UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-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 FUND INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC, Plaintiffs, v. BEECHWOOD RE LTD., *et al.*, Defendants.	18-cv-12018-JSR
SENIOR HLEATH INSURANCE COMPANY OF PENNSYLVANIA, Third-Party Plaintiff, v. PB INVESTMENT HOLDINGS LTD., *et al.*, Third-Party Defendants.	

THIRD-PARTY DEFENDANT LAWRENCE PARTNERS, LLC'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA

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PRELIMINARY STATEMENT

SHIP's Opposition[1] underscores the weaknesses of the TPC. Most glaringly, SHIP understates the applicable pleading standard, boldly asserting that it need not plead its fraud-based claims with particularity because Rule 9(b) does not apply to the TPC. SHIP's evasive arguments should be rejected. It is axiomatic that the legal sufficiency of the TPC, which asserts claims against Lawrence Partners sounding in fraud, is governed by Rule 9(b). SHIP's failure to respond to Lawrence Partners' argument that the TPC does not pass Rule 9(b) muster is proof positive that its claims do not withstand applicable legal scrutiny.

SHIP also fails to meaningfully address Lawrence Partners' arguments that critical elements of SHIP's claims are not sufficiently alleged.[2] SHIP's Opposition clarifies that Lawrence Partners is included in this case based solely on the conclusory allegation that Murray Huberfeld controlled it. Incongruously, though, the Opposition does not point to any allegations providing factual context for that conclusion. Nor does the Opposition describe any allegations supporting

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[1] Omnibus Memorandum of Law in Opposition to Motions to Dismiss Third-Party Complaint of Senior Health Insurance Company of Pennsylvania, No. 1:18-cv-12018-JSR, Doc. No. 361 ("Opposition" or "Opp.").

[2] SHIP also plays fast and loose with their pleading, often referencing allegations that it says are directed to Lawrence Partners, but which in fact are not. For instance, [redacted] (Opp. at 12 (citing TPC ¶ 87).) In fact, [redacted]. Similarly, [redacted]. (Opp. at 11-12.) In fact, the TPC alleges [redacted]. (TPC ¶ 30(b).) Finally, [redacted] (Opp. at 21.) In fact, the TPC specifically alleges [redacted]. (TPC ¶¶ 389-393, 395.)

a reasonable inference that Lawrence Partners otherwise had actual knowledge of any element of the Platinum-Beechwood Scheme directed to SHIP, or that Lawrence Partners was controlled or took direction from anyone who did. The Opposition further fails to direct the Court to a single relevant act by Lawrence Partners amounting to substantial assistance of any fraud or breach of fiduciary duty. The TPC does nothing more than allege that [redacted]. Hence, the aiding-and-abetting and civil conspiracy claims fail under any applicable pleading standard.

The unjust enrichment claim is also defective for multiple reasons, principally because there is nothing in the TPC connecting any distribution of SHIP's property to Lawrence Partners. In any event, the TPC's own allegations bar SHIP's unjust enrichment claim; the TPC confirms that it is improperly premised on rights entirely governed by the IMAs. Even accepting the well-pleaded allegations as true, SHIP has not asserted, nor can it assert, legally cognizable claims against Lawrence Partners. Accordingly, dismissal of the TPC against Lawrence Partners with prejudice is proper.

ARGUMENT

I. The Legal Sufficiency Of The TPC Is Governed By Rule 9(b)

SHIP seeks to evade the proper pleading standard governing its claims for aiding-and-abetting fraud and breach of fiduciary duty (Counts 3-4), civil conspiracy (Count 5), and unjust enrichment (Count 7). SHIP's fraud-based claims must be plead with particularity. SHIP merely asserts that its claims "clear[] the low bar imposed by Rule 8 . . . ." (Opp. at 12-13, 15.) SHIP then argues that Rule 9(b) does not apply to the TPC because it "does not seek to attribute *misstatements* to the Moving Defendants but instead focuses on their *conduct* . . . ." (Opp. at 12-13 n.2 (emphasis in original).) The distinction that SHIP attempts to draw, however, is sophistry.

