UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Case No. 18 Civ. 6658 (JSR)
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY, Third-Party Plaintiffs, v. MARK NORDLICHT, ET AL., Third-Party Defendants.	Case No. 18 Civ. 12018 (JSR)

THIRD-PARTY DEFENDANT DANIEL SAKS' REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Third-Party Defendant Daniel Saks ("Saks") respectfully submits this reply memorandum of law ("Reply") in further support of his Motion to Dismiss the Third-Party Complaint ("TPC") filed by Plaintiffs Washington National Insurance Company and Bankers Conseco Life Insurance Company (collectively, "CNO").

PRELIMINARY STATEMENT

CNO's opposition brief (Consol. Dkt. No. 439)[1] fails to identify facts to support key elements of each cause of action it has asserted against Saks or provide legally sufficient explanations as to why such facts are not required to be alleged. Despite pursuing an arbitration proceeding against Beechwood for years, through which CNO obtained extensive discovery not only from Beechwood entities, but from numerous non-parties including Saks himself, CNO's TPC remains notably deficient as to Saks. The many deficiencies detailed below will not be cured through additional discovery or opportunities to amend. The TPC should be dismissed in its entirety as to Saks, without leave to amend.

ARGUMENT

I. CNO's RICO Claims Fail in Several Respects

A. The alleged predicate acts to which CNO refers in its Opposition demonstrate that there is no closed-ended continuity as to Saks

Although the TPC did not specify any predicate offenses by Saks, CNO now contends that Saks' predicate offenses are those communications with CNO set forth in Paragraph 644 of the TPC. *See* Opp. at 14. Even setting aside that none of these communications constitutes a predicate offense, these allegations do not satisfy the two-year minimum for closed-ended

[1] Citations to docket entries in this Reply refer to the consolidated *In re Platinum-Beechwood Litigation* docket, No. 18 Civ. 6658 (JSR).

continuity. The first alleged communication between Saks and CNO occurred on "January 26, 2015," and the last alleged communication occurred on "February 18, 2016," after Saks had left BAM and was replaced as CIO by Dhruv Narain. (TPC ¶ 644.) In other words, Saks' alleged predicate offenses occurred over the course of 13 months. The Second Circuit has never found a properly pleaded substantive RICO claim based on predicate offenses occurring over less than two years—approximately twice as long as here. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008). Moreover, CNO's allusion to circumstances where the duration of the predicate acts "borders on substantial" is inapposite. (Opp. at 14.) The case that CNO cites, *Fresh Meadow Food Services, LLC v. RB 175 Corp.*, 282 F. App'x 94 (2d Cir. 2008), involved predicate acts that occurred over a three-and-a-half-year period.

Saks' less-than-two-year tenure at Platinum and Beechwood further underscores the TPC's failure to establish continuity and makes clear that leave to replead the substantive RICO claim would be futile. The fact that Saks began employment at Platinum in March 2014 and departed Beechwood in December 2015 demonstrates that CNO cannot cure the deficiencies in the TPC as to Saks.[2] Even if Saks committed predicate acts on the first and last days of his employment, he still would not have reached this Circuit's minimum threshold for closed-ended continuity. *See* Opinion and Order, dated June 21, 2019 (Dkt. No. 488) at 16-17 (holding in the PPVA action that the length of Saks' employment at Platinum and Beechwood did not satisfy closed-ended continuity). CNO's argument that Saks admitted being on a "Platinum-Beechwood

[2] While CNO argues against going "outside the Complaint" on a motion to dismiss, Opp. at 13 n.7, it alleges no facts to dispute Saks' basic dates of employment, which are confirmed in documents to which CNO had access before this case even began. In any event, the dispute is of no moment given the specific alleged predicates that CNO identifies for the first time in its Opposition, which occurred over a period of only 13 months.

journey of the last two years," *id.*, is a red herring because that statement says nothing about the timing and duration of the specific predicate offenses that Saks allegedly committed. The substantive RICO claim should be dismissed with prejudice, without leave to replead.

B. CNO fails to identify any agreement by which Saks consciously joined the alleged Beechwood conspiracy

In his opening brief, Saks advanced several arguments regarding the deficiencies of the RICO conspiracy claim against him. Dkt. No. 351 ("Opening Br.") at 9-11. In its Opposition, CNO responded only to an argument that Saks did not make—that, to plead a RICO conspiracy, CNO need not allege predicate acts by Saks that occurred over the course of two years. Opp. at 14.

