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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	18-cv-06658 (JSR)
MELANIE L. CYGANOWSKI, Plaintif, -v- BEECHWOOD RE LTD., et al., Defendants.	: : : : : : : : :	18-cv-12018 (JSR)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE BEECHWOOD PARTIES' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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The Beechwood Parties, by and through their undersigned counsel, respectfully submit this reply brief in further support of their motion to dismiss the First Amended Complaint.[1]

ARGUMENT

I. THE RECEIVER'S CLAIMS AGAINST FEUER AND TAYLOR ARE BARRED BY THE *WAGONER* RULE AND THE DOCTRINE OF *IN PARI DELICTO*

All of the Receiver's claims against Feuer and Taylor should be dismissed on the basis of either the *Wagoner* Rule or the *in pari delicto* doctrine. As in the PPVA case, the FAC fails to allege insider status as to Feuer or Taylor, as neither is alleged to have held positions at PPCO or to have owed fiduciary duties to PPCO. *See* ECF No. 488 at 21. For this reason, Feuer and Taylor may not be subject to liability unless the adverse-interest exception to the *Wagoner* Rule or the *in pari delicto* doctrine applies. *Id.* at 23. And it does not.

Here, all of the allegations regarding Feuer and Taylor concern their alleged role in the formation of Beechwood (FAC ¶¶ 13, 47-48, 108-10, 138, 155, 157, 173, 193, 260, 263-64, 277, 305, 318, 321), which the Receiver alleges was created "to gain access to hundreds of millions of dollars in insurance assets that would then be channeled into the Platinum family of funds" (*Id.* ¶ 5.) New York courts have routinely found that the adverse-interest exception is inapplicable to allegations such as these because the alleged misconduct enabled the funds to continue to survive. *See New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 145 A.D.3d 16 (1st Dep't. 2016); *Balanced Return Fund Ltd. v. Royal Bank of Can.*, 2014 N.Y. Misc. LEXIS 6380, at *44 (Sup. Ct. N.Y. Cty. Oct. 30, 2014); *Walker, Truesdell, Roth & Assocs., Inc., v. Globeop Fin. Servs. LLC*, No. 600469/09, 2013 WL 8597474, at *7 (Sup. Ct. N.Y. Cty. May 27,

[1] All defined terms set forth herein have the same meanings as set forth in the Beechwood Parties' Memorandum of Law in Support of Their Motion to Dismiss.

2013).[2] Because the only well-pleaded allegations in the FAC concerning Feuer and Taylor relate to the formation of Beechwood and its purported use as a vehicle to prop up the Platinum funds, and those allegations do not fall within the adverse-interest exception, all of the claims against them should be dismissed pursuant to the *Wagoner* Rule or the *in pari delicto* doctrine.[3]

II. THE CIVIL RICO CLAIMS SHOULD BE DISMISSED

The Receiver argues that her RICO claims should not be dismissed because (1) dismissal under the RICO Amendment to the PSLRA is premature, (2) the claims are not grounded in securities fraud and thus not subject to dismissal under the RICO Amendment, and (3) the claims are broad enough in terms of the number of victims, time, and purpose to constitute a continuous pattern of racketeering activity. She is wrong on all three counts.

As a preliminary matter, this Court has already held that identical claims advanced by PPVA and SHIP were barred by the RICO Amendment. *See* ECF No. 488, at 15 ("[T]he Court holds that the RICO Amendment bars plaintiffs' RICO claim, even to the extent that the claim relies on alleged misstatements of PPVA's NAV"); *see also In re Platinum-Beechwood Litig.*, No. 18-CV-6658 (JSR), 2019 WL 1759925, at *8 (S.D.N.Y. Apr. 22, 2019) ("SHIP's allegations are barred … insofar as the gravamen of [its] claims is that Beechwood [f]unneled SHIP's assets

[2] The Receiver suggests that the PPCO Feeder Funds may be able to avoid this rule since they are nominally creditors of the PPCO Master Fund. But the master-feeder structure of the PPCO Funds is standard, and each of the cases cited here involves suits brought on behalf of feeder-fund plaintiffs. In contrast, the Receiver cites no authority in support of her novel reading of *Wagoner.*