It is axiomatic that the legal sufficiency of the TPC, which asserts claims against Lawrence Partners sounding in fraud, is governed by Rule 9(b). *See* Fed. R. Civ. P. 9(b).

Where, as here, a plaintiff's claims sound in fraud, Rule 9(b)'s heightened pleading standard requires the plaintiff to state the underlying circumstances with particularity. *See* Fed. R. Civ. P. 9(b); *see also Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381, 387 (S.D.N.Y. 2007) ("Rule 9(b) provides that the circumstances of fraud must 'be alleged with particularity,' requiring 'reasonable detail as well as allegations of fact from which a strong inference of fraud reasonably may be drawn.'") (citation omitted). This heightened pleading requirement applies equally to claims for aiding-and-abetting fraud and breach of fiduciary duty that are predicated on fraudulent conduct. *See Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014) ("In asserting claims of fraud-including claims for aiding and abetting fraud or a breach of fiduciary duty that involves fraud – a complaint is required to plead the circumstances that allegedly constitute fraud with particularity."); *Hongying Zhao v. JPMorgan Chase & Co.*, No. 17 Civ. 8570 (NRB), 2019 U.S. Dist. LEXIS 40673, at *9 (S.D.N.Y. Mar. 13, 2019) ("Rule 9(b) applies to all 'averments of fraud.' This wording is cast in terms of the conduct alleged, and is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action.") (*quoting Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004)). The same heightened pleading requirement applies to SHIP's claim of unjust enrichment, which is "based on the same predicate allegations relating to a fraudulent scheme" that form the gravamen of a complaint. *See DeBlasio v. Merrill Lynch & Co.*, No. 07 Civ. 318 (RJS), 2009 U.S. Dist. LEXIS 64848, at *36-39 (S.D.N.Y. July 27, 2009).[3]

[3] In its Opposition, SHIP expressly concedes that the group pleading doctrine is irrelevant to its claims against Lawrence Partners because the TPC is subject to Rule 8, and not Rule 9(b). (*See* Opp. at 12-13 n.2 ("SHIP need not invoke Rule 9(b)'s group pleading doctrine to satisfy Rule

All of SHIP's claims against Lawrence Partners sound in fraud, both in form and substance. *See* Count 3 (aiding-and-abetting fraud), Count 4 (aiding-and-abetting breach of fiduciary duty based on same alleged fraudulent misconduct), Count 5 (civil conspiracy based on Lawrence Partners' alleged participation in a "fraudulent conspiracy" (*see* TPC ¶ 450)), and Count 7 (unjust enrichment based on same conduct). Yet, SHIP's Opposition does not even attempt to argue that its claims withstand Rule 9(b) scrutiny. (*See* Opp. at 12-13.) SHIP's concession is fatal to its claims.[4]

II. The Allegations Supporting SHIP's Aiding-And-Abetting Fraud And Breach Of Fiduciary Duty Claims Lack Relevant Factual Underpinning

SHIP's Opposition confirms that its aiding-and-abetting claims against Lawrence Partners are inappropriately predicated on bare conclusory allegations without reference to underlying factual content. Both counts fail whether analyzed under Rule 9(b) or Rule 8. "The Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Krys*, 749 F.3d at 129 (citation omitted).

1. *SHIP Does Not Sufficiently Allege That Lawrence Partners Had Actual Knowledge Of The Platinum-Beechwood Scheme*

8(a)(2) . . . the group pleading doctrine is irrelevant.").) To the extent that SHIP revises its argument to claim that the TPC also passes Rule 9(b) muster based on the group pleading doctrine, its argument should be rejected because SHIP does not allege any predicate written statements attributed to Lawrence Partners, or that Lawrence Partners was a requisite corporate insider with direct involvement in day-to-day affairs. *In re Platinum-Beechwood Litig.*, Nos.18-cv-6658 & 10936 (JSR), 2019 U.S. Dist. LEXIS 62745, at *35 (S.D.N.Y. Apr. 11, 2019). Accordingly, Rule 9(b) requires SHIP to plead the facts underlying Lawrence Partners' fraudulent conduct with particularity. For the reasons set forth in Lawrence Partners' opening brief and below, SHIP has failed to do so.

