UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YOKK

IN RE PLATINUM-BEECHWOOD LITIGATION	18-cv-06658 (JSR)
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Third-Party Plaintiff, - against - PB INVESTMENT HOLDINGS LTD., *et al.*, Third-Party Defendants.	18-cv-12018 (JSR)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THIRD-PARTY DEFENDANT ELLIOT FEIT'S MOTION TO DISMISS THIRD-PARTY COMPLAINT, PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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Third-Party Defendant Elliot Feit ("Defendant" and/or "Feit") submits this reply memorandum of law in further support of his motion to dismiss the Third-Party Complaint, dated May 15, 2019 (the "Complaint") of Third-Party Plaintiff Senior Health Insurance Company of Pennsylvania ("Plaintiff" and/or "SHIP"), pursuant to Federal Rule of Civil Procedure 12(b)(6).

ARGUMENT

Defendant Feit's motion should be granted for all of the reasons set forth in the Memorandum of Law in Support of Third-Party Defendant Elliot Feit's Motion to Dismiss Third-Party Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), dated July 15, 2019 ("Moving Brief").[1] SHIP has failed to show that there are any legally valid bases to its claims that Defendant Feit: (i) had "actual knowledge" of, or provided "substantial assistance" in the commission of, any wrongdoing (*see* Points I and II, *infra*); (ii) took any action in furtherance of any wrongful agreement/conspiracy (*see* Point III, *infra*); and/or (iii) was unjustly enriched at SHIP's expense (*see* Point IV, *infra*).

In short, SHIP has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that, to survive a motion to dismiss, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

For all of the reasons set forth herein, as well as the reasons set forth in Defendant Feit's Moving Brief, the claims asserted by SHIP, against Defendant Feit, must be dismissed. Fed. R. Civ. P. 12(b)(6).

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[1] Undefined capitalized terms are ascribed the definitions set forth in the Moving Brief.

POINT I

BECAUSE PLAINTIFF FAILS TO PLEAD SUFFICIENT PLAUSIBLE FACTS TO DRAW ANY REASONABLE INFERENCE OF DEFENDANT FEIT'S "ACTUAL KNOWLEDGE" OF ANY WRONGDOING, THE COURT MUST DISMISS PLAINTIFF'S AIDING-AND-ABETTING CLAIMS (COUNTS ONE AND TWO)

In his Moving Brief (at 7-8), Defendant Feit explained that:

> The allegations in the Complaint – to the effect that Defendant Feit somehow had 'actual knowledge' of any fraud or breach of fiduciary duty – are threadbare and general in nature, unsupported as they are by any specific factual allegation that Defendant Feit, in particular, had any such knowledge. (Complaint at ¶¶ 35, 378, 417, 426.)

In response, SHIP implicitly recognizes the absence of any factual allegation directly evincing Defendant Feit's "actual knowledge" and invites the Court to infer such knowledge from alleged facts that are indisputably untrue, unsupportable, and/or implausible. (Omnibus Memorandum of Law in Opposition to Motions to Dismiss Third-Party Complaint of Senior Health Insurance Company of Pennsylvania, dated July 29, 2019 ("Opp. Br.") at 16-18.) Indeed, SHIP's allegations do not establish that Defendant Feit actually (*i.e.*, subjectively) knew of the allegedly fraudulent or wrongful scheme. *See Samuel M. Feinberg Testamentary Tr. v. Carter*, 652 F. Supp. 1066, 1082 (S.D.N.Y. 1987); *see also Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2012) ("*Krys I*").

At best, SHIP's allegations add up to nothing more than "mere notice or unreasonable awareness." *Samuel M. Feinberg Testamentary Tr.*, 652 F. Supp. at 1082. SHIP equates – and, thereby, confuses – support for some limited knowledge with the requisite "actual knowledge" of the Platinum-Beechwood Scheme. (Opp. Br. at ¶¶ 16-18.) Without more, of course, SHIP's allegations provide no basis to the proposition that Defendant Feit had the requisite degree of "actual knowledge" to sustain SHIP's aiding-and-abetting claims.

In short, SHIP's allegations do not add up.

First, in the face of undisputable evidence showing that Defendant Feit never was employed by, or had any affiliation with, any Platinum-related entity (Feit Aff. at ¶¶ 3-8, Exh. A), SHIP effectively abandons its factually faulty allegation that Defendant Feit "served in [a] dual role[] at Platinum ***and*** Beechwood" (Complaint at ¶ 424 (emphasis in original)). This fact alone significantly distinguishes and distances the allegations concerning Defendant Feit from the other allegations of wrongdoing set forth in the Complaint. What's more, it sets the proper interpretive context for understanding Defendant Feit's role, contemporaneous understanding, and alleged actions.

Second, SHIP invites the Court to pile a number of inferences upon another factually faulty allegation. As a centerpiece of its allegations against Defendant Feit, SHIP claims that Defendant Feit [redacted] (Opp. Br. at 13), when he [redacted] (*id*. at 4, *citing*, Complaint at ¶ 240.a). SHIP infers from this rather unusual statement that Defendant Feit [redacted] (*Id*.) Such an inference, however, is as implausible as it is erroneous and – frankly – ludicrous.

[redacted] (Reply Affidavit of Elliot Feit, dated August 5, 2019, at ¶¶ 3-5, Exh. B.) At or about the same time, Defendant Feit sent another email, from his personal email address, to the intended recipients (*i.e.*, close friends who shared Defendant Feit's personal appreciation for ice hockey and the New York Rangers). (*Id*. at ¶ 6, Exh. C.) [redacted] (*Id*. at ¶ 4.) Clearly,

therefore, Defendant Feit [redacted].[2] (*Id*. at ¶¶ 5-6.)

In its Opposition Brief (at 4, 13, 17), in an effort to prop-up its threadbare and conclusory allegations, SHIP heavily relies on these dramatically faulty and decidedly implausible inferences. On the basis of Defendant Feit's [redacted], SHIP embarrassingly argues that "[a]lthough he feigns ignorance, Feit knew that [Beechwood's] performance fee requests were based on materially inflated valuations."[3] (*Id*. at 4.) Clearly, however, SHIP's interpretation – whether assessed alone or in conjunction with its other allegations – widely misses the mark.

Third, without any basis, SHIP (mis)characterizes Defendant Feit's role, describing him as "senior" (Opp. Br. at 3, 13, 17, 23) and an "officer" (*id*.), with the ability and authority within Beechwood to "sign off" on investment valuations (*id*. at 17). Such assertions, however, are purely fictional, devoid as they are of any factual basis.

In fact, entirely out of whole cloth, SHIP mischaracterizes Defendant Feit as: (i) the "Chief Executive Officer of BAM" (*id*. at 13, 17); and (ii) "one of the senior-most executives for the very entity responsible for managing all of SHIP's investments" (*id*. at 17). Neither was true; not even nearly so. It is undisputed – and undisputable – that Defendant Feit worked at

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[2] It appears as though SHIP – captured by its results-driven interpretive framework – confuses the word [redacted] with "slurry." Webster's Dictionary defines: (i) "slurry" as "a watery mixture of insoluble matter (such as mud, lime, or plaster of paris)," *see* < https://www.merriam-webster.com/dictionary/slurry>; and (ii) [redacted] In other words, even if Defendant Feit could not otherwise innocently explain his use of the word [redacted] SHIP easily could have avoided its wildly mistaken interpretation and faulty inference.

[3] What's more, even if Defendant Feit possessed some information regarding SHIP's investments and accounts (Opp. Br. at 17), such information – standing alone – is not sufficient to establish that Defendant Feit had any subjective, actual knowledge of any fraud and/or breach of fiduciary duty. *See Samuel M. Feinberg Testamentary Tr.*, 652 F. Supp. at 1082.

Beechwood as a finance director who had no role or responsibilities with respect to the investment side of Beechwood's business.[4] (Feit Aff. at ¶¶ 3-8, Exh. A.) In short, there are no bases upon which the Court somehow could infer that Defendant was "senior," an "officer," or someone who "signed off" on valuations.

Finally, SHIP grasps at a number of innocuous "straws" in a failed attempt to allege that Defendant Feit "had full knowledge of the Platinum-Beechwood Scheme" and "knew the valuations at Beechwood were inflated and unreliable." (Opp. Br. at 4; *see also id*. at 6, 13, 17.) Although SHIP alleges that, [redacted] (*id*.; Complaint at ¶ 335) does not evince that Defendant Feit had any specific knowledge regarding Beechwood's valuations or the alleged Platinum-Beechwood Scheme. In fact, SHIP's syllogism amounts to nothing more than a classic *non sequitur*.

Similarly, SHIP alleges that, as a finance director at Beechwood, Defendant Feit had some involvement in [redacted]. (Opp. Br. at 5-6, 17, 20; Complaint at ¶¶ 377-378.) It is not plausible or reasonable, however, to infer from such involvement any specific knowledge of the character of Beechwood's valuations or the alleged

[4] At some length, SHIP summarizes certain email correspondence involving Defendant Feit – from April 2015, July 2015, and February 2016 – that SHIP contends shows that "Feit was *the* person responsible for requesting authorization from SHIP to withdraw funds from the IMA accounts in satisfaction of allegedly earned performance fees." (Opp. Br. at 4 (emphasis in original).) But Defendant Feit does not dispute that he *calculated* performance fees, *submitted* performance-fee requests, and *responded* to related requests from SHIP. (Moving Br. at 4.) Without more, however, such actions do not evince that Defendant Feit had any "actual knowledge" of the Platinum-Beechwood Scheme or that any valuations he utilized to calculate any performance fees were misstated, overvalued, or unreliable – and because SHIP does not allege any more, the Court must dismiss the aiding-and-abetting claims, as stated against Defendant Feit.

Platinum-Beechwood Scheme. Nor can such knowledge be plausibly or reasonably inferred from: (i) Defendant Feit's "sending real-time updates and requests for direction to Nordlicht and Levy on how and where SHIP's funds would be invested" (Opp. Br. at 6; Complaint at ¶¶ 414, 423-424); (ii) his position on Beechwood's financial committee – and not any investment or valuation committee (Opp. Br. at 17); or (iii) his legitimate and appropriate work with outside valuation firms (*id*.).

Accordingly, for all of the foregoing reasons, as well as the reasons set forth in Defendant Feit's Moving Brief, the Court must dismiss SHIP's claims for aiding and abetting fraud and breach of fiduciary duty (Counts One and Two), as stated against Defendant Feit.

POINT II

BECAUSE PLAINTIFF FAILS TO PLEAD SUFFICIENT PLAUSIBLE FACTS TO DRAW ANY REASONABLE INFERENCE OF DEFENDANT FEIT'S "SUBSTANTIAL ASSISTANCE" IN ANY FRAUD OR BREACH OF FIDUCIARY DUTY, THE COURT MUST DISMISS PLAINTIFF'S AIDING-AND-ABETTING CLAIMS (COUNTS ONE AND TWO)

In his Moving Brief (at 9), Defendant Feit explained that a defendant substantially assists a fraud or breach of fiduciary duty "when the defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *SPV OSUS Ltd. v. AIA LLC*, 2016 WL 3039192, at *6 (S.D.N.Y. May 24, 2016) (Rakoff, J.), *quoting*, *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 295 (2d Cir. 2006). He also demonstrated that his "alleged actions were neither 'substantial' nor committed to advance the commission of any alleged fraud or breach of fiduciary duty." (*Id*. at 9-10, *citing*, *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014) ("*Krys II*"); *Lerner*, 459 F.3d at 295; *SPV OSUS Ltd.*, 2016 WL 3039192, at *6; *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 479 F. Supp. 2d 349, 370 (S.D.N.Y. 2007).)

In response, SHIP points to its allegations that Defendant Feit submitted requests for performance fees and transferred certain investments. (Opp. Br. at 20.) Fatally, however, as

shown herein (Point I, *supra*), SHIP's allegations that Defendant Feit took these actions in order to advance the commission of an alleged fraud or breach of fiduciary duty are unsubstantiated and conclusory. In short, there is no basis for SHIP to allege that Defendant Feit took any actions that were anything other than Defendant Feit carrying out his legitimate and appropriate job responsibilities as a finance director at Beechwood. (Mov. Br. at 9.)

Accordingly, the Court must dismiss SHIP's claims for aiding and abetting fraud and breach of fiduciary duty (Counts One and Two), as stated against Defendant Feit.

