UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Case No. 18 Civ. 6658 (JSR)
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Third-Party Plaintiff, v. PB INVESTMENT HOLDINGS LTD., 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

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Third-Party Defendant Daniel Saks ("Saks") respectfully submits this reply memorandum of law ("Reply") in further support of his motion to dismiss ("Motion") the Third-Party Complaint (Dkt. No. 367) ("TPC") filed by Third-Party Plaintiff Senior Health Insurance Company of Pennsylvania ("SHIP").

PRELIMINARY STATEMENT

The TPC fails to allege critical elements of each cause of action it asserts against Saks. Rather than address the direct arguments Saks made as to these elements in his Opening Brief, SHIP cites irrelevant facts that do not support the causes of action it asserts, invents doctrine to excuse itself from pleading those elements, ignores the key elements that it has not alleged as to Saks, and rebuts arguments that Saks has not actually made. In doing so, SHIP emphasizes the weaknesses of the TPC that require Saks' dismissal from this action. The Court should grant Saks' motion and dismiss the TPC in its entirety as to him.

ARGUMENT

I. SHIP's Aiding and Abetting Causes of Action Fail to Allege Either Critical Element of the Claim as to Saks

Saks argued in his Opening Brief that SHIP failed to state an aiding and abetting claim against him for two reasons: first, SHIP pled no facts that Saks had actual knowledge, as opposed to mere notice, of an alleged fraudulent scheme to create Beechwood for the purpose of inducing SHIP to invest money that it would not otherwise have invested, *see* Opening Br. at 7-9, and second, that SHIP failed to allege that Saks substantially assisted in causing any of the injuries that SHIP specifically identified in the TPC, *see* Opening Br. at 9-10. SHIP responded that because the Court held that the *Trott* Plaintiffs, in a separate action, had stated aiding and abetting claims against Saks through allegations that overlapped with SHIP's, the Court should likewise hold that SHIP has stated a cause of action against Saks. *See* Opp. at 36-37. But

SHIP's response fails to address both key elements of aiding and abetting liability for torts allegedly committed against SHIP.

First, SHIP cannot support an inference that Saks *actually* knew of the fraudulent scheme it alleges—to create Beechwood and enter into the IMAs under false pretenses to induce SHIP to part with its money—by reference to the Court's decision as to a completely different alleged fraudulent scheme. SHIP's argument might be more persuasive if, for example, the scheme that it alleges were the same as the scheme alleged in the *Trott* action. But it is not. As this Court wrote, in the relevant alleged *Trott* scheme "the Platinum Defendants [which do not include Saks] transferred or encumbered PPVA's remaining assets" that held actual value, but "would consistently report PPVA's NAV without taking into account the encumbrances." Dkt. No. 290, Apr. 11, 2019 Op. & Order, at 45. This alleged overstatement of PPVA's NAV allegedly allowed Platinum, in turn, to inflate the fees and other compensation it earned from its investors. *See id.* In contrast, the primary fraud that SHIP alleges Saks aided and abetted are those in the separate action, *SHIP v. Beechwood Re Ltd.*, No. 18 Civ. 6658. *See* Opp. at 32 (stating that the primary fraud is the one alleged "against the SHIP Action Defendants"). There, SHIP alleged that there was a fraudulent scheme to create the separate Beechwood entity "to lure institutional investors, such as insurers, into entrusting their funds to a seemingly legitimate, independent insurance company." *See SHIP v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 526-27 (S.D.N.Y. 2018) (quoting SHIP's complaint). SHIP ignores this point, and otherwise seeks to support Saks' knowledge only through "Saks's position and involvement at the Beechwood Advisors," Opp. at 11, which is legally insufficient.

As argued in our Opening Brief, the facts SHIP alleges do no more than establish that Saks had an opportunity to learn of the fraudulent scheme claimed by SHIP, not that he actually

did know about it. That is not enough under the law. Case after case (including those cited by Saks in his Opening Brief, at 8) has held that a defendant's opportunity to learn of a fraudulent scheme does not suffice to plead actual knowledge, even where the fraud was allegedly so obvious that it could not be ignored. SHIP cannot replace the actual knowledge pleading requirement with reference to a separate, irrelevant alleged scheme.

Second, SHIP cannot rely on Saks' alleged participation in the Montsant transaction to establish his substantial assistance of the fraudulent scheme that SHIP alleges. *See* Opp. at 42, 45. In order to properly plead substantial assistance, "the plaintiff [must] allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *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 *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001)). Indeed, this Court has dismissed claims for aiding and abetting because they "fail[ed] on proximate causation grounds." *See SPV OSUS*, 2016 WL 3039192, at *8. This is why our Opening Brief goes through each alleged injury in SHIP's TPC and explains why none of Saks' alleged actions proximately caused the enumerated alleged harm.