[3] Unlike the JOLs in the *Trott* case, the Receiver does not allege that the Beechwood entities are alter egos of Platinum. To the contrary, as detailed in Point III below, the Receiver alleges that the Beechwood entities were controlled by their insurance clients SHIP and CNO. Still, the Beechwood Parties interpret the Court's recent decision in the PPVA Action (ECF No. 488) to suggest that factual issues have been presented, which prevent the application of the adverse-interest exception at the pleading stage to certain allegations—namely, the Black Elk transaction and the PPCO Loan Transactions and Securities Purchases. In light of this, the Beechwood entities will clarify below which instances of alleged misconduct clearly fall within the adverse-interest exception for the purposes of this motion to dismiss.

to Platinum.") Here, as in the related complaints, the FAC describes a Ponzi-like scheme designed to mask a severe liquidity crisis and keep the Platinum funds afloat. (FAC ¶¶ 2, 3, 19, 91, 100-07, 178-80, 193, 335.) More than that, the FAC alleges that Beechwood was formed to "gain access to hundreds of millions of dollars in insurance assets that would then be channeled into the Platinum family of funds." (*Id.* ¶ 5; *see also id.* ¶¶ 168-76.) This Court has already held that allegations such as these fall within the scope of the RICO Amendment.[4]

The Receiver contends that her RICO claims may not be dismissed under the RICO Amendment "[u]nless and until this Court rules that the Receiver has alleged an actionable securities fraud claim against at least one defendant in connection with her RICO claim." (Opp. 17.) That is incorrect as a matter of law. *See Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 643 (S.D.N.Y. 2017) (The RICO Amendment "bars *any* claim that is actionable as fraud in the purchase or sale of securities, even in situations where a plaintiff lacks standing or is otherwise precluded from asserting a valid claim under the securities laws.") Indeed, as long as the alleged conduct "could form the basis of a securities fraud claim against *any* party—be it against, or on behalf of, the plaintiff, defendants or a non-party—it may not be fashioned as a civil RICO claim." *Id*. at 644. That is certainly the case here, where the thrust of the Receiver's claims tracks the securities fraud claims being asserted against PPCO's general partner and its officers by the SEC. Accordingly, dismissal under the RICO Amendment to the PSLRA is not premature.

Next, seeking to avoid the RICO Amendment, the Receiver attempts to recast the predicate acts of racketeering upon which she relies. (Opp. 18.) She highlights the fact that two

[4] Conduct undertaken to keep a Ponzi scheme alive is conduct undertaken "in connection with the purchase and sale of securities." *See Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012) (Rakoff, J.). That is exactly what the Receiver has alleged here.

of the alleged predicate acts include aiding Nordlicht in connection with his alleged breach of fiduciary duty and commission of common-law fraud. (*Id.*) But recasting her claims in this manner does not help the Receiver side-step the RICO Amendment. To the contrary, the allegations that form the basis of the Receiver's claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraud—the allegations the Receiver now invokes—are the exact same allegations that this Court has already found to be covered by the RICO Amendment. For example, the Receiver's aiding and abetting claims are premised on allegations that Nordlicht caused PPCO to misrepresent and overvalue its net asset value. (FAC ¶¶ 324(i), 335(i).) As this Court has already held, misstatements concerning the funds' net asset value were not "merely incidental or tangentially related to the sale of securities." ECF No. 488, at 15 (quoting *Leykin v. AT & T Corp.,* 423 F. Supp. 2d 229, 241 (S.D.N.Y 2006)). Rather, "they were made in substantial part to sustain defendants' Ponzi scheme." (*Id.*) Accordingly, they are covered by the RICO Amendment and should be dismissed. (*Id.*)