POINT III

BECAUSE PLAINTIFF FAILS TO PLEAD SUFFICIENT PLAUSIBLE FACTS TO SHOW THAT DEFENDANT FEIT TOOK ANY ACTION IN FURTHERANCE OF ANY AGREEMENT, THE COURT MUST DISMISS PLAINTIFF'S CIVIL-CONSPIRACY CLAIM (COUNT FIVE)

In his Moving Brief (at 10-12), Defendant Feit demonstrated that SHIP's non-specific and unsubstantiated claim for civil conspiracy (Count Five) as against Defendant Feit should be dismissed because, among other reasons, SHIP does not – and cannot: (i) specifically name Defendant Feit in connection with its civil-conspiracy claim; (ii) allege a specific agreement involving Defendant Feit; (iii) allege that Defendant Feit took any overt act in further of any agreement; and (iv) allege any intentional participation by Defendant Feit in further of a plan or purpose.

Although SHIP argues that Defendant Feit "took several overt steps in further of the Co-Conspirators' illegal objectives" and was involved "in the part of the conspiracy to alter the valuations to benefit Beechwood" (Opp. Br. at 23), SHIP's claims are unsupported, unsupportable, and conclusory.

Among other things, even if Defendant Feit took certain actions as part of his legitimate and appropriate work activities (*e.g.*, calculating fees, communicating fee requests, and

transferring funds between accounts), in order for one of those actions to form the basis for a conspiracy claim, SHIP acknowledges (*id*. at 21) that it must show that Defendant Feit took action in furtherance of an agreement between conspirators regarding a cognizable tort. *See Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dep't 2012) (dismissing civil-conspiracy claim because "the complaint does not allege any overt action on the part of the defendant . . . *in furtherance of the agreement*" between conspirators (emphasis added)). SHIP, however, has not shown – because it cannot show – any plausible basis to allege that Defendant Feit took action *in furtherance of any agreement*. *See id*.

POINT IV

BECAUSE PLAINTIFF FAILS TO PLEAD SUFFICIENT PLAUSIBLE FACTS SUGGESTING THAT DEFENDANT FEIT RECEIVED ANY MONIES BY WHICH HE WAS ENRICHED, THE COURT MUST DISMISS PLAINTIFF'S EQUITABLE CLAIM (COUNT SEVEN)

In his Moving Brief (at 12-14), Defendant Feit demonstrated that, because "SHIP possesses no facts suggesting that Defendant Feit received any fees or other monies by which he was unjustly enriched," "the only aspect of the Complaint that purports to bring Defendant Feit within the scope of SHIP's unjust-enrichment claim is its catch-all definition of 'Co-Conspirators.'" For this reason, SHIP alleges nothing more than that, "[t]o the extent that" Defendant Feit received fees or monies from wrongful transactions, he – along with a litany of other "Co-Conspirators" – somehow was unjustly enriched. (Complaint at ¶ 464.)

In its Opposition Brief (at 25), SHIP fails to resurrect its unjust-enrichment claim. In addition to the fact that SHIP does not – because it cannot – support, with plausible factual allegations, its claim that Defendant Feit "knew that the valuations portrayed by Beechwood were inflated," SHIP argues that Defendant Feit "benefited in the form of annual bonuses and raises." (*Id*.) In other words, whereas SHIP pleads that *Beechwood* earned performance fees, it

does not – because it cannot – allege that *Defendant Feit* specifically and individually received any discernible portion of those fees.[5] *See Mina Inv. Holdings, Ltd. v. Lefkowitz*, 51 F. Supp. 2d 486, 490 (S.D.N.Y. 1999) (recognizing that, in order to survive dismissal, a plaintiff pleading unjust enrichment must allege some facts showing that the defendant was enriched).

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in Defendant Feit's Moving Brief, Defendant Feit respectfully requests that the Court enter an Order, dismissing the Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), and granting Defendant Feit such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 5, 2019

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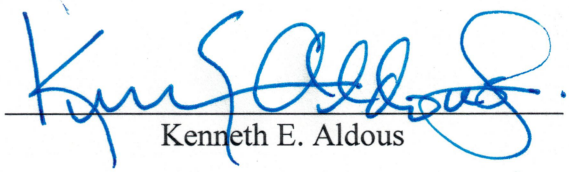

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[5] In fact, if receipt of "annual bonuses and raises" somehow were sufficient to plead enrichment, nearly every Beechwood employee could face potential liability. Clearly, however, in order to avoid dismissal, SHIP must allege a more direct and proximate form of "enrichment" (*i.e.*, tying a specific alleged gain to a specific performance fee).