CNO's RICO conspiracy claim still fails for the reasons set forth in Saks' opening brief, to which CNO has not responded and has thus conceded. First, CNO failed to identify any unlawful agreement to which Saks was a party. *See* Opening Br. at 10; *Hecht v. Commerce Clearing House, Inc.*, 713 F. Supp. 72, 77 (S.D.N.Y. 1989), *aff'd* 897 F.2d 21 (2d Cir. 1990). Nor has CNO alleged the required "factual basis" to infer that the agreement was "conscious" on Saks' part. *Picard v. Kohn*, 907 F. Supp. 2d 392, 400 (S.D.N.Y. 2012) (Rakoff, J.). Second, the TPC alleges no overt act by Saks to further the alleged RICO conspiracy. *See* Opening Br. at 10-11; *Hecht*, 897 F.2d at 25. Each deficiency provides an independent basis for dismissal, and CNO has not argued otherwise.

C. The RICO claims are barred by the PSLRA

Even if CNO had pleaded the elements of a substantive RICO claim or a RICO conspiracy claim against Saks, each is barred by the PSLRA's RICO Amendment. In addition to arguments made by Saks and others in their opening briefs, CNO admits in its Opposition that its allegations are not materially different from those made by SHIP, which the Court dismissed as

barred by the PSLRA. CNO states that its argument is that "Beechwood's transaction with CNO was an outright fraud to gain control over CNO's cash." Opp. at 10. But SHIP made the exact same argument. As the Court stated in its Apr. 23, 2019 Opinion (Dkt. No. 292), "[a]ccording to SHIP, the 'object of the criminal enterprise was to entice SHIP to part with its money,'" which Beechwood then used to fund securities transactions. Apr. 23, 2019 Op. at 21-22. The Supreme Court's decision in *SEC v. Zandford*, 535 U.S. 813, 815 (2002), is equally applicable to CNO's claims here as it was to SHIP's, and thus the claims are barred. *See also* June 21, 2019 Op. at 15-17 (holding that PPVA's RICO claims against Saks and others were barred by the PSLRA).

II. CNO Fails to State a Claim for Breach of Fiduciary Duty Against Saks

A. Saks did not owe a personal fiduciary duty to CNO

CNO argues that because Saks was a corporate officer of BAM, and because BAM owed fiduciary duties to CNO, CNO's claim against Saks for breach of fiduciary duty in his *individual* capacity should survive. *See* Opp. at 20-30. In support, CNO cites supposed "admissions"—none of which are alleged to have been made by Saks—that Beechwood, the corporate entity and contractual reinsurer of CNO's assets, owed fiduciary duties to CNO. Opp. at 20-21. But the fact that Beechwood owed those duties to CNO under the Reinsurance Agreements is both unremarkable and irrelevant to whether CNO may pursue claims against Saks himself.

Corporate officers do not owe fiduciary duties directly to contractual counterparties of their employer unless they establish a "personal relationship of trust and confidence" with those counterparties. *Krys v. Butt*, 486 F. App'x 153, 156 (2d Cir. 2012). Both the TPC and CNO's Opposition repeatedly make clear that CNO spoke to Saks only in his role as one of a group of investment managers at BAM that included Stewart Kim and Dhruv Narain. (TPC ¶ 644.) As the Court made clear in its decision on the initial round of motions to dismiss SHIP's complaint in a related case, the fact that SHIP "allege[d] that Narain managed SHIP's assets as CIO of

BAM" was irrelevant because SHIP did not "indicate that there was anything about [Narain's] role as a corporate official that created a personal relationship of trust and confidence." *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 525 (S.D.N.Y. 2018). The same is true here. Paragraph 868 of the TPC alleges only that Saks made representations "on behalf of Beechwood Re, BAM and BAM Administrative," and not in his individual capacity. Those allegations are necessary to sustain a claim for breach of duty against Saks personally, rather than against his employer. CNO's allegations against Saks are indistinguishable from SHIP's initial allegations against Narain, and should likewise be dismissed.

B. CNO does not allege a breach of duty by Saks

Saks argued in his Opening Brief that while CNO had attempted to allege a breach of the duty of loyalty by Saks, it failed to show that Saks was conflicted as to any transaction he entered. Opening Br. at 12-13. CNO responds that it has also alleged that Saks breached his fiduciary to CNO by omission. Opp. at 29. That allegation does not appear in the TPC as to Saks. (*See* TPC ¶ 869 (failing to plead breach of duty by omission)). CNO cannot amend its pleadings by adding new claims in an opposition to a motion to dismiss. *See, e.g.*, *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998).