The Receiver argues that the other two predicate acts upon which she purports to rely—that the defendants "participate[d] in the structuring and consummation of [the PPCO Loan Transactions]" (FAC ¶ 283(iii)) and "transmit[ted] communications and documents that facilitated the PPCO Loan Transactions and Securities Purchases …" (*id.* ¶ 283(iv))—were not acts "in connection with" a purchase or sale of a security. But this argument defies credulity. "[F]raud in the purchase or sale of securities," 18 U.S.C. § 1964(c), covers a broad swath of deceptive conduct relating to transactions involving securities. The Supreme Court has made clear that this language is to be "construed not technically and restrictively, but flexibly to effectuate [the statute's] remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotation marks omitted). Here, the FAC defines the PPCO Loan Transactions as "a series of transactions … through which" the PPCO Master Fund borrowed nearly $70 million "*in*

order to purchase certain securities." (FAC ¶ 223) (emphasis added). The Purchased Securities are integral to the purported scheme since, without them, the FAC merely describes a $70 million loan to a cash-strapped hedge fund.

The Receiver does not respond directly to Beechwood's argument that her RICO claims are too narrow in time to constitute a continuous pattern of racketeering. (Mot. 16.) Instead, she asserts that, "[i]n determining whether continuity exists this Court should not limit its consideration to the duration of the scheme but should also look at the overall context in which the acts took place." (Opp. 21.) But predicate acts committed over a 22-month period are insufficient as a matter of law to constitute a "pattern" for RICO purposes. ECF No. 488, at 15-16; *In re Platinum-Beechwood*, 2019 WL 1759925, at *8. And the FAC, as narrowed, now purports to rely upon predicate acts which occurred during only a 4-*month period* from December 2015 to March 2016. This does not "satisfy the requirements of closed-ended continuity." ECF No. 488 (quoting *First Capital Asset Mgmt*., 385 F.3d at 182.)[5]

III. THE SECURITIES FRAUD CLAIMS SHOULD BE DISMISSED

A. The FAC Fails to State a Claim under § 10(b) or Rule 10b-5

The FAC, by its very terms, alleges that Defendants "did materially misrepresent to the PPCO Funds that the true value of the Purchased Securities was their par value as set forth in the transaction documents for the PPCO Loan Transactions and Securities Purchases, and knowingly omitted or concealed that the true value of the Purchased Securities was only a fraction of par value." (FAC ¶ 311.) The Receiver belatedly recognizes that she has failed to plead an actionable misstatement or omission, instead arguing that her securities fraud claim is not

[5] There is nothing about the "overall context in which the acts took place" that changes this analysis. The alleged conspiracy is limited to a single victim and a narrow purpose: "the false and fraudulent over-valuation of assets and the transfer of assets of the PPCO Funds to Beechwood, for the benefit of the CNO Defendants and the SHIP Defendants." (FAC ¶ 285.)

predicated upon an actual misstatement of fact, but instead rests upon some unspecified conduct. (Opp. 26-27 (citing *Van Cook v. SEC*, 653 F.3d 130, 140-41 (2d Cir. 2011)).) But "[c]ourts have not allowed subsections (a) and (c) of Rule 10b–5 to be used as a back door into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b–5." *SEC v. Kelly*, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011) (internal quotation marks omitted). Thus, "[s]cheme liability … hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement." *Id.* at 344.

The Receiver's argument represents an obvious attempt to use subsections (a) and (c) of Rule 10b–5 as a "back door into liability" here. The Receiver points to ¶¶ 179-180, 225-258, and 268-271 of the FAC in support of her contention that she has sufficiently pleaded the elements of securities fraud. (*See* Opp., Sch. A.) But none of these allegations support the Receiver's newfound contention that the Beechwood Parties performed some inherently deceptive act that is distinct from the alleged misstatement identified in the FAC—namely, that the defendants "materially misrepresent[ed] to the PPCO Funds the true value of the Purchased Securities was their par value as set forth in the transaction documents for the PPCO Loan Transactions and Securities Purchases." (*Id.* ¶ 311.) And as to each of these allegations the FAC violates the group-pleading doctrine and particularity requirements of Rule 9(b).

First, ¶¶ 179-180 of the FAC concern the use of reinsurance proceeds in 2014 and 2015 to "prop up the Platinum Funds and their portfolio companies." (FAC ¶ 179.) These allegations on their face do not apply to the Receiver's securities fraud claims, which explicitly relate to the PPCO Loan Transactions and Securities Purchases. (*Id.* ¶ 310-11; *see also* Opp. 18 (explaining that the securities law claims are premised on allegations that the defendants made misrepresentations to PPCO in connection with the Purchased Securities).) They are simply irrelevant to this cause of action.

