

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION

Civil Action No.
1:18-cv-6658

MELANIE L. CYGANOWSKI, AS RECEIVER,
BY AND FOR PLATINUM PARTNERS CREDIT
OPPORTUNITIES MASTER FUND LP, *et al.*,

Plaintiffs,

v.

BEECHWOOD RE LTD., *et al.*,

Defendants.

Civil Action No.
1:18-cv-12018

SENIOR HEALTH INSURANCE COMPANY OF
PENNSYLVANIA,

Third-Party Plaintiff,

v.

PB INVESTMENT HOLDINGS LTD., *et al.*,

Third-Party Defendants.

**THIRD-PARTY DEFENDANT PB INVESTMENT HOLDINGS LTD.’S REPLY
MEMORANDUM OF LAW SUPPORTING DISMISSAL OF SENIOR HEALTH
INSURANCE COMPANY OF PENNSYLVANIA’S THIRD-PARTY COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

 I. THE GROUP PLEADING RULE BARS SHIP’S CLAIMS 1

 II. THE TPC FAILS TO STATE A CLAIM FOR AIDING AND ABETTING 3

 III. THE TPC FAILS TO STATE A CLAIM FOR CIVIL CONSPIRACY 4

 IV. THE TPC FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT 4

 V. THE TPC FAILS FOR WANT OF JURISDICTION 5

CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Barneli & Cie SA v. Dutch Book Fund SPC, Ltd.</i> , 95 A.D.3d 736, 946 N.Y.S.2d 53 (1st Dep’t 2012)	6
<i>Briarpatch Ltd. LP v. Phoenix Pictures, Inc.</i> , 312 F. App’x 433 (2d Cir. 2009)	4
<i>Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, ENR v. WPHG Mexico Operating, L.L.C.</i> , No. 651242/2014, 2015 N.Y. Misc. LEXIS 1470 (Sup. Ct. N.Y. Cty. Apr. 24, 2015)...	6,7
<i>FIMBank P.L.C. v. Woori Fin. Holdings Co.</i> , 104 A.D.3d 602, 962 N.Y.S.2d 114 (1st Dep’t 2013)	6
<i>Gillespie v. St. Regis Residence Club</i> , 343 F. Supp. 3d 332 (S.D.N.Y. 2018).....	5
<i>Goel v. Ramachandran</i> , 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dep’t 2013).....	6
<i>In re LIBOR-Based Fin. Instruments Antitrust Litig.</i> , 27 F. Supp. 3d 447 (S.D.N.Y. 2014).....	5
<i>Laydon v. Mizuho Bank, Ltd.</i> , No. 12-cv-3419 (GBD), 2014 U.S. Dist. LEXIS 46368 (S.D.N.Y. Mar. 28, 2014).....	5
<i>Pope v. Rice</i> , No. 04 Civ. 4171 (DLC), 2005 U.S. Dist. LEXIS 4011 (S.D.N.Y. Mar. 14, 2015).....	4
<i>Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.</i> , 345 F. Supp. 3d 515 (S.D.N.Y. 2018).....	5
<i>Solow v. Stone</i> , 994 F. Supp. 173 (S.D.N.Y.), <i>aff’d</i> , 163 F.3d 151 (2d Cir. 1998).....	3
<i>Sperry v. Crompton Corp.</i> , 8 N.Y.3d 204 (2007)	5
<i>Tap Holdings, LLC v. Orix Finance Corp.</i> , 109 A.D.3d 167, 970 N.Y.S.2d 178 (1st Dep’t 2013)	6
<i>Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)</i> , 543 B.R. 127 (2016).....	7

PB Investment Holdings Ltd., as successor-in-interest to Beechwood Bermuda Investment Holdings Ltd. (“PBIHL”), submits this reply brief in support of its motion to dismiss the Third-Party Complaint (“TPC”) filed by Senior Health Insurance Company of Pennsylvania (“SHIP”).

ARGUMENT

Of the 471 numbered paragraphs that comprise the TPC, only one specifically mentions PBIHL or its predecessor BBIHL. (*See* TPC ¶ 15.) The generalized and conclusory group pleadings regarding “Beechwood,” the “Beechwood Entities,” the “Co-Conspirators,” and the “Co-Conspirator Defendants” are inadequate to state a claim against PBIHL.

The extent of CNO’s allegations against PBIHL consists of: (1) identifying PBIHL as a subsidiary of Beechwood Bermuda International Ltd. (“BBIL”); (2) collectively referring to PBIHL and others as “Beechwood Entities[;]” and (3) alleging that PBIHL was involved in “executing certain transactions to the benefit of the Co-Conspirators, and to the detriment of SHIP.” (*See id.*) The TPC does nothing more than allege guilt by association for PBIHL. SHIP makes no allegations about the alleged Platinum-Beechwood Scheme that are specific to PBIHL. Indeed, the claims against PBIHL appear to be based solely on PBIHL’s possible presence on an organization chart. There are no factual allegations that are specific to PBIHL that would tend to establish any element of the claims that SHIP may bring against it. Accordingly, SHIP’s third-party claims against PBIHL should be dismissed with prejudice.

I. THE GROUP PLEADING RULE BARS SHIP’S CLAIMS.

SHIP attempts to avoid dismissal by claiming the TPC “‘clear[s] the low bar imposed by Rule 8,’ which merely requires a plaintiff ‘to give the defendant fair notice of what the plaintiff’s claim is and the ground upon which it rests.’” (Opp. at 13) (quoting Apr. 11, 2019 Op. at 42). SHIP

contends the TPC does so by making allegations “specific to each of the Moving Defendants [which] implicate each of them directly in the Platinum-Beechwood Scheme.” (*Id.*)

First, SHIP does not, and cannot, allege that PBIHL was a primary actor in the events made the basis of the TPC. SHIP relies on the Court’s April 11, 2019 opinion in the *Trott* case to support its position. However, SHIP ignores the core holding in that opinion. The April 11 opinion explains that group pleading is appropriate for those defendants who are “alleged to have been a high-level corporate insider.” (Apr. 11, 2019 Op. at 45.) SHIP does not present anything in its Opposition Brief to suggest how a single mention of PBIHL in the TPC translates into PBIHL being a high-level corporate insider.

Second, SHIP considers but fails to properly apply the April 11 opinion. The opinion does not find that group pleading is permissible for all allegations, even those involving non-insiders. The opinion notes that group pleading applies to corporate insiders who were responsible for statements in a group-published document. (*Id.* at 22 – 23.) The Court did not accept group pleading as applied to claims regarding individual fraudulent conduct. In fact, the Court dismissed the claims against certain “Beechwood Entities” for “impermissible group pleading” that lacked specific allegations. (*Id.* at 34 – 35.)

Third, on June 21, 2019, the Court completely dismissed PBIHL from the *Trott* case. In that opinion, the Court notes that PBIHL is “named in a single paragraph of the SAC, and is not charged with any specific wrongdoing.” (June 21, 2019 Op. at 58.) And so it is here. PBIHL is only specifically mentioned in one paragraph, and it is not charged with any specific wrongdoing. PBIHL’s alleged involvement appears to be as a “Beechwood Entity” and subsidiary of BBIL that was involved in “executing certain transactions to the benefit of the Co-Conspirators, and to the

detriment of SHIP.” (TPC ¶ 15.) These are the extent of the allegations against PBIHL. The TPC fails to give PBIHL fair notice of the claims against it. Therefore, the TPC should be dismissed.

II. THE TPC FAILS TO STATE A CLAIM FOR AIDING AND ABETTING.

SHIP’s aiding and abetting claims are still subject to dismissal because “a third-party relationship between the aider and abettor and the corporation is a necessary element in any such action.” *Solow v. Stone*, 994 F. Supp. 173, 181 (S.D.N.Y.), *aff’d*, 163 F.3d 151 (2d Cir. 1998). Thus, these claims fail if PBIHL was dominated and controlled by the principal actors and perpetrators of the underlying fraud or breach of fiduciary duty and SHIP claims. (SHIP contends that PBIHL and other “organizations were instrumentalities of the architects of the Platinum-Beechwood Scheme that served key roles in the fraud against SHIP” (Opp. at 2)).

Further, the TPC lacks any factual allegations which tend to show that PBIHL had actual knowledge of any wrongful act, or that PBIHL provided substantial assistance to the commission of any of those allegedly wrongful acts. SHIP contends in its brief, but not in the TPC that PBIHL was “set up as an asset protection vehicle and an alter ego of Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor, [and] was dominated and controlled by them specifically for the purpose of executing certain transactions to benefit the Co-Conspirators to the detriment of SHIP,” so PBIHL would have known of and agreed to perpetuate the fraud. (Opp. at 23.) SHIP’s alter ego allegations regarding PBIHL specifically are non-existent in the TPC. Even so, the TPC only alleges that “each of the other Co-Conspirators directly participated in, and played a principal role in consummating, several [] fraudulent transactions . . . for the benefit of Beechwood- and Platinum-related entities and individuals.” (TPC ¶ 424.) The only allegations specific to PBIHL in the entire TPC regard it being a “Beechwood Entity” organized and operating in Bermuda, a subsidiary of BBIL, and involved in “executing certain transactions to the benefit of the Co-

Conspirators, and to the detriment of SHIP.” (TPC ¶ 15.) This lack of particularity dooms the aiding and abetting claims.

III. THE TPC FAILS TO STATE A CLAIM FOR CIVIL CONSPIRACY.

SHIP does not dispute that the civil conspiracy claim arises out of the same misconduct as the aiding and abetting claims. Rather, SHIP asserts that “the civil conspiracy count is not ‘duplicative’ of aiding and abetting and does not warrant dismissal because conspiracy might be proved where other claims could fail.” (Opp. at 22.) Nevertheless, SHIP does not specify how its duplicative claim for civil conspiracy is a pleading in the alternative. (*Id.*) Nor does SHIP address the clear authority that a claim of civil conspiracy that is duplicative of an aiding and abetting claim should be dismissed. *See, e.g., Briarpatch Ltd. LP v. Phoenix Pictures, Inc.*, 312 Fed. App’x 433, 434 (2d Cir. 2009). Given that the underlying acts are identical, there is no alternative theory of liability, so the conspiracy claim should be dismissed.

Similarly, SHIP’s argument fails to show how PBIHL intentionally participated in the furtherance of any fraud or breach of fiduciary duty. SHIP makes no specific allegations whatsoever regarding PBIHL. Indeed, SHIP does not even allege facts that tend to show that PBIHL independently owed a fiduciary duty to SHIP, a requirement under New York law for any claim of conspiracy to breach a fiduciary duty. *See, e.g., Pope v. Rice*, No. 04 Civ. 4171 (DLC), 2005 U.S. Dist. LEXIS 4011, at *42 (S.D.N.Y. Mar. 14, 2015). Therefore, SHIP’s civil conspiracy claim must be dismissed.

IV. THE TPC FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT.

SHIP contends that it “has alleged sufficient facts to maintain unjust enrichment claims against each Moving Defendant.” (Opp. at 24 – 25.) SHIP, further contends, with respect to

PBIHL, that “the TPC explicitly details how [PBIHL] was involved in the Agera transactions, which used SHIP’s assets to enrich [PBIHL] itself, and others. (*Id.* at 25.)

First, these contentions are wholly vague and conclusory and insufficient to support an unjust enrichment claim. *See Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 533 (S.D.N.Y. 2018) (allegations that certain defendants were “enriched” were “entirely conclusory” and “not entitled to be assumed to be true”); *see also Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352 – 53 (S.D.N.Y. 2018).

Second, an unjust enrichment claim must be dismissed if the relationship between the parties is “too attenuated.” *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 – 16 (2007). There must be “some type of direct dealing or actual, substantive relationship” between PBIHL and SHIP. *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD), 2014 U.S. Dist. LEXIS 46368, at *42 (S.D.N.Y. Mar. 28, 2014) (internal quotations omitted). SHIP does not allege any relationship or contact between itself and PBIHL, nor does it allege any direct dealing between these parties. Dismissal is proper where, as here, “it makes little sense to conclude that a particular defendant [] somehow improperly obtained [benefits] intended for a certain plaintiff when those two parties never transacted or otherwise maintained a business relationship at all.” *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 27 F. Supp. 3d 447, 479 (S.D.N.Y. 2014). Therefore, the Court should dismiss SHIP’s unjust enrichment claim against PBIHL.

V. THE TPC FAILS FOR WANT OF JURISDICTION

SHIP asks the Court to exercise personal jurisdiction over PBIHL based on PBIHL’s alleged status as a successor entity and alter ego.¹ (*Opp.* at 27 – 28.) A court may exercise personal

¹ SHIP argues without any support that PBIHL has waived this jurisdictional argument because it did not raise it in *Trott*. (*See Opp.* at 27.) The Court granted 12(b) dismissal of PBIHL in *Trott*, however, so SHIP’s waiver argument is moot as PBIHL is no longer a party to that matter.

jurisdiction over a foreign affiliate of a defendant based on alter ego liability, but SHIP's minimal allegations fail to establish that the Court should exercise jurisdiction over PBIHL.

The "primary focus" here is "on the degree of control exercised by the domestic [company] over the foreign [company]." *Goel v. Ramachandran*, 111 A.D.3d 783, 787, 975 N.Y.S.2d 428 (2d Dep't 2013). "It is only when the two corporations are in fact, if not in name . . . one and the same corporation, [that] there is realistically no basis for distinguishing them for jurisdictional purposes." *Id.* Thus, while veil piercing factors (less the fraud prong) are relevant to the analysis, *Tap Holdings, LLC v. Orix Finance Corp.*, 109 A.D.3d 167, 174, 970 N.Y.S.2d 178 (1st Dep't 2013), "conclusory allegations in the complaint are insufficient." *Barneli & Cie SA v. Dutch Book Fund SPC, Ltd.*, 95 A.D.3d 736, 737, 946 N.Y.S.2d 53 (1st Dep't 2012). For instance, merely demonstrating common ownership or control is not enough. *See FIMBank P.L.C. v. Woori Fin. Holdings Co.*, 104 A.D.3d 602, 603, 962 N.Y.S.2d 114 (1st Dep't 2013).

The TPC does not adequately plead facts that give rise to jurisdiction over PBIHL. For one, the case law makes clear that personal jurisdiction is not automatic "merely because money, allegedly wrongfully taken by a defendant subject to jurisdiction in New York, was transferred to" a foreign affiliate. *Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, ENR v. WPHG Mexico Operating, L.L.C.*, No. 651242/2014, 2015 N.Y. Misc. LEXIS 1470, at *9 (Sup. Ct. N.Y. Cty. Apr. 24, 2015). SHIP's only apparent basis for suing PBIHL rests on BBIH's alleged involvement in "executing certain transactions to the benefit of the Co-Conspirators." (*See* TPC ¶ 15.) This conclusory allegation is insufficient to confer jurisdiction over PBIHL under either the successor-in-interest or alter ego jurisdictional arguments made by SHIP.

The TPC makes conclusory allegations of common ownership and control but fails to provide any factual allegations in support. SHIP's brief merely rehashes these conclusory

allegations. (See Opp. at 27 – 28.) Arguing that a company is a “shell entity” and pointing “to multiple, similarly named entities” that were formed as part of “a business venture” “does little to buttress the inadequacy” of SHIP’s allegations. *Cargill*, 2015 N.Y. Misc. LEXIS 1470, at *9. Further, the TPC is deficient with respect to every veil piercing factor. Compare *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 543 B.R. 127, 144 – 45 (2016) (finding there was no prima facie showing that foreign company was subject to personal jurisdiction as the alter ego of a corporate parent). Therefore, the TPC fails for want of jurisdiction.

CONCLUSION

For the foregoing reasons, dismissal is proper for SHIP’s claims of aiding and abetting fraud, aiding and abetting breach of fiduciary duties, participating in a civil conspiracy, and unjust enrichment. SHIP’s third-party claims against PBIHL should be dismissed with prejudice.

Dated: August 5, 2019

Respectfully submitted,

Condon Tobin Sladek Thornton, PLLC

/s/ Kendal B. Reed

Kendal B. Reed (*pro hac vice*)

Texas Bar No. 24048755

kreed@ctstlaw.com

8080 Park Lane, Suite 700

Dallas, Texas 75231

(214)265-3853 Telephone

(214)691-6311 Facsimile

*Attorneys for Defendant/Third-Party Defendant
PB Investment Holdings Ltd.*

CERTIFICATE OF SERVICE

It is hereby certified that on this 5th day of August 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this proceeding.

/s/ Kendal B. Reed

Kendal B. Reed