III. CNO Alleges No Affirmative Misrepresentation by Saks, and the Special Facts Doctrine Does Not Require Correction of an Impression Not Known to Be False

A. The TPC alleges no affirmative misrepresentation by Saks, and fraud by omission cannot be established in the absence of a fiduciary duty

As to CNO's fraud and fraudulent inducement claims,[3] the TPC fails to allege any

[3] Though packaged as one count, fraud and fraudulent inducement are distinct causes of action. CNO concedes that it cannot allege fraudulent inducement by Saks, *see* Opp. at 35-36; that claim should be summarily dismissed.

affirmative misrepresentation by Saks. CNO contends that Saks' "primary sin was [his] conspiratorial silence in concealing the key facts from CNO, as opposed to what [he] represented to CNO." Opp. at 26. The TPC repeatedly adds, after bullets relevant to Saks in Paragraph 644, the non-sequitur that Saks "made sure, as always, to conceal any relationship between Platinum and Beechwood." Without any detail, this is likewise an alleged omission. The TPC does not identify any specific affirmative misrepresentation by Saks, nor does the Opposition. Although fraud may be established by omission, fraud by omission generally requires "a fiduciary relationship requiring disclosure of the unknown facts." *See, e.g.*, *Connaughton v. Chipotle Mexican Grill, Inc.*, 23 N.Y.S.2d 216, 220 (1st Dep't 2016). As CNO has not pleaded a fiduciary duty with Saks personally, it cannot pursue a claim of fraud by omission against him.

B. The "special facts" doctrine does not require Saks to volunteer information that would correct a false impression that Saks is not alleged to have known

CNO also argues that the "special facts" doctrine compelled Saks to disclose Beechwood's relationship to Platinum. Opp. at 37-38. The special facts doctrine requires that "(1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge." *Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank*, 57 F.3d 146, 155 (2d Cir. 1995). The TPC pleads no facts to support that Saks knew what CNO thought the relationship between Platinum and Beechwood was. Paragraph 644 of the TPC repeatedly implies that the relationship between Platinum and Beechwood did not come up in conversations between Saks and CNO. As CNO acknowledges, Saks was not present for the initial representations that Beechwood made to CNO, Opp. at 35-36, nor does the TPC plead any other facts to suggest that Saks later came to understand what those initial representations were. CNO's failure to make any factual allegations regarding Saks' understanding of CNO's

knowledge of the Platinum-Beechwood relationship leaves CNO without any basis to claim that Saks had anything to correct. *See, e.g.*, *Travelers Indem. Co. of Ill. v. CDL Hotels USA, Inc.*, 322 F. Supp. 2d 482, 500 (S.D.N.Y. 2004). This again leaves CNO without any allegation of an actionable misrepresentation.

C. CNO fails to plead that Saks was a cause of any injury or that Saks obtained anything through the fraud

In addition to the grounds for dismissal discussed above, Saks made two additional arguments in favor of dismissal of the fraud claims against him: first, that CNO did not plead that Saks proximately caused any injury to CNO, Opening Br. at 15; and second, that CNO did not plead that Saks gained anything from the fraud, *id.* at 15-16. CNO does not meaningfully engage with these arguments, and thus Saks rests on his Opening Brief as to these elements.

IV. CNO Fails to Establish Either Actual Knowledge or Substantial Assistance of a Fraud or Breach of Duty by Saks

A. CNO fails to allege that Saks actually knew of the fraudulent scheme

CNO responds to Saks' actual knowledge arguments only by reference to the Court's initial decision in the PPVA action finding that it "could reasonably infer Saks' knowing participation" in a scheme to encumber Platinum assets by virtue of his participation in a transaction involving Montsant, a Platinum subsidiary. Opp. at 45. The TPC alleges no nexus between the Montsant transaction and CNO or any of its assets, and thus the citation is irrelevant. CNO does not otherwise dispute Saks' arguments that he had no actual knowledge of a scheme to mislead CNO as to the relationship between Platinum and Beechwood.