Second, ¶¶ 225-58 of the FAC, which correspond to the subsections of the FAC titled "The December 2015 Fraudulent Conveyance" and "The March 2016 Fraudulent Conveyance," do nothing more than describe the PPCO Loan Transactions and Securities Purchases, *i.e.*, the alleged misrepresentations. They do not contain any allegation that any Beechwood Party engaged in any inherently deceptive act that is distinct from the alleged misstatements in the loan documents. Moreover, these sections of the FAC make clear that the only Beechwood entity that is alleged to have interfaced with the PPCO funds in these transactions was BAM Admin. Accordingly, to the extent any conduct can be attributed to a Beechwood entity, it is limited to BAM Admin, and the claims against the rest of the Beechwood Parties should be dismissed.

Third, ¶¶ 268-271 of the FAC consist entirely of conclusory allegations restating the elements of a RICO cause of action. While they nominally relate to the PPCO Loan Transactions and Securities Purchases, they contain no well-pleaded factual allegations concerning any conduct or deceptive act performed by any of the Beechwood Parties. Indeed, these allegations are illustrative of the Receiver's pleading failures and her general disregard for the particularity requirements of Rule 9(b).

B. The FAC Fails to State a Claim under § 20(a)

Because the Receiver fails to state a claim for a primary violation of § 10(b) or Rule 10b-5 by a controlled person, her § 20(a) claims against Feuer and Taylor should be dismissed on that basis alone. However, even if the Receiver could establish a primary violation by one of the Beechwood entities, she still fails to state a control-person claim against Feuer or Taylor. That is because the Receiver must do more than merely allege that Feuer or Taylor has control person status. *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 166 (S.D.N.Y. 2012). Instead, she must assert that Feuer and Taylor "exercised actual control over the matters at issue." *Id.* She has failed to do that here.

Indeed, as set forth in the Beechwood Parties' moving brief, the Receiver has failed to plead any facts suggesting that Feuer or Taylor had any involvement in the PPCO Loan Transactions and Securities Purchases. The Receiver did not address this argument in her opposition and, accordingly, the Court should treat this element as abandoned. *In re Platinum-Beechwood Litig.*, No. 18-cv-10936, 2019 WL 1570808, at *19 (S.D.N.Y. Apr. 11, 2019).

Moreover, as the Receiver emphasizes in her opposition, the FAC alleges that CNO and SHIP—not Beechwood and certainly neither Feuer nor Taylor—exercised actual control over the transactions at issue.[6] (*See*, *e.g.*, FAC ¶¶ 11, 176, 181; *see also* Opp. 28 ("Beechwood was directed by the CNO and SHIP Defendants to sell these securities back to [the] PPCO Master Fund."); *id.* at 30 ("CNO, BCLIC, WNIC and SHIP directed Beechwood to sell certain loan instruments back to PPCO Master Fund"); *id.* at 59 ("[CNO] directed Beechwood to enter into the PPCO Loan Transactions and Securities Purchases."); *id.* ("Between December 2015 and March 2016, CNO … directed Beechwood …, as their agent, to enter into several transactions with PPCO Master Fund.").) In light of this, the control-person claims should be dismissed.

IV. THE AIDING AND ABETTING CLAIMS SHOULD BE DISMISSED

As a preliminary matter, as discussed above, the Receiver's aiding and abetting claims against Feuer and Taylor should be dismissed on the basis of either the *Wagoner* Rule or the *in pari delicto* doctrine. In addition, to the extent that the Receiver's aiding and abetting claims are premised on the "misrepresentation and overvaluation of the PPCO Funds' net asset value" (FAC ¶¶ 324(i), 335(i)), they should be dismissed as to the Beechwood entities as well.[7]

[6] To the extent that the Receiver (incorrectly) maintains that Feuer or Taylor had only nominal control over Beechwood, she fails to state a claim. *Ellison v. Am. Image Motor Co.*, 36 F. Supp. 2d 628, 642 (S.D.N.Y. 1999) (dismissing § 20(a) claims where plaintiff alleged that defendants had only nominal control over company).