SHIP attempts to avoid this argument by claiming that it has alleged a "highly interdependent scheme," which should allow it to sidestep the proximate cause requirement of substantial assistance. Opp. at 45 (quoting *ABF Capital Mgmt. v. Askin Capital Mgmt., LP*, 957 F. Supp. 1308, 1328 (S.D.N.Y. 1997)). But the case that SHIP cites, *ABF Capital Management*, has nothing to do with proximate cause. That case merely states that the pleading of a "highly interdependent scheme" allows a plaintiff to circumvent the requirement that the aider-abettor's substantial assistance must "relate to the preparation or dissemination of the false statements" that form the basis for the primary fraud, *ABF Capital Mgmt.*, 957 F. Supp. at 1328, which Saks

has not argued. Indeed, the court in *ABF Capital Management* subsequently analyzed the defendants' conduct, and found that the defendants' non-routine "participation in the financing of a fraudulent scheme," and the fact that they provided the fraudster with "false and inflated 'performance marks' for ultimate dissemination to the Investors," constituted substantial assistance. *Id.* at 1330. SHIP does not allege these types of facts with any specificity against Saks. The other cases SHIP cites are similarly irrelevant to whether the allegations against Saks allow an inference that he proximately caused SHIP's alleged injury, as those cases contained direct, affirmative misrepresentations by the defendant to the plaintiff. *See King Cnty., Wash. v. IKB Deutsche Industriebank AG*, 751 F. Supp. 2d 652, 665 (S.D.N.Y. 2010) (aiding and abetting defendant allegedly "designed, structured, marketed and maintained" a fraudulent structured investment vehicle and "disseminated the false and misleading ratings" that were used to perpetrate the fraud); *Nathel v. Siegal*, 592 F. Supp. 2d 452, 470 (S.D.N.Y. 2008) (defendants allegedly "misrepresented their expertise" and provided dubious expert opinions to the plaintiff "to make the [fraudulent] partnerships appear legitimate").

SHIP does not otherwise contest that it has not pled proximate cause. As detailed in our Opening Brief, none of the allegations of Saks' conduct could have proximately caused any of the four injuries that SHIP alleges: (1) inducement to enter into the IMAs; (2) not terminating the IMAs earlier to mitigate damages; (3) Beechwood's withholding of allegedly unearned performance fees; and (4) the expenses incurred in connection with terminating the IMAs. *See* Opening Br. at 9-10. Because SHIP must plead that Saks' substantial assistance caused its injury, and they have not done so, the aiding and abetting claims against Saks should be dismissed.

II. SHIP Alleges No Agreement by Which Saks Joined the Alleged Conspiracy

Our Opening Brief also shows that SHIP failed to state a civil conspiracy claim against Saks because it failed to identify any agreement to which Saks was a party—a necessary element of such a claim. *See* Opening Br. at 11-12. SHIP's response is insufficient to rebut this argument. SHIP alleges that because Saks had "prior employment at Platinum" and had "control of BAM," he necessarily joined the supposed conspiracy. Opp. at 50-51. SHIP ignores the case law cited in our Opening Brief (at 12) that common employment, standing alone, does not suffice to allege a civil conspiracy. And SHIP does not even attempt to identify any agreement by which Saks joined the conspiracy it alleges. SHIP's civil conspiracy claim cannot survive without identifying the "times, facts, and circumstances" by which Saks agreed to join the alleged conspiracy. *Brownstone Inv. Grp. v. Levey*, 468 F. Supp. 2d 654, 661 (S.D.N.Y. 2007).

III. SHIP Cannot State a Claim for Unjust Enrichment Against Saks in the Absence of Any Allegation That Saks Was Enriched

Our Opening Brief makes a simple and straightforward argument—SHIP cannot adequately plead an unjust enrichment claim against Saks where it has not pled that he was enriched. Opening Br. at 12. Unable to quibble with this basic assertion of law, SHIP instead erects the strawman that it need not "trace the exact flow of funds through numerous Moving Defendants and pin an exact dollar amount on each individual at the pleading stage." Opp. at 55-56. But we never made that argument. To survive a motion to dismiss, an unjust enrichment plaintiff must allege some facts showing that the defendant was enriched. *See, e.g.*, *Mina Inv. Holdings, Ltd. v. Lefkowitz*, 51 F. Supp. 2d 486, 490 (S.D.N.Y. 1999). Here, SHIP simply pleads that Beechwood earned performance fees from its investment of SHIP's assets, without alleging that Saks received any share of those performance fees. And, despite SHIP's insistence that "the TPC contains numerous factual allegations to support that Saks and Kim were unjustly enriched

at SHIP's expense," Opp. at 55 (citing Opp. at 11), the page to which SHIP refers to support that assertion does not refer to any alleged enrichment of Saks, *see* Opp. at 11. Accordingly, the unjust enrichment claim against Saks should be dismissed.

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 renew, as well as granting any further relief as the Court deems just and proper under the circumstances.

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