IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Case No. 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.	Case No. 18-cv-12018 (JSR)
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Third-Party Plaintiff, v. PB INVESTMENT HOLDINGS LTD., *et al.*, Third-Party Defendants.	

MEMORANDUM OF LAW BY THIRD-PARTY DEFENDANTS WHITESTAR LLC, WHITESTAR LLC II, AND WHITESTAR LLC III IN SUPPORT OF THEIR MOTION TO DISMISS SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA'S THIRD-PARTY CLAIMS

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Third-Party Defendants Whitestar LLC, Whitestar LLC II, and Whitestar LLC III (the "Whitestar Entities") respectfully submit this memorandum of law in support of their motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the claims against them in the Third-Party Complaint ("TPC," *Cyganowski* Docket No. 195) of Senior Health Insurance Company of Pennsylvania ("SHIP").

PRELIMINARY STATEMENT

SHIP's counterclaims and third-party claims span 160 pages and 471 paragraphs, but they mention the Whitestar Entities only twice. The first reference to the Whitestar Entities identifies each of them as the owner of a BRILLC Series Entity[1] and indicates that all three Whitestar Entities were owned by Naomi Bodner and Laura Huberfeld, the respective spouses of defendants David Bodner and Murray Huberfeld. (TPC, ¶ 30.) The other reference generally alleges, with no supporting details whatsoever, that the Whitestar Entities (and others) were part of an asset-protection scheme "to shelter . . . racketeering profits." (*Id.*, ¶ 381.)

Aside from these bare and solitary allegations against the Whitestar Entities, the TPC also contains improperly group-pled allegations against the BRILLC Series Members (a group that includes the Whitestar Entities) that similarly lack the requisite specificity and are insufficient to sustain a valid claim. Most basically, SHIP does not allege that the Whitestar Entities have (or ever had) any bank accounts (or other assets), that such putative accounts contain (or ever contained) any funds, that any such putative funds reflect (or ever reflected) transfers from any other entity related to this litigation, or that the source of such putative funds is in any way suspect or the basis for any of the claims alleged in the TPC.

1. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the TPC.

Moreover, the claims SHIP brings against the Whitestar Entities – and the other third-party defendants lumped in alongside them – require that SHIP demonstrate specific elements, allegations of which are wholly lacking in the TPC. Rather than plead the necessary elements of the claims it brings against the Whitestar Entities, SHIP simply alleges that they are owned by Naomi Bodner and Laura Huberfeld – neither of whom has been accused of any wrongdoing. There is not a single distribution to any Whitestar Entity alleged in the TPC that is connected even generally to any wrongdoing by Bodner or Huberfeld, or anyone allegedly assisted by Bodner or Huberfeld. SHIP's vague allusions, which constitute no more than guilt-by-association, do not satisfy SHIP's pleading obligations, and SHIP's claims against the Whitestar Entities should be dismissed.

ARGUMENT

To withstand a motion to dismiss, a plaintiff must allege facts – not conclusory allegations – sufficient to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (courts need not credit "mere conclusory statements" from complaints when considering a motion to dismiss). "A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *DeJesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996).

A. The TPC Lacks Allegations of Misconduct by the Whitestar Entities.

Here, other than establishing that the Whitestar Entities own and control certain BRILLC Series Entities, the only allegation directly naming the Whitestar Entities alleges that they played an unspecified role in an asset-protection scheme perpetrated by various individual defendants. However, SHIP fails to support this conclusory allegation with any factual allegations whatsoever. SHIP does not make a single allegation about how the Whitestar Entities

supposedly facilitated or assisted the asset-protection scheme the TPC vaguely references. The TPC contains no factual allegations about the Whitestar Entities' knowledge of, participation in, or benefit from any such scheme, such as by engaging in any transactions (let alone any improper transactions) or accepting funds (let alone any allegedly ill-gotten funds). Absent those most basic factual allegations, the solitary and conclusory allegation in the TPC specific to the Whitestar Entities fails to provide a valid basis for the claims against them.

