability to the PPCO Receiver, such liability will be as a result of the fraudulent and other wrongful conduct of each of the Cross-claim and Third-party Defendants that [CNO sues] in this action." (Compl. ¶ 922.) CNO's allegations are plainly deficient.

Second, CNO appears to base its claim for indemnification on the theory that PBIHL is Beechwood Re's alter ego, so the indemnification provisions of the CNO-Beechwood Re Reinsurance Agreements should be applied to PBIHL. (*See* Opp. at 60.) The allegations do not adequately allege alter ego liability against PBIHL. Also, since there is no express indemnification agreement that directly applies to PBIHL, CNO is only entitled to indemnity where it "is not personally at fault and did not actually contribute to the injury, but [is] held liable to the plaintiff only vicariously." *Jordan v. Madison Leasing Co.*, 596 F. Supp. 707, 709 (S.D.N.Y. 1984). Stated differently, PBIHL "would have to be the sole wrongdoer[] and [CNO] vicariously liable for [the] wrongdoing, as in the insured/insurer situation, for common law indemnity to apply." *Devon Mobile Comms. Liquidating Trust v. Adelphia Comms. Corp.* (*In re Adeplphia Comms. Corp.*), 322 B.R. 509, 527 (Bankr. S.D.N.Y. 2005). CNO makes no such allegations. Therefore, its claim for contribution and indemnity should be dismissed.

D. Unjust Enrichment.

CNO contends "[t]he Co-conspirators' transfer of $75 million of the Demand Note's $100 million capacity to Beechwood Bermuda unjustly enriched Beechwood Bermuda," which "Beechwood Bermuda" then used to "purchase valuable assets." (Opp. at 60.) CNO also asserts that "[s]ome or most of those assets were transferred to [PBIHL] when it acquired one of the Beechwood Bermuda entities." (*Id.*)

First, these contentions are wholly vague and conclusory and insufficient to support an unjust enrichment claim.[3] *See Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 533 (S.D.N.Y. 2018) (allegations that certain defendants were "enriched" were "entirely conclusory" and "not entitled to be assumed to be true"); *see also Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352 – 53 (S.D.N.Y. 2018).

Second, an unjust enrichment claim must be dismissed if the relationship between the parties is "too attenuated." *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 – 16 (2007). There must be "some type of direct dealing or actual, substantive relationship" between PBIHL and CNO. *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD), 2014 U.S. Dist. LEXIS 46368, at *42 (S.D.N.Y. Mar. 28, 2014) (internal quotations omitted). CNO does not allege any relationship or contact between itself and PBIHL, nor does it allege any direct dealing between these parties. Dismissal is proper where, as here, "it makes little sense to conclude that a particular defendant [] somehow improperly obtained [benefits] intended for a certain plaintiff when those two parties never transacted or otherwise maintained a business relationship at all." *In re LIBOR-Based Fin.*

[3] These factual allegations are also new. A plaintiff may not amend pleadings to avoid dismissal by alleging new facts in an opposition brief. *See O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss."). These allegations should be disregarded.

Instruments Antitrust Litig., 27 F. Supp. 3d 447, 479 (S.D.N.Y. 2014). Therefore, the Court should dismiss CNO's unjust enrichment claim against PBIHL.

IV. THE COMPLAINT FAILS FOR WANT OF JURISDICTION.

CNO asks the Court to exercise personal jurisdiction over PBIHL based on PBIHL's alleged status as "an alter ego of each of the Beechwood entities and Platinum, none of whom contest personal jurisdiction." (Opp. at 64.) A court may exercise personal jurisdiction over a foreign affiliate of a defendant based on alter ego liability, but CNO's allegations fail to establish that the Court should exercise jurisdiction over PBIHL.

