

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

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	:	
IN RE PLATINUM BEECHWOOD LITIGATION,	:	No. 1:18-cv-06658-JSR
	:	
-----X	:	

MELANIE L. CYGANOWSKI, AS RECEIVER, et al.,	:	No. 1:18-cv-12018-JS
	:	
Plaintiffs	:	
	:	
-v-	:	
	:	
BEECHWOOD RE LTD, et al.,	:	
	:	
Defendants	:	
	:	
-----X	:	

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA	:	
	:	
Third-Party Plaintiff	:	
	:	
-v-	:	
	:	
PB INVESTMENT HOLDINGS, LTD., et al	:	
	:	
Third-Party Defendants	:	:
	:	
-----X	:	

**THIRD PARTY DEFENDANT BERNARD FUCHS' REPLY MEMORANDUM OF LAW  
IN SUPPORT OF MOTION TO DISMISS THE THIRD PARTY COMPLAINT**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii

POINT 1- The TPC fails to state a cause of action for  
aiding and abetting fraud or breach of fiduciary  
duty.....2

POINT II- The TPC fails to state a cause of action for  
civil conspiracy.....3

POINT III- The TPC fails to state a cause of action for  
unjust enrichment.....4

CONCLUSION.....4

**TABLE OF AUTHORITIES**

*ABF Capital Mgt. v. Askin Capital Mgt., L.P.*,  
957 F.Supp. 1308 (S.D.N.Y. 1997).....3

*Aetna Cas. and Sur. Co. v. Aniero Concrete Co., Inc.*,  
404 F.3<sup>rd</sup> 566 (2<sup>nd</sup> Cir. 2005).....3

*Anwar v. Fairfield Greenwich, Ltd.*, 728 F.Supp.2<sup>nd</sup> 372 (S.D.N.Y.2010).....2

*Corsello v. Verizon New York, Inc.*, 18 N.Y.3<sup>rd</sup> 777 (2012).....4

*Gillespie v. St. Regis Residence Club*, 343 F.Supp. 3<sup>rd</sup> 332 (S.D.N.Y. 2018).....4

*High Tides, LLC v. DeMichele*, 88 A.D.3<sup>rd</sup> 954 (2<sup>nd</sup> Dep’t 2011).....3

*In re Alleu Distributors, Inc.*, 446 B.R. 32 (Bankr. E.D.N.Y. 2011).....4

*In re Platinum-Beechwood Litig.*, 2019 WL 2569653 (S.D.N.Y. June 21, 2019).....3, 4

*Landesbank Baden-Wurttenmberg v. RBS Holdings USA, Inc.*,  
14 F.Supp.3<sup>rd</sup> 488 (S.D.N.Y. 2014).....2

*Maersk, Inc. v. Neewra, Inc.*, 687 F.Supp.2<sup>nd</sup> 300 (S.D.N.Y. 2009).....4

*Silvercreek Mgt., Inc. v. Citigroup, Inc.*, 346 F.Supp.3<sup>rd</sup> 473 (S.D.N.Y. 2018).....3

*Vasquez v. Hong Kong and Shanghai Banking Corp., Ltd.*,  
2019 WL 2327810 (S.D.N.Y., May 30, 2019). ....3

*VFP Investment I LLC v. Foot Locker, Inc.*, 147 A.D.3<sup>rd</sup> 491 (1<sup>st</sup> Dep’t 2017).....2



was merely a holder of an ownership interest in PPVA. He never had conversations with anyone from SHIP nor had any connections with Beechwood.

## POINT I

### **THE TPC FAILS TO STATE A CAUSE OF ACTION FOR AIDING AND ABETTING FRAUD OR BREACH OF FIDUCIARY DUTY**

While the cases cited by SHIP may apply to the other Third Party Defendants, they are distinguishable as regards Fuchs. In *Anwar v. Fairfield Greenwich, Ltd.*, 728 F.Supp.2<sup>nd</sup> 372 (S.D.N.Y.2010), the Citco defendants contracted with the Madoff funds to perform financial services for it, serving as administrator, custodian, bank and depository. *Id.* at 392. Citco marketed itself as an industry leader and a reliable fiduciary to safeguard the interest of investors.” *Id.* at 393. The Court stated there was a strong inference of knowledge given Citco Defendants’ “familiarity with the Funds, as well as their general experience in providing financial services to the funds.” *Id.* at 443. In *Landesbank Baden-Wurtttemberg v. RBS Holdings USA, Inc.*, 14 F.Supp.3<sup>rd</sup> 488 (S.D.N.Y. 2014), the Defendants were directly involved in the securitization process and the preparation of offering materials. *Id.* at 514-15.

This is a far cry from what is alleged regarding Fuchs, TPC ¶ 46 does not allege that he had a senior position at Platinum, only that he had membership interests, was involved in miscellaneous unspecified meeting with investors but not with SHIP. TPC ¶ 373-78, which SHIP claims show Fuchs’ actual knowledge, only states that Fuchs and fourteen other Defendants or Third Party Defendants took unspecified overt actions to facilitate certain listed investments. The statement that Fuchs had actual knowledge is a legal conclusion without anything to back it up. *VFP Investment I LLC v. Foot Locker, Inc.*, 147 A.D.3<sup>rd</sup> 491, 492-93 (1<sup>st</sup> Dep’t 2017). Fuchs’ ownership interest in PPVP is not sufficient to establish actual knowledge. There is nothing in his

alleged actions which would permit an inference that he had actual knowledge of any fraudulent communications between PPVA and SHIP or that any information he communicated to PPVA's potential investors were false or misleading. *High Tides, LLC v. DeMichele*, 88 A.D.3<sup>rd</sup> 954, 959 (2<sup>nd</sup> Dep't 2011). Red Flags or warning signs is not a substitute for actual knowledge. *Silvercreek Mgt., Inc. v. Citigroup, Inc.*, 346 F.Supp.3<sup>rd</sup> 473, 487 (S.D.N.Y. 2018).

As for substantial assistance, SHIP again has failed to distinguish Fuchs from the herd. Each of the items listed on page 42 of their brief has nothing to do with him since he had no connections whatsoever with Beechwood. Even if there is a highly interdependent scheme, there has to be "particularly strong allegations of motivation and scienter" to find substantial assistance. *ABF Capital Mgt. v. Askin Capital Mgt., L.P.*, 957 F.Supp. 1308, 1328 (S.D.N.Y. 1997). There is nothing in the TPC from which the court could infer that Fuchs initiated any of the alleged fraudulent schemes or assisted in orchestrating the schemes. *In re Platinum-Beechwood Litig.*, 2019 WL 2569653, at \*18 (S.D.N.Y. June 21, 2019). Merely being an investor who sought to maximize his investment's return is not enough. *Id.*

An alleged aider and abettor can only be held liable where the plaintiff's injury "is a direct or reasonably foreseeable result of the defendant's conduct." Fuchs could not have foreseen that talking to investors not connected in any way with SHIP would lead to his liability to it. *Vasquez v. Hong Kong and Shanghai Banking Corp., Ltd.*, 2019 WL 2327810, at \*19 (S.D.N.Y., May 30, 2019).

## POINT II

### THE TPC FAILS TO STATE A CAUSE OF ACTION FOR CIVIL CONSPIRACY

The courts have constantly held that a plaintiff's cause of action for civil conspiracy must be dismissed if it just realleges a tort or breach of contract set forth in other causes of action. *Aetna*

*Cas. and Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3<sup>rd</sup> 566, 591 (2<sup>nd</sup> Cir. 2005). SHIP's civil conspiracy Count is just a repeat of its aiding and abetting Counts One and Two. *In re Alleu Distributors, Inc.*, 446 B.R. 32, 60-61 (Bankr. E.D.N.Y. 2011). SHIP has also failed to allege overt acts by Fuchs that assisted the conspiracy. There are no allegations that Fuchs had anything to do with either Beechwood or SHIP or that engaged in transactions designed to support inflated valuations or to conceal the integration of plaintiff and Beechwood. *Id. See, Maersk, Inc. v. Neewra, Inc.*, 687 F.Supp.2<sup>nd</sup> 300, 319 (S.D.N.Y. 2009).

### **POINT III**

#### **THE TPC FAILS TO STATE A CAUSE OF ACTION FOR UNJUST ENRICHMENT**

Unjust enrichment is not available where it simply duplicates or replaces a conventional tort claim. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3<sup>rd</sup> 777, 790-91 (2012); *In re Platinum-Beechwood Litigation*, 2019 WL 2569653 at \*14 (S.D.N.Y., June 21, 2019). The only allegation against Fuchs was that he was unjustly enriched by virtue of his ownership interest in PPVA from which he allegedly received the benefit of SHIP's investment money. These are the exact allegations against Fuchs which SHIP alleges makes him liable aiding and abetting fraud and breach of fiduciary duty in the other Counts.

SHIP also ignores that it was required to plead how Fuchs specifically profited at plaintiff's expense. *Gillespie v. St. Regis Residence Club*, 343 F.Supp. 3<sup>rd</sup> 332, 352-53 (S.D.N.Y. 2018). The only allegation is that he had direct or indirect interests in PPVA which is not enough.

### **CONCLUSION**

Defendant Bernard Fuchs respectfully requests that the Court enter an order dismissing with prejudice all of the claims asserted against him in the Third Party Complaint and granting him such other and further relief as this Court deems just and proper.

Dated: July 12, 2019

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