SHIP relies in part on allegations that paint the Whitestar Entities as alter egos of David Bodner and Murray Huberfeld, based solely on the fact that their wives owned the Whitestar Entities. Yet the TPC is completely devoid of any allegation that Bodner or Huberfeld actually controlled the Whitestar Entities or directed their wives to have the Whitestar Entities take any specific actions – much less actions that would form the basis for valid claims here. SHIP's unsupported assumption that the Whitestar Entities participated in or supported any alleged wrongdoing based solely on the fact that their owners are married to defendants Bodner and Huberfeld does nothing to resurrect SHIP's otherwise deficient claims against the Whitestar Entities. Moreover, to the extent that defendants Bodner and Huberfeld – the Whitestar Entities' only purported link to the alleged Platinum-Beechwood scheme – have no individual liability for the reasons set forth in support of their individual motions to dismiss SHIP's TPC (Master Docket Nos. 471 and 542, and Master Docket Nos. 451 and 549, respectively), SHIP's claims against the Whitestar Entities must also be dismissed.

B. Improper Group Pleading Cannot Save the TPC From its Failure to Make Specific Allegations Against the Whitestar Entities.

Allegations directed against the entire group of BRILLC Series Members, a disparate set of entities that own membership interests in different BRILLC Series Entities, do not remedy the insufficiency of the scant allegations brought specifically against the Whitestar Entities merely because the Whitestar Entities own some of the BRILLC Series Entities. The Federal Rules of Civil Procedure require "at a minimum, that a complaint give each defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." *Atuahene v. City of Hartford*, 10 Fed. App'x 33, 34 (2d Cir. 2001). A complaint that "lump[s] all the defendants together . . . and provid[es] no factual basis to distinguish their conduct . . . fail[s] to satisfy this minimum standard." *Id.* Group pleading is sufficient to satisfy a plaintiff's burden in narrow circumstances, generally involving fraudulent statements in group-published documents, none of which apply to the Whitestar Entities. *See, e.g.*, *DeAngelis v. Corzine*, 17 F. Supp. 3d 270, 281-82 (S.D.N.Y. 2014); *In re Cross Media Mktg. Corp. Secs. Litig.*, 314 F. Supp. 2d 256, 262-63 (S.D.N.Y. 2004). As this Court previously recognized in dismissing claims against various entities:

> The group pleading doctrine allows particular statements or omissions to be attributed to individual defendants even when the exact source of those statements is unknown. In order to invoke the group pleading doctrine against a particular defendant the complaint must allege facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs, at the entity issuing the statement. Group pleading allows plaintiffs only to connect defendants to statements – it does not also transitively convey scienter. *In re Platinum-Beechwood Litig.*, No. 18-cv-6658 (JSR), No. 18-cv-10936 (JSR), 2019 WL 1570808, at *8 (S.D.N.Y. Apr. 11, 2019).

The TPC makes certain vague allegations that the BRILLC Series Members, as a group without distinguishing among them, entered into unspecified transactions that ultimately assisted

the alleged perpetrators of the Platinum-Beechwood scheme. (TPC, ¶¶ 381, 436, 441, 442, 450.) But SHIP's group pleading provides insufficient specificity regarding actions the Whitestar Entities are alleged to have taken that could sustain valid claims against them – insufficient because the TPC makes no specific allegations at all against the Whitestar Entities. SHIP's reliance on group pleading about the BRILLC Series Members, along with SHIP's failure to include any factual, non-conclusory allegations about the Whitestar Entities, warrants dismissal of SHIP's third-party claims against the Whitestar Entities. *See, e.g., Leneau v. Pointe*, No. 16-CV-776 (GHW), 2018 WL 566456, at *15 (S.D.N.Y. Jan. 25, 2018) (dismissing claims because "complaints that rely on group pleading and fail to differentiate as to which defendant was involved in the alleged unlawful conduct are insufficient to state a claim") (internal quotations omitted).

C. The TPC Fails to Allege Requisite Elements of the Claims SHIP Brings Against the Whitestar Entities.

Not only are SHIP's allegations against the Whitestar Entities insufficient because they are group-pled and conclusory, even if the TPC's allegations regarding the BRILLC Series Members are treated as if they were specifically made against the Whitestar Entities, the TPC still fails to plead central elements of the claims SHIP brings against the Whitestar Entities, as described in detail below.

