

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PLATINUM-BEECHWOOD LITIGATION

Consolidated Case No.
18-cv-6658 (JSR)

MELANIE L. CYGANOWSKI, as Equity
Receiver for PLATINUM PARTNERS
CREDIT OPPORTUNITIES MASTER FUND
LP, PLATINUM PARTNERS CREDIT
OPPORTUNITIES FUND (TE) LLC,
PLATINUM PARTNERS CREDIT
OPPORTUNITIES FUND LLC, PLATINUM
PARTNERS CREDIT OPPORTUNITIES FUND
INTERNATIONAL LTD., PLATINUM
PARTNERS CREDIT OPPORTUNITIES
INTERNATIONAL (A) LTD., and
PLATINUM PARTNERS CREDIT
OPPORTUNITIES FUND (BL) LLC,

Civil Action No.
18-cv-12018 (JSR)

Plaintiffs,

v.

BEECHWOOD RE LTD., et al.

Defendants.

WASHINGTON NATIONAL INSURANCE
COMPANY and BANKERS CONSECO
LIFE INSURANCE COMPANY,

Third-Party Plaintiffs,

v.

MARK NORDLICHT, et al.,

Third-Party Defendants.

SENIOR HEALTH INSURANCE
COMPANY OF PENNSYLVANIA,

Third-Party Plaintiff,

v.

PB INVESTMENT HOLDINGS LTD., et al.,

Third-Party Defendants.

**THIRD-PARTY DEFENDANT WILL SLOTA'S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY
COMPLAINT OF THIRD-PARTY PLAINTIFF SENIOR HEALTH INSURANCE
COMPANY OF PENNSYLVANIA PURSUANT TO FED R. CIV. P. 9(b) and 12(b)(6)**

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Defendant Will Slota respectfully submits the following reply memorandum of law in further support of his motion to dismiss the TPC¹ of third-party plaintiff SHIP.

POINT I
SHIP HAS NOT IDENTIFIED ANY FACTUAL ALLEGATIONS
SUFFICIENT TO SUSTAIN THE AIDING AND ABETTING FRAUD COUNT

A. Only the allegations referring to Slota specifically should be considered

SHIP attempts to defend the TPC against arguments by other moving defendants that the TPC impermissibly lumps the defendants together and makes broad generalizations against them collectively, employing group pleading that does not meet the Rule 8(a) standard. Omnibus Memorandum of Law in Opposition to Motions to Dismiss Cross-Claims and Third-Party Complaint of Senior Health Ins. Co. of Pennsylvania (the “Opposition Brief,” ECF 522) at 26.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ Defined terms herein are as defined in Slota’s initial memorandum of law (the “Initial Brief,” ECF 480). All citations to the docket (“ECF ____”) refer to the master docket for *In Re Platinum Beechwood Litigation*, No. 1:18-cv-6658-JSR.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SHIP’s authorities, *David v. Weinstein Company LLC*, No. 18-cv-5414 (RA), 2019 WL 1864073, (S.D.N.Y. Apr. 24, 2019), and *Canosa v. Ziff*, No. 18-cv-4115 (PAE), 2019 WL 498865 (S.D.N.Y. Jan. 28, 2019), are irrelevant. Plaintiffs in these cases asserted identical negligence claims against each director of corporations that employed him. The plaintiff in each action alleged the same actions and inaction by the defendants collectively (essentially one unit, a corporate board) such that they could be deemed to be acting in the same manner simultaneously. By contrast, the TPC alleges multiple and distinct roles and acts by a large population of defendants, but then attempts to attribute every of those different acts by each one to each other one, and in Slota’s case with no explanation of any relationship between him and them.³ Such group pleadings of actions by Co-Conspirators should be held ineffective as to Slota and disregarded. Moreover, neither SHIP’s indiscriminate references to “Co-Conspirators” nor the allegations specific to Slota are sufficient to state causes of action under Rule 9(b).

1. SHIP’s explanation for its impermissible group pleading is inaccurate

SHIP acknowledges that group pleading is permissible to allow a “plaintiff

[REDACTED]

to attribute corporate misstatements to a group of individual defendants ‘where the defendants are a narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document.’” Opposition Brief at 30 citing *In re Platinum-Beechwood Litigation*, 18-cv-6658 (JSR), 18-cv-10936 (JSR), 2019 WL 1570808, *15 (S.D.N.Y. Apr. 11, 2019). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

“[E]vidence that a defendant could or should have been able to deduce the fact of an underlying fraud on the basis of red flags or warning signs is not a substitute for actual knowledge.” *Silvercreek Management, Inc. v. Citigroup, Inc.*, 346 F. Supp.3d 473, 487 (S.D.N.Y. 2018). Such is the case here.

SHIP seeks to avoid the absence of the actual knowledge element of aiding and abetting by conflating actual knowledge with the actions alleged to constitute substantial assistance, calling them “fraudulent,” and implying Slota’s actual knowledge of the alleged fraud from the alleged performance of those actions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In response to Slota’s comments on the absence of facts in the Counts, SHIP protests that Counts One and Two “both incorporate ‘each and every allegation above as if set forth fully in this count,’ ...emphasizing the obvious point.” Opposition Brief at 38. Slota’s argument is that there are no “detailed allegations regarding Slota elsewhere in the complaint” on which the Counts can rely.

3. SHIP has not shown substantial assistance by Slota to a fraud

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SHIP relies on the statement that “substantial assistance can take many forms,” *JP Morgan Chase Bank v. Winnick*, 406 F. Supp.2d 247, 257 (S.D.N.Y. 2005), apparently for the principle that actions within the scope of an individual’s ordinary job duties can constitute substantial assistance. However, the decisions to which it cites are not relevant to Slota. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

4. SHIP’s argument that it is not obligated to allege proximate causation when there is a “highly interdependent scheme” is inaccurate

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED] Unable to do so, SHIP argues that it is not obligated to show proximate cause where there is a “highly interdependent scheme.” That doctrine affects pleading elements in a different type of fraud case. Further, even there is a “highly interdependent scheme” it does not excuse a plaintiff from pleading proximate cause.

ABF addressed what form of substantial assistance a plaintiff must plead when the alleged fraud is based on misrepresentations in or omissions from a document. Ordinarily in such a situation, the plaintiff must allege that the alleged aider/abettor prepared or disseminated the document, but *ABF* stated that because there was “a highly interdependent scheme in which both parties benefitted from ACM’s fraudulent activity,” it was sufficient for purposes of showing substantial assistance that the plaintiff alleged that the brokers assisted ACM’s scheme directly. 957 F. Supp. at 1328. That “highly interdependent scheme” doctrine is categorically irrelevant to this case: there is no need to invoke that doctrine here because the alleged fraud is not limited to misrepresentations in or omissions from a document.

Nor does *ABF* does hold that the existence of a “highly interdependent scheme” excuses the obligation to plead proximate cause—to the contrary, it doesn’t even discuss proximate

[REDACTED]

cause. SHIP's argument appears only to be grounded in dicta in footnote 101 in *King Cty., Wash. v. IKB Deutsche Industriebank AG, IKB*, 751 F. Supp.2d 652 (S.D.N.Y. 2010), which cites to *ABF*. There, Morgan Stanley was sued for aiding and abetting fraud relating to an investment vehicle. Plaintiffs alleged with particularity extensive involvement by Morgan Stanley in the investment vehicle, which it designed, structured, marketed, and maintained. The decision states that plaintiffs sufficiently alleged substantial assistance and proximate causation, which is unremarkable considering the alleged degree of Morgan Stanley's involvement.¹²

However, footnote 101 quotes *ABF* for the principle that "where plaintiffs "allege[d] a highly interdependent scheme in which both parties benefitted from ... fraudulent activity ... [,] allegations that a defendant actively assisted and facilitated the fraudulent scheme itself ... [were] sufficient.'" It appears that *King County* incorrectly construed *ABF* in the footnote 101 dicta to mean that those allegations alone are sufficient to show proximate causation. Instead, *ABF* holds that where there is a "highly interdependent scheme" it is not necessary to plead that *the defendant prepared or disseminated a fraudulent document*.

Nathel v. Siegal, 592 F. Supp.2d 452 (S.D.N.Y. 2008) appears in the Opposition Brief in the same passage as *ABF* and *King County*, but it does not hold that the existence of a "highly interdependent scheme" excuses SHIP from showing proximate cause. *Nathel* confirms that it is necessary to evaluate whether there is a viable allegation of proximate cause based on the unique facts specific to each defendant. SHIP's argument that the existence of a "highly interdependent scheme" excuses the need to allege proximate cause is baseless.

¹² The statement that the plaintiffs showed substantial assistance *and* proximate causation suggests that proximate causation is an element separate and apart from substantial assistance. That formulation is anomalous. Proximate causation is "embedded" in the substantial assistance analysis, to use the language of SHIP's authority. Opposition Brief at 45.

SHIP concludes by saying that the issue of proximate causation is inappropriate for a motion to dismiss, quoting *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 468 F. Supp.2d 508, 531 (S.D.N.Y. 2006) (property damage action) and that “proximate causation generally remains an issue of fact for the jury,” quoting *Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 351 F. Supp.2d 79, 91 (S.D.N.Y. 2004) (malpractice action against an investment banker).

[REDACTED]

POINT II
THE REMAINING COUNTS MUST BE DISMISSED AS TO SLOTA

[REDACTED] counts, Slota relies on his Initial Brief and the arguments set forth in the previous Point.

The TPC in its entirety should be dismissed with prejudice as against Slota.

Dated: New York, NY
July 12, 2019

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