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.	

REPLY MEMORANDUM OF LAW BY THIRD-PARTY DEFENDANTS WHITESTAR LLC, WHITