UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	18-cv-6658 (JSR)
MELANIE L. CYGANOWSKI, as Equity Receiver for PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, *et al.*, Plaintiffs, v. BEECHWOOD RE LTD., *et al.*, Defendants.	18-cv-12018 (JSR)
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Third-Party Plaintiff, v. PB INVESTMENT HOLDINGS LTD., *et al.*, Third-Party Defendants.	

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION BY THIRD-PARTY DEFENDANT DAVID BODNER TO DISMISS SHIP'S THIRD-PARTY COMPLAINT

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Third-party defendant David Bodner respectfully submits this reply memorandum of law in further support of his motion to dismiss the Third-Party Complaint ("TPC") (ECF No. 195)[1] of Senior Health Insurance Company of Pennsylvania ("SHIP") pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY REPLY STATEMENT

SHIP is unable to identify any misrepresentation or omission by anyone that Bodner can be said to have knowingly assisted. Unable to be precise, SHIP resorts in its Opposition (as it does in its TPC) to broad charges of "schemes" and "conspiracies." But those words offer no help to SHIP's claims for aiding and abetting fraud, where to survive a motion to dismiss SHIP must identify a specific fraudulent statement or omission as to which Bodner knowingly provided substantial assistance, and to plead the facts of his assistance with Rule 9(b) specificity. The same is true of SHIP's claim that Bodner aided and abetted a fiduciary breach: SHIP was obligated to identify the breach, the breaching party, and plead Bodner's assistance with specificity. SHIP has not done this.

Nor has SHIP identified any facts that would plausibly support the charge that Bodner formed an unlawful agreement to join a conspiracy. Investing in a business to be managed by others is neither unusual nor unlawful. Using family trusts to hold individual member interests is neither unusual nor unlawful. Interacting from time to time with the individuals managing the business on business matters—such as introducing a potential investment—is neither unusual nor unlawful. Conspiracy to defraud an insurance company is of

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[1] Unless stated otherwise, ECF citations refer to the *Cyganowski* docket, Case No. 18-cv-12018 (JSR). Capitalized terms not defined herein shall have the meanings ascribed to them in the Memorandum of Law in Support of Motion by Third-Party Defendant David Bodner to Dismiss Third-Party Complaint (ECF No. 279) (the "Bodner Motion"). Emphasis is supplied throughout this memorandum unless otherwise noted.

course both unusual and unlawful. That is why Rule 9(b) requires facts that indicate an agreement by Bodner to work with one or more others to commit fraud. The Complaint offers invective and conclusions, but it offers no facts that Bodner conspired to commit fraud.

SHIP parrots its co-defendant Conseco in a blatant mischaracterization of a July 29, 2015 email sent to Bodner by his secretary: Exhibit 33 to the Second Amended Complaint in *Trott* ("Exhibit 33"). As set forth previously (ECF No. 311 at 4) and again below, there is no plausible reading of the July 29 email where it could be attributed to Bodner or to anyone with any actual knowledge of the Beechwood–Conseco relationship. That is because, as of July 2015, Conseco was already well aware that Beechwood's assets had been invested in Platinum, and so the concern expressed in that email—that "**if** Ed Bonach from [Conseco] [f]inds out we invested beechwoods money into Platinum with its illiquid investments"—simply makes no sense, and does not provide a plausible basis for allegations against Bodner. Nothing in Exhibit 33 indicates substantial assistance by Bodner, or evinces Bodner's participation in a conspiracy directed at SHIP (or at Conseco, which did not allege a civil conspiracy count). It is undisputed that Bodner never interacted with SHIP or Conseco.

In his opening memorandum, Bodner identified that SHIP's conspiracy claim had three components to it: a claim that Beechwood's Primary Actors induced SHIP into entering the IMAs (the Inducement Claim); that SHIP's assets were mismanaged by Beechwood (the Transactional Claim); and that Beechwood took profits by overstating the value of the assets in SHIP's accounts (the Valuation Claim). SHIP derides Bodner's effort to deal in precision, accusing him of inventing "artificial distinctions between various aspects of the integrated scheme." (Opp. at 33). But Bodner merely adopted the distinctions that SHIP itself drew. *Cf.* TPC ¶ 446 (alleging an inducement claim); ¶¶ 447–448 (alleging transactional and valuation