[4] For the avoidance of doubt, as set forth below and in its opening brief, SHIP's claims also do not pass muster under Rule 8 because the TPC does not allege sufficient factual content as to Lawrence Partners to allow the Court to draw the reasonable inference that Lawrence Partners is liable for the misconduct alleged. *See* Opening Br. at 5-6; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a complaint must plead sufficient facts to "state a claim to relief that is plausible on its face").

According to SHIP, the only allegations supporting its claim that Lawrence Partners had actual knowledge of the Platinum-Beechwood Scheme are that Lawrence Partners was purportedly [redacted] (Opp. at 19.) These averments are bare conclusions, legally insufficient to allege that Lawrence Partners had actual knowledge of any fraud or breach of fiduciary duty, or that Murray Huberfeld's alleged knowledge should be imputed to it. To be sure, although Rule 9(b) "permits a plaintiff to plead knowledge 'generally,' 'generally' is merely 'a relative term' that allows knowledge to be pleaded with less particularity than is required for the pleading of fraud; 'generally' is not the equivalent of conclusory." *Krys*, 749 F.3d at 129.

The allegation that Huberfeld "controlled" Lawrence Partners should be disregarded because it is a conclusion, not an alleged fact. SHIP does not direct the Court or Lawrence Partners to a single particularized allegation providing an example of direction or control of Lawrence Partners by Murray Huberfeld, or that Lawrence Partners committed any fraud or wrongful act (or any act) at Huberfeld's behest. Instead, the TPC merely repeats the refrain that Lawrence Partners was "100%-owned and controlled" by Murray Huberfeld. (*See, e.g.*, TPC ¶¶ 30-31, 433.) This conclusion is, as a matter of law, insufficient to justify SHIP's imputation of Huberfeld's alleged actual knowledge to Lawrence Partners. SHIP should not escape the plethora of controlling law in this Circuit holding that such "bald assertions and conclusions of law" are legally insufficient to support a claim, let alone a claim sounding fraud. *See, e.g.*, *Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214, 222-25 (2d Cir. 2018) (dismissing fiduciary duty claim because, *inter alia*, no allegations indicate that "defendants were able to exercise any [relevant] control"); *Long v. Parry*,

679 Fed. App'x 60, 63 (2d Cir. 2017) ("Long's proposed amended complaint does not plead facts sufficient to support his bald assertion . . . .").

Nor can SHIP properly impute Murray Huberfeld's purported knowledge to Lawrence Partners under an "alter-ego" theory. (*See* TPC ¶ 31.) The TPC contains no particularized allegations that Lawrence Partners was used by Huberfeld or any other alleged wrongdoer to accomplish his own and not Lawrence Partners' business, that Lawrence Partners carried on Huberfeld's business in his personal capacity for purely personal ends, or that Lawrence Partners' corporate formalities were not observed, that it was undercapitalized, or that it engaged in any ultra vires activity. The Opposition does not point to any such facts either. Absent such well-pleaded facts, SHIP's attempt to predicate Lawrence Partners' purported "actual knowledge" on an alter ego theory must be rejected. *In re Platinum-Beechwood Litig.*, Nos. 18-cv-6658 & 10936, 2019 U.S. Dist. LEXIS 104562, at *60-61 (S.D.N.Y. June 21, 2019) (dismissing alter ego claim against the Huberfeld Family Foundation).