B. CNO fails to allege that Saks substantially assisted the fraudulent scheme through an overt act

Contrary to CNO's contention that it is "laughable" for Saks to argue that he "did not 'substantially assist' in the [alleged] scheme's operation," *see* Opp. at 47, the only fact to which

CNO refers to argue that Saks substantially assisted was serving as CIO "in 2014-15." *See id.* at 46-50. CNO also refers to the conclusory allegation in Paragraph 840 that Saks was "responsible for fulfilling [a] promise" to divest CNO trusts of investments in Platinum-controlled funds and entities, even though CNO alleges no facts to connect Saks to that promise. *Id.* at 47.

None of these allegations allude to anything that Saks *did* to substantially assist the putative scheme. CNO instead argues, in essence, that Saks substantially assisted the scheme by allegedly *not* making an affirmative choice to reveal the alleged fraud to CNO. Even if CNO had properly alleged that Saks actually knew of the supposed scheme to defraud them—and it has not for the reasons set forth above—Second Circuit precedent is clear that inaction does not suffice to allege substantial assistance where, as here, the defendant does not owe a personal fiduciary duty to the plaintiff. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 295 (2d Cir. 2006). CNO thus fails to state aiding and abetting claims against Saks.

V. CNO Fails to Explain How Saks Was Enriched at CNO's Expense, and Thus CNO Cannot Sue Saks for Unjust Enrichment

In his Opening Brief, Saks made two arguments in support of his motion to dismiss the unjust enrichment claim: first, that CNO's unjust enrichment claim improperly duplicates the other causes of action it asserts; and second, that CNO failed to identify any way in which Saks was enriched. Opening Br. at 19-21. In its Opposition, CNO summarily addresses this argument by Saks and numerous other defendants without any reference to the clear precedent that Saks and other defendants cite and without any specificity as to Saks. *See* Opp. at 63 & n.29. CNO cannot simply plead, without basis, that Saks was part of a larger group that profited at CNO's expense without explaining the alleged enrichment to Saks. *See, e.g.*, *Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352-53 (S.D.N.Y. 2018).

VI. No Facts Alleged Against Saks Support a Claim for Contribution or Indemnity Against Him for Supposed Wrongdoing Against PPCO

CNO lastly alleges that it may plead claims for contribution and indemnity "in the alternative," regardless of whether the facts that it alleges in the TPC support those claims. *See* Opp. at 54-60. That is not the law. Claims for both contribution and indemnity require the plaintiff to establish that the defendant committed some tort against the party to whom it is allegedly liable. Here, CNO pleads no facts that would allow the Court to conclude that Saks caused any injury to PPCO. Moreover, for a contribution claim, the defendant must be a "joint tortfeasor," and for a common-law indemnity claim, the defendant must be a tortfeasor where the plaintiff is blameless. Neither is sufficiently pleaded here.

As to the contribution claim, CNO argues that *Epstein v. Haas Securities Corp.*, 731 F. Supp. 1166 (S.D.N.Y 1990), supports their "form of alternative pleading." However, *Epstein* did not endorse the ability to plead a claim for contribution based on no facts; it simply rejected the defendant's direct argument that the plaintiffs "must admit that they were joint tortfeasors in order to seek contribution in the context of the federal securities laws." *See id.* at 1186-88. In contrast to the allegations against Saks here, the claims in *Epstein* against the contribution defendant, Frank Shannon, alleged that Shannon manipulated the market for certain securities by purchasing sold shares at artificially inflated prices, which harmed the original plaintiff. *See id.* at 1182. As Saks argued in his Opening Brief, there is no allegation here that Saks injured PPCO in any way, *see* Opening Br. at 21. Conclusory allegations, devoid of any facts, cannot pass muster under Rule 8 as interpreted by the Supreme Court in *Twombly* and *Iqbal*.

As to the indemnity claim, CNO appears to have abandoned that claim against Saks. CNO maintains the indemnity claim on the basis of the alter ego allegations advanced in Paragraphs 470, 518-21, and 592 of the TPC. Opp. at 59. None of those Paragraphs allege in

even a conclusory fashion that Saks was an alter ego of any Beechwood entity. For that reason, as well as all of the reasons set forth in Saks' Opening Brief, the indemnity claim should be dismissed as to Saks.

CONCLUSION

For each of the foregoing reasons, Saks requests an order dismissing all of the claims asserted against him with prejudice and without leave to replead, as well as granting any further relief as the Court deems just and proper under the circumstances.

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