conduct). In its Opposition, SHIP does not argue that Bodner assisted any transactional or valuation-based conduct. The Opposition with respect to Bodner is strictly limited to the Inducement Claim, where it alleges that Bodner used generically named family trusts numbered 7 to 14 to hold his Beechwood stock, and thus helped the Primary Actors "conceal" his ownership. This assertion is plain wrong. The trust documents clearly identify the settlor and beneficiaries of the trusts, and any lawyer or businessperson from SHIP could have asked to see the trust documents. But SHIP expressed no interest in the identity of the owners of Beechwood, and the IMAs themselves contained no representations or warranties regarding ownership. (Bodner Motion at 2). SHIP's only answer to this is to argue (incorrectly) that the Court already sustained the Inducement Claim in its December 21, 2018 Opinion, but that claim was sustained on a different and broader set of alleged misrepresentations and omissions principally related to the investment of SHIP's assets, none of which SHIP connects to Bodner.

Finally, the unjust enrichment claim is defective for multiple reasons, principally because there is absolutely nothing in the TPC connecting any distribution of SHIP's property to Bodner. Accordingly, SHIP has not saved its TPC.

REPLY POINTS

I. SHIP Cannot Save its Aiding and Abetting Claims

A. None of the Facts Alleged Demonstrate Substantial Assistance

All the facts alleged as to Bodner in the TPC are reprinted on pages 8 and 9 of the Opposition. Taking it line-by-line—and ignoring the conclusory verbiage—Bodner: (i) was an initial owner of Beechwood stock (common and preferred) through family trusts and an LLC owned by his wife; (ii) communicated through his secretary, [redacted] (Opp. at 9),

where that investment is never alleged to have been made and its relevance here never explained; and (iii) wrote the Exhibit 33 email. The first and second of these is admitted, and neither is actionable by SHIP or anyone else. The third is false, and shown below to be implausible.

SHIP has not identified under Rule 9(b) standards an act by Bodner of knowing, substantial assistance to an identified fraudulent misrepresentation or omission. Without any such showing, the aiding and abetting claim is deficient and should be dismissed.

B. SHIP Intentionally Mischaracterizes Exhibit 33

SHIP's Opposition relies on Exhibit 33, claiming that Bodner "admitted to the fraud" in that email. (Opp. at 9). Like Conseco before it, SHIP overreaches.

Exhibit 33 consists of two emails. The bottom portion was sent on July 29 by Bodner's secretary to Bodner (not by Bodner). In the top portion, Bodner replied, typing only "hwerblowsky@platinumlp.com," referring to Platinum's in-house counsel. The operative paragraph of the July 29 email states "I'm really concerned that **if** Ed Bonach from CNO Financial Group Finds out we invested beechwoods money into Platinum with its illiquid investments (since it didn't exactly fit their investment objective) he won't trust us and he will take all of the aprox 500 mil, he has invested in beachwood - Out." The clear statement of the author is that CNO (Conseco) did not know as of that date—July 29, 2015—that Beechwood's funds had been invested in Platinum into illiquid investments, or so-called "level 3 assets."

Nothing could be further from reality. As Conseco sets forth in its third-party complaint (ECF No. 75) (the "Conseco TPC"), throughout 2014 it "continued questioning the discretionary investment of trust assets that Beechwood Re and its agents were making in Level 3 assets, a class of assets that are particularly illiquid and speculative. Some were investments in Platinum-controlled funds and entities." (Conseco TPC ¶ 630). Conseco alleges further that, at

the end of 2014, it was aware that David Levy, as investment manager for Beechwood, was "overly reliant on Platinum-controlled funds and entities as his source of investments for the trust assets" because he had been formerly employed by Platinum, and that Conseco had discussed this with Feuer and Taylor. (Conseco TPC ¶ 631). Thus, by July 29, 2015, anyone with actual knowledge of the Beechwood-Conseco relationship would not be "really concerned" about "Ed Bonach from CNO Financial Group find[ing] out" that Beechwood money was invested with Platinum, because that person would know for a fact that Bonach and Conseco already knew it well, and for nearly a year prior.