[7] To the extent the Receiver maintains that the allegations contained in FAC ¶¶ 111 and 171-72 are sufficient to create an issue of fact regarding whether the "Beechwood Defendants" were Platinum

The Receiver's remaining aiding and abetting claims concern (1) the PPCO Loan Transactions and Securities Purchases, and (2) PPCO's temporary purchase of an interest in Black Elk for the sole benefit of the PPVA funds. (FAC ¶¶ 324(ii)-(iii), 335(ii)-(iii).) Here, the FAC does not allege that BRILLC, BRE Holdings, or BBL had any involvement with these transactions. (*See* Opp. 39 n.12.) Accordingly, the aiding and abetting claims should be dismissed as to those entities for failure to state a claim under Rules 12(b)(6) and 9(b). *See* ECF No. 488 at 28 (dismissing claims against BRILLC, BRE Holdings, BRE, and BBIL).

V. THE RECEIVER'S UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED

As set forth in the Beechwood Parties' moving brief, the unjust enrichment claim against BAM Admin fails for two independent reasons: (1) an unjust enrichment claim cannot stand where an express agreement governs the rights at issue; and (2) merely alleging a general, non-specific benefit is insufficient to plead an unjust enrichment claim. (Mot. 24-25.)

Here, the Receiver does not dispute that a series of express agreements govern the rights at issue. Indeed, in her opposition, the Receiver reaffirms that her unjust enrichment claims arise from the PPCO Loan Transactions and Securities Purchases (Opp. 66), each of which is connected to a structured agreement (FAC ¶ 418). As this Court has explained, "an unjust enrichment claim is not available where it simply duplicates, or replaces a conventional contract or tort claim." *See* ECF No. 488, at 43-44 (quoting ECF No. 290, at 27). To the extent the Receiver seeks to recover under the PPCO Loan Transactions and Securities Purchases, the appropriate vehicle is a breach of contract action, and the unjust enrichment claim against BAM Admin should be dismissed.

While the Receiver seems to accept that a series of express agreements govern the rights

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insiders, those allegations are all notably limited to the Beechwood asset manager entities (BAM, BAM II, and BAM Admin).

at issue, she nevertheless advances the argument that her unjust enrichment claim "is not simply duplicative of relief available under a contract." (Opp. 67.) At the same time, she offers no explanation for why this is supposedly so. Instead, she merely notes that that "BCLIC and WNIC do not have direct contracts with any of the PPCO Funds." (*Id.* at 68.) Thus, she implicitly acknowledges that, in contrast to CNO, BAM Admin does have contracts with the PPCO Funds—a fact which forecloses her unjust enrichment claim against that entity.

Additionally, even were the rights at issue not governed by structured agreements executed in connection with the PPCO Loan Transactions and Securities Purchases, the Receiver's unjust enrichment claim against BAM Admin would still be subject to dismissal. That is because the Receiver fails to adequately explain how BAM Admin, which merely acts as a collateral agent for lenders like CNO and SHIP, was purportedly enriched by any of these transactions. The Receiver does not address this point in her opposition brief, pointing only to general, non-specific benefits like "assets, liens and obligations." (Opp. 66-67.) But the only specific benefits that she alleges BAM Admin received are liens. (*See* Sch. A to Opp. (purporting to reference certain BAM asserted liens).) And courts in this district have held that the maintenance of a lien over collateral pursuant to an agreement is insufficient to state a claim for unjust enrichment. *In re Lehman Bros. Holdings Inc.*, 541 B.R. 551, 580 (S.D.N.Y. 2015). Since that is all the Receiver alleges, her claim should be dismissed.

CONCLUSION

For the foregoing reasons, the Beechwood Parties respectfully request that the Court enter an order dismissing, with prejudice, all of the claims asserted against BRILLC, BRE Holdings, BBL, Feuer, and Taylor, as well as the securities fraud claims, civil RICO claims, and unjust enrichment claims asserted against the remaining Beechwood Parties and granting the Beechwood Parties such other and further relief as this Court deems just and proper.

Dated: June 26, 2019
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