Aiding and Abetting Claims: Without making a single allegation specific to the Whitestar Entities, SHIP alleges that the BRILLC Series Members aided and abetted fraud and breach of fiduciary duties. "The particularity requirements of Rule 9(b) apply to claims of aiding and abetting fraud no less than to direct fraud claims." *Filler v. Hanvit Bank*, 156 Fed. App'x 413, 417 (2d Cir. 2005). "To state a claim for aiding and abetting fraud under New York law, a plaintiff must show (1) the existence of a fraudulent scheme; (2) that the defendant had actual

knowledge of the fraud; and (3) that the defendant provided substantial assistance to the fraudulent scheme." *Rosner v. Bank of China*, 349 Fed. App'x 637, 638 (2d Cir. 2009). Similarly, to "plead a claim of aiding and abetting a breach of fiduciary duty under New York law, [a] plaintiff must set forth facts showing (i) a breach by a fiduciary of obligations to another; (ii) that the aider and abetter knowingly induced or participated in the breach; and (iii) that the plaintiff suffered damages as a result of the breach." *Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, No. 00-cv-8688 (WHP), 2003 WL 22218643, at *7-8 (S.D.N.Y. Sept. 25, 2003).

As an initial matter, if SHIP's allegations related to fraud or breach of fiduciary duty are insufficient, claims that the Whitestar Entities aided or abetted the underlying tort must also fail. But regardless of whether the underlying claims are valid, the aiding and abetting claims against the Whitestar Entities fail in any event because they are insufficiently pled. With respect to the claim of aiding and abetting fraud – which must meet the stricter pleading standards of Rule 9(b) – the TPC contains no allegations that the BRILLC Series Members generally, or the Whitestar Entities specifically (or their owners, Naomi Bodner and Laura Huberfeld), provided any assistance, much less substantial assistance, to any purported fraud. And the allegations that attempt to remotely link the Whitestar Entities to alleged fraud do so only by way of conclusory statements that constitute nothing more than assumptions untethered to any actual factual allegations.

SHIP's claim that the Whitestar Entities aided and abetted a breach of fiduciary duty fails for similar reasons. Nowhere in the TPC does SHIP plead with any specificity that the BRILLC Series Members or the Whitestar Entities "knowingly induced or participated in" any breach of fiduciary duty. Reading the allegations in the TPC as broadly as possible – and even crediting

SHIP's improperly group-pled allegations – the most the TPC alleges against the Whitestar Entities is that they were created to shelter revenues that were derived from allegedly improper activity. Whether or how the Whitestar Entities purportedly did so is entirely unclear from the TPC. And "the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." *Kaufman v. Cohen*, 307 A.D.2d 113, 126 (1st Dep't 2003). Here, the Whitestar Entities clearly owed no fiduciary duty to SHIP, and there is nothing in the TPC approaching an allegation that the Whitestar Entities or their owners induced, or actively participated in, a breach of fiduciary duties. This Court previously held that the absence of any allegations that BRILLC and related entities substantially assisted any purported fraud or breach of fiduciary duty warranted dismissal of aiding and abetting claims against them. *In re Platinum-Beechwood Litig.*, No. 18-cv-6658 (JSR), No. 18-cv-10936 (JSR), 2019 WL 2569653 at *9 (S.D.N.Y. June 21, 2019). The same result is appropriate here, where the TPC makes no such allegations against the Whitestar Entities.

Civil Conspiracy: SHIP alleges that the Whitestar Entities, along with many others, conspired to fraudulently induce SHIP to invest its funds with Beechwood. "In order to adequately plead a claim for civil conspiracy, a plaintiff must establish first the underlying tort that the parties have conspired to commit." *Hilton Head Holdings b.v. v. Peck*, No. 11-cv-7768 (KBF), 2012 WL 613729, at *5 (S.D.N.Y. Feb. 23, 2012). Accordingly, to the extent the TPC fails to adequately plead fraud, its conspiracy claim must fail.

Further, regardless of the validity of SHIP's underlying fraud claim, the TPC fails to state a claim for civil conspiracy against the Whitestar Entities because, in addition to demonstrating an underlying tort, a plaintiff bringing a civil conspiracy claim must "allege and prove a corrupt agreement between two or more parties, an overt act, intentional participation in the furtherance

of the conspiracy, and a causal connection to the claimed damages." *Donini Int'l, S.P.A. v. Satec (U.S.A.) LLC*, No. 03-cv-9471(CSH), 2004 WL 1574645, at *3 (S.D.N.Y. July 13, 2004). "Conclusory claims of conspiracy that are not pleaded with sufficient factual grounding should be dismissed." *Id.*; *Campbell v. Thales Fund Mgmt., LLC*, No. 10-cv-3177 (JSR), 2010 WL 4455299, at *7 (S.D.N.Y. Oct. 12, 2010) (dismissing conspiracy claim based on "wholly conclusory" allegation). Indeed, claims for conspiracy to commit fraud must meet Rule 9(b)'s heightened pleading standard. *See Fezzani v. Bear, Stearns & Co.*, 592 F. Supp. 2d 410, 428-29 (S.D.N.Y. 2008) (dismissing claims based on conclusory allegations).