Finally, SHIP does not (i) allege a single fact demonstrating that *Lawrence Partners* had actual knowledge of any element of the Platinum-Beechwood Scheme directed to SHIP, (ii) describe any circumstances from which it can be plausibly inferred that *Lawrence Partners* acquired actual knowledge that any primary actors were defrauding or breaching fiduciary duties to SHIP, or (iii) contain any non-conclusory facts supporting an inference that *Lawrence Partners* actually knew of the fraudulent scheme it alleges.

The Opposition makes no attempt to meaningfully distinguish its aiding-and-abetting claims against Lawrence Partners from the aiding-and-abetting claims against the "Preferred Investors" in the *Trott* Action, which claims this Court recently dismissed. *See In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745 at *41-46. There, the Court identified that

plaintiffs' aiding-and-abetting claims, brought against family members of alleged primary wrongdoers, were deficient because the allegations of "guilt by association" were "insufficient to impute actual knowledge to any of" the defendants. *Id.* SHIP's claims here are identical and likewise fail. *See, e.g., Rosner v. Bank of China*, 349 F. App'x 637, 638-39 (2d Cir. 2009) (finding failure to plead actual knowledge notwithstanding plaintiff's "conclusory statements . . . that [defendant] actually knew something").

2. Lawrence Partners Did Not Substantially Assist Any Alleged Scheme

The Opposition also does not cure SHIP's failure to allege that Lawrence Partners substantially assisted the Platinum-Beechwood Scheme. Aiding-and-abetting claims require particularized allegations that the defendant provided substantial assistance to advance the predicate tort's commission. *See In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745 at *38; "There must also be a 'nexus between the primary fraud, [the alleged aider and abettor's] knowledge of the fraud[,] and what [the alleged aider and abettor] did with the intention of advancing the fraud's commission.'" *Krys*, 749 F.3d at 127 (citation omitted).

The Opposition identifies only two allegations to support substantial assistance: [redacted] (Opp. at 21.) Neither pass muster.

First, contrary to the Opposition, [redacted] The charging paragraphs for Count 3 do allege that [redacted] (TPC ¶ 433.) But the generalized reference to the

"BRILLC Series Members" is misleading and overbroad. Contrary to the Opposition, the specific allegations in the TPC about [redacted] (TPC ¶¶ 392-393, 395 ([redacted]).) As to the fact of [redacted], that allegation alone, amounting to an investment in an insurance business, is not sufficient to find an overt act that substantially assists a fraud or breach of fiduciary duty proximately causing any injury to SHIP. SHIP's only non-conclusory allegation against Lawrence Partners – [redacted] (TPC ¶ 30) – is far from the particularized allegation of substantial assistance necessary to sustain aiding-and-abetting claims.

III. SHIP's 'Catch-All' Civil Conspiracy Claim Similarly Fails

This Court recently dismissed a conspiracy claim in the *Trott* action because it was duplicative of the plaintiff's aiding-and-abetting claims. *In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 104562, at *39-41. SHIP's civil conspiracy claim here is likewise premised on the same allegations that support its aiding-and abetting-claim (*see* TPC ¶ 449).

In any event, the civil conspiracy claim is substantively deficient, failing to meet the strictures of Rule 9(b) or Rule 8. Setting aside the conclusory allegation of control by Murray Huberfeld, the TPC alleges nothing more against Lawrence Partners [redacted]. Common ownership alone is not sufficient to establish an agreement. *See Donini Int'l, S.p.A. v. Satec (USA) LLC*, No. 03 Civ. 9471 (CSH), 2004 U.S. Dist. LEXIS 13148, at *8-11 (S.D.N.Y. July 13, 2004). SHIP's civil conspiracy claim cannot survive without identifying the "times, facts, and circumstances" by which Lawrence Partners purportedly agreed

to join the alleged conspiracy. *Brownstone Inv. Grp., LLC v. Levey*, 468 F. Supp. 2d 654, 661 (S.D.N.Y. 2007). SHIP has not done so.