The "primary focus" here is "on the degree of control exercised by the domestic [company] over the foreign [company]." *Goel v. Ramachandran*, 111 A.D.3d 783, 787, 975 N.Y.S.2d 428 (2d Dep't 2013). "It is only when the two corporations are in fact, if not in name . . . one and the same corporation, [that] there is realistically no basis for distinguishing them for jurisdictional purposes." *Id.* Thus, while veil piercing factors (less the fraud prong) are relevant to the analysis, *Tap Holdings, LLC v. Orix Finance Corp.*, 109 A.D.3d 167, 174, 970 N.Y.S.2d 178 (1st Dep't 2013), "conclusory allegations in the complaint are insufficient." *Barneli & Cie SA v. Dutch Book Fund SPC, Ltd.*, 95 A.D.3d 736, 737, 946 N.Y.S.2d 53 (1st Dep't 2012). For instance, merely demonstrating common ownership or control is not enough. *See FIMBank P.L.C. v. Woori Fin. Holdings Co.*, 104 A.D.3d 602, 603, 962 N.Y.S.2d 114 (1st Dep't 2013).

The Complaint does not adequately plead facts that give rise to jurisdiction over PBIHL. For one, the case law makes clear that personal jurisdiction is not automatic "merely because money, allegedly wrongfully taken by a defendant subject to jurisdiction in New York, was transferred to" a foreign affiliate. *Cargill Soluciones Empresiarales, S.A. de C.V., SOFOM, ENR v. WPHG Mexico Operating, L.L.C.*, No. 651242/2014, 2015 N.Y. Misc. LEXIS 1470, at *9 (Sup.

Ct. N.Y. Cty. Apr. 24, 2015). CNO's only apparent basis for suing PBIHL rests on a 2014 transfer of funds to "[PBIHL] (among others)." (*See* Compl. ¶ 517.)

For another, the Complaint makes conclusory allegations of common ownership and control. CNO's opposition brief merely rehashes these conclusory allegations.[4] (*See* Opp. at 65 – 66.) Arguing that a company is a "shell entity" and pointing "to multiple, similarly named entities" that were formed as part of "a business venture" "does little to buttress the inadequacy" of CNO's allegations. *Cargill*, 2015 N.Y. Misc. LEXIS 1470, at *9. Further, the Complaint is deficient with respect to every veil piercing factor. *Compare Weisfelner v. Blavatnik* (*In re Lyondell Chem. Co.*), 543 B.R. 127, 144 – 45 (2016) (finding there was no prima facie showing that foreign company was subject to personal jurisdiction as the alter ego of a corporate parent). Therefore, the Complaint fails for want of jurisdiction.

V. THE *IN PARI DELICTO* DOCTRINE APPLIES.

CNO does not contest the merits of PBIHL's *in pari delicto* argument. CNO instead argues that the *in pari delicto* doctrine does not apply. (*See* Opp. at 6.) This is incorrect.

The Receiver brings claims against CNO and PBIHL for injuries the PPCO Funds allegedly sustained as part of the so-called "Platinum-Beechwood Scheme." (*See* FAC ¶ 3.) CNO brings claims against PBIHL for the harm this scheme allegedly caused CNO. *In pari delicto* is a "long-standing principle" in New York which "bars a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party whose equal or lesser fault contributed to the loss." *Rosenbach v. Diversified Grp., Inc.*, 85 A.D.3d 569, 570, 926 N.Y.S.2d 49 (1st Dep't 2011) (citations omitted). This doctrine applies to third-party and cross

[4] CNO argues that PBIHL has waived this jurisdictional argument because it did not raise it in *Trott*. (*See* Opp. at 66.) The Court granted 12(b) dismissal of PBIHL in *Trott*, however, so CNO's waiver argument is moot.

claims asserted by alleged tortfeasors. *See id.* CNO does not cite any authority that suggests there has been "any change in New York's adherence to this long-standing principle." *Id.* at 571. Citing an opinion that applies Indiana law does not help, either. (*See* Opp. at 6) (citing *Gary/Chi. Int'l Airport Auth. v. Zaleski*, 144 F. Supp. 3d 1019 (N.D. Ind. 2015)). Therefore, dismissal is proper because the doctrine applies and CNO does not challenge PBIHL's argument on the merits.

CONCLUSION

As the above makes clear, CNO's claims against PBIHL should be dismissed with prejudice.

Dated: June 26, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on this 26th day of June 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this proceeding.

/s/ Kendal B. Reed
Kendal B. Reed