Here, SHIP alleges – in purely conclusory and collective fashion – that the BRILLC Series Members (a group that includes but is not limited to the Whitestar Entities), were created as part of the alleged Platinum-Beechwood fraud. Even treating that allegation as applicable to the Whitestar Entities, it amounts to nothing more than an assumption that, simply because the Whitestar Entities are owned by Naomi Bodner and Laura Huberfeld, those entities are somehow connected to the scheme allegedly perpetrated by their husbands. There are no allegations in the TPC to support that assumption. Moreover, there are no allegations in the TPC that the BRILLC Series Members, including the Whitestar Entities (and Naomi Bodner and Laura Huberfeld), ever agreed to – or did – participate in a fraud or take any action in furtherance of a fraud. SHIP's civil conspiracy claim should therefore be dismissed.

Unjust Enrichment: "To state a claim for unjust enrichment in New York, a plaintiff must allege that (1) defendant was enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances were such that equity and good conscience require defendants to make restitution." *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 320 F. Supp. 2d 164, 177 (S.D.N.Y. 2004). SHIP fails to allege the most basic element of an unjust enrichment claim – that the

Whitestar Entities were enriched. SHIP only alleges, in collective fashion, that the BRILLC Series Members were created to assist in secreting away assets related to the Platinum-Beechwood scheme and "were direct or indirect beneficiaries of Performance Fees paid to the Beechwood Entities or monies earned from transactions in which Beechwood favored its own interests or Platinum's interests over SHIP's interests." (TPC, ¶ 462.) Setting aside the fact that this allegation is collectively pled, it still fails to sustain a valid unjust enrichment claim because it is wholly conclusory and insufficiently detailed to satisfy the heightened pleading requirement of Rule 9(b) that SHIP must meet, because its unjust enrichment claim is premised on alleged fraud. *See Welch v. TD Ameritrade Holding Corp.*, No. 07-civ-6904 (RJS), 2009 WL 2356131, at *21 (S.D.N.Y. July 27, 2009).

Nowhere does the TPC allege that the Whitestar Entities have or ever had any assets, let alone that any such assets were transferred to them by entities involved with Platinum or Beechwood, or that any such transfers reflect ill-gotten gains. SHIP fails to identify any transaction from which the Whitestar Entities were allegedly enriched, what amount(s) they received, or when any such transactions occurred. Absent any allegation that the Whitestar Entities were at all enriched by the activities of other defendants in this action, SHIP's unjust enrichment claim against the Whitestar Entities must be dismissed.

SHIP's unjust enrichment claim should also be dismissed for the independent reason that it duplicates SHIP's other tort claims against the Whitestar Entities. *See Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790-91 (2012). Additionally, SHIP alleges that the Whitestar Entities were unjustly enriched by performance fees pursuant to the various IMAs – but a plaintiff "cannot state a claim for unjust enrichment based on the payment of contractually owed performance fees." *In re Platinum-Beechwood Litig.*, 377 F. Supp. 3d 414, 427 (S.D.N.Y.

2019). The fact that the Whitestar Entities were not parties to the IMAs does not permit SHIP to bring unjust enrichment claims against them. "The existence of a valid and binding contract governing the subject matter at issue in a particular case . . . preclude[s] a claim for unjust enrichment even against a third party non-signatory to the agreement." *Id.* (*citing Law Debenture v. Maverick Tube Corp.*, No. 06-cv-14320 (RJS), 2008 WL 4615896, at *12 (S.D.N.Y. Oct. 15, 2008). Thus, not only is SHIP's unjust enrichment claim against the Whitestar Entitles insufficiently pled, it is also legally precluded.

CONCLUSION

For the foregoing reasons, the Whitestar Entities respectfully request that the Court dismiss SHIP's third-party claims against them.

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New York, NY

Respectfully Submitted,
WIGGIN AND DANA LLP

/s/ *Paul A. Tuchmann*

Paul A. Tuchmann
Brett M. Collings
437 Madison Avenue, 35th Floor
New York, New York 10022
Telephone: 212-551-2600
Facsimile: 212-551-2888

Counsel for Third-Party Defendants Whitestar LLC, Whitestar LLC II, and Whitestar LLC III