It is not for this motion to speculate how or why the secretary sent this email to Bodner, or how the use of the word "we" could plausibly include Bodner, who never had any contact with Ed Bonach or Conseco. But comparing the operative paragraph in Exhibit 33 with the admissions made in the Conseco TPC makes it clear that the alleged co-conspirators—who were fielding complaints and criticism from Conseco with respect to the illiquid investments and the investments in Platinum in 2014—could not have written this email in 2015. For certain, it was not authored by Bodner. Nor could it plausibly have been written by an alleged conspirator. It was no "confession" by Bodner.[2]

C. SHIP Misstates the Court's Rulings on Prior Motions to Dismiss

In his opening memorandum, Bodner noted that the theory of the Inducement Claim is that Levy, Feuer and Taylor (the alleged Primary Actors) concealed from SHIP that the stock of Beechwood was majority-held by Bodner, Mark Nordlicht and Murray Huberfeld; and that Bodner aided and abetted that omission by the Primary Actors by making his Beechwood

[2] No matter what inference might be afforded the email on the issue of knowledge, neither the email nor anything else alleged in the TPC supports the requisite allegation of substantial assistance.

investments through generically numbered trusts 7–14. Bodner observed that the aiding and abetting Inducement Claim cannot survive a motion because the underlying omission—the failure to disclose—failed as a matter of law, since SHIP never expressed any interest in the identity of Beechwood's ownership prior to entering the IMAs.

In response, SHIP argues that the Court already sustained the underlying fraud in its Opinion of December 6, 2018, denying the motions to dismiss of Feuer, Taylor and Levy on SHIP's fraudulent inducement claim. *Senior Health Ins. Co. v. Beechwood Re Ltd.,* 345 F. Supp. 3d 515, 524–525 (S.D.N.Y. Dec. 6, 2018). But the misrepresentations and omissions before the Court on that motion were broader in scope than those Bodner is alleged to have aided and abetted. Specifically, SHIP alleged false statements by Taylor in April 2014, by Feuer at a board meeting in May 2014, and by Levy in the months prior to the execution of the IMAs, regarding SHIP's investment strategy. *Id*. at 526. SHIP alleged that "defendants' affirmative representation about Beechwood's investment strategy were fraudulent because 'they did not reflect Beechwood's true investment approach and scheme and did not account for the fact that Beechwood intended to and would use SHIP's assets to favor Beechwood, Platinum, and their related parties and affiliates.'" *Id.* SHIP also alleged that "defendants' omissions were fraudulent because they 'hid the reality that Beechwood intended, in essence, to convert SHIP's assets to the uses of Platinum and the individuals controlling Beechwood and Platinum in a manner fundamentally inconsistent with the safe and conservative portfolio they promised.'" *Id.*

The Court held that, under the special facts doctrine, Feuer, Taylor and Levy had an obligation to affirmatively disclose to SHIP their alleged plan to invest SHIP's assets into and alongside Platinum, and denied their motion to dismiss the fraudulent inducement claim. But the facts required to be disclosed by the Primary Actors under the special facts doctrine in the

context of that motion were not the facts of who else owned Beechwood—SHIP showed no interest in that—but about the Primary Actors' plans to allegedly "use SHIP's assets to favor Beechwood, Platinum, and their related parties and affiliates." *SHIP,* 345 F. Supp. 3d at 526. (S.D.N.Y. December 6, 2018). In other words, the special facts doctrine required the Primary Actors to disclose their alleged plans to engage in transactional conduct to SHIP's detriment. Bodner is not connected to any transactional conduct.

SHIP only connects Bodner to the non-disclosure of his family's ownership interests, by alleging that he purchased his Beechwood stock through numbered family trusts. That claim is not sustainable under the special facts doctrine for two reasons. First, the special facts doctrine only applies to information that is in possession of one party but "not readily available to the other." *SHIP,* 345 F. Supp. 3d at 527 (S.D.N.Y. December 6, 2018) (citations omitted). Here, SHIP never asked for the information, and there is nothing in the TPC to suggest that Beechwood would have withheld or misrepresented the identities of the settlors or beneficiaries of the trusts had SHIP asked. Second, nothing alleged regarding the context of the pre-IMA negotiations indicates that SHIP was "acting on the basis of mistaken knowledge." *Id*. (citations omitted). SHIP does not allege that it believed that some other party, other than Bodner, owned Beechwood stock, and is now surprised to learn that in fact it is Bodner's trusts that own the stock. SHIP was indifferent to who owned Beechwood, as evidenced by the fact that it never asked. The owners could have been Saudi royals or New York hedge funds – SHIP did not care at that time.

In sum, Bodner respectfully submits that the Court did not determine in its December 2018 decision that the special facts doctrine required the Primary Actors to volunteer to SHIP that eight of the numbered trusts belonged to Bodner's family, or that Bodner's family

owned preferred stock through a series LLC. The Primary Actors had no such obligation, and Bodner cannot therefore be deemed to have aided and abetted them through his silence. Nor is there any fact alleged that Bodner was told—or was aware—that the ownership of the trusts would not be disclosed in response to inquiry.