IV. The Unjust Enrichment Claim Is Factually And Legally Deficient

SHIP's Opposition offers no meaningful answer to the myriad legal deficiencies plaguing its unjust enrichment claim against Lawrence Partners. Principally, SHIP argues that Lawrence Partners should be required to defend this case despite no allegation that it was unjustly enriched. Specifically, SHIP complains that Lawrence Partners "attempt[s] to impose an unreasonably high standard of proof on SHIP at the notice pleading stage" and that SHIP's inability "to trace the exact flow of funds through numerous Moving Defendants and pin an exact dollar amount on each party at the pleading stage" should not be fatal to their claim. (Opp. at 26.) But SHIP misses the point. SHIP's claim should be dismissed not because it has failed to pin an "exact dollar amount" on Lawrence Partners' purported enrichment, but because they fail to allege that Lawrence Partners received enrichment at SHIP's expense *at all*. Contrary to the Opposition, the TPC does not "contain[] . . . factual allegations to support that Lawrence Partners was unjustly enriched at SHIP's expense." (Opp. at 26.) Rather, neither the Opposition nor the TPC point to any funds that Lawrence Partners actually received. (*See* TPC ¶¶ 462, 464 (stylizing claim as "to the extent that" Lawrence Partners received any benefit).) Because the TPC does not allege that Lawrence Partners was actually enriched – let alone at SHIP's expense – the unjust enrichment claim fails.

Second, SHIP cannot escape settled law (including recent rulings by this Court) holding that an unjust enrichment claim is barred by a valid agreement, even as against a nonparty to the agreement. SHIP's Opposition argues that the IMAs between the Beechwood Entities and SHIP do not bar its unjust enrichment claim against Lawrence Partners because Lawrence Partners "w[as] not [a party] to the IMAs and the claims against [it] are not subsumed by SHIP's breach of contract claims against the Beechwood Advisors." (Opp. at 27.) SHIP's argument does not square

with the law. As this Court recently held, an unjust enrichment claim cannot stand where an express agreement governs the rights at issue, even as against a third-party non-signatory to the agreement. *In re Platinum-Beechwood Litig.*, 377 F. Supp. 3d 414, 426-27 (S.D.N.Y. 2019).

Nor does SHIP's argument square with the facts. In the Opposition, SHIP flees from its pleading, asserting that "the factual allegations against . . . Lawrence Partners . . . are not based on performance fees payable under the IMAs." (Opp. at 27.) Yet, the plain language of the TPC confirms that the unjust enrichment claim is premised precisely upon such fees. *See* TPC ¶¶ 462, 464 ("to the extent that . . . the BRILLC Series Members . . . obtained the proceeds of any Performance Fees, dividends, or distributions they too were unjustly enriched"). Here, there is no question that the IMAs govern the payment of Performance Fees and the transactions with SHIP at issue in the TPC (*see generally* TPC ¶¶ 162-231) and that these are the same sums underlying SHIP's unjust enrichment claim against Lawrence Partners (TPC ¶¶ 462, 464). The fact that SHIP's unjust enrichment claim is based upon such amounts – even against a non-signatory to the agreement – is fatal to its claim. *See In re Platinum-Beechwood Litig.*, 377 F. Supp. 3d at 426-27.

Finally, SHIP fails to respond to Lawrence Partners' argument that the unjust enrichment claim should be dismissed for the independent reason that SHIP's relationship to Lawrence Partners is too attenuated to state a claim. (*See* Opening Br. at 13-14.) Accordingly, SHIP's unjust enrichment claim against Lawrence Partners should be deemed abandoned and dismissed. *In re Platinum Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *70 (dismissing unjust enrichment claim against parties where plaintiffs opposition did not address argument for dismissal) (*citing Lipton v. City of Orange, N.Y.*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004)).

CONCLUSION

All of SHIP's third-party claims against Lawrence Partners should be dismissed with prejudice.

Date: August 5, 2019

Respectfully submitted,

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