II. SHIP Cannot Save Its Civil Conspiracy Claim

SHIP devotes just a few sentences of the Opposition to rescue its conspiracy claim against Bodner, contending that Bodner "was a knowing and active participant in the Platinum–Beechwood conspiracy" and "took several overt steps in furtherance of the Co-Conspirators' illegal objectives." (Opp. at 48). SHIP offers no new facts to support these untethered claims; it merely refers back to the two paragraphs at pages 8 and 9 of the Opposition. With respect to the ownership of stock through trusts, [redacted] SHIP fails to demonstrate how these could plausibly be deemed "overt steps" in pursuit of a conspiracy, as opposed to the conduct of ordinary business by an investor and businessperson. With respect to Exhibit 33, Bodner's one-line reply to the operative email, referring the secretary to Platinum's counsel, is again not plausibly consistent with membership in a conspiracy.

Without evidence of an unlawful agreement between Bodner and another person, the civil conspiracy claim must be dismissed. *See Quinn v. Teti*, No. 99-9433, 2000 U.S. App. LEXIS 27210, at *5 (2d Cir. 2000) (affirming dismissal of civil conspiracy claim because plaintiff failed to "present evidence of a corrupt agreement between two or more persons"); *Campbell v. Thales Fund Mgmt., LLC* No. 10 Civ. 3177 (JSR), 2010 U.S. Dist. LEXIS 114439,

at *19 (S.D.N.Y. Oct. 12, 2010) (dismissing "wholly conclusory" claims of conspiracy by fund managers) (Rakoff, J.).[3]

III. SHIP's Unjust Enrichment Claim Also Fails

SHIP's throw-in unjust enrichment claim is defective for at least three separate reasons. First, SHIP fails to allege with Rule 9(b) specificity that Bodner was enriched at SHIP's expense, or that he was enriched at all. SHIP has merely restated its conclusory assertion that Bodner "was a beneficiary of performance fees paid to the Beechwood Entities and monies earned from transactions in which Beechwood favored its own interests or Platinum's interests over SHIP's interests." (Opp. at 54). SHIP does not and cannot identify with any specificity (or even generally) which transaction Bodner is alleged to have been enriched by, in what amount, or when it occurred. There is not a single specific performance fee or other remuneration identified to have enriched Bodner.

Second, SHIP fails to heed the principle of New York law that an unjust enrichment claim cannot merely duplicate a conventional tort claim, even where (as here) the conventional tort claim fails to state a claim. *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012) ("To the extent these [contract] claims succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects."). SHIP offers no response to *Corsello*.

Third, SHIP's contention that its unjust enrichment claim is not barred by its contract claims against Beechwood under the IMAs is ill-founded. SHIP argues that Bodner is

[3] In the event the Court permits the aiding and abetting claim to survive the motion, the conspiracy claim should be dismissed as duplicative. *Trott v. Platinum Mgmt. (NY) LLC (In re Platinum-Beechwood Litig.)*, 2019 U.S. Dist. LEXIS 104562, at *39-40 (S.D.N.Y. June 21, 2019).

not a party to the IMAs, but this response ignores both settled law that quasi-contract claims are barred where a valid and binding agreement exists even when such claim is made against a non-party to the agreement, and this Court's ruling that SHIP "cannot state a claim for unjust enrichment based on the payment of contractually owed performance fees." *Senior Health Ins. Co. v. Beechwood Re Ltd*., No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 67952, at *32, 33-34 (S.D.N.Y. April 22, 2019); *Law Debenture v. Maverick Tube Corp*., No. 06 Civ. 14320 (RJS), 2008 U.S. Dist. LEXIS 87438, at *36 (S.D.N.Y. Oct. 15, 2008) (citation omitted). SHIP argues that its unjust enrichment claim should stand against Bodner because its claims against him "are not based on performance fees payable under the IMAs" (Opp. at 53), but then a few sentences later, SHIP contradicts itself, arguing that Bodner was unjustly enriched as "a beneficiary of performance fees paid to the Beechwood Entities." (Opp. at 54). SHIP ties itself in knots trying to save this defective claim, but its efforts are unavailing.

CONCLUSION

The TPC should be dismissed against Bodner.

Dated: July 12, 2019
New York, New York

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: */s/ Eliot Lauer*

Eliot Lauer
Gabriel Hertzberg
101 Park Avenue
New York, New York 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559
Email: elauer@curtis.com
ghertzberg@curtis.com

Attorneys for Third-Party Defendant David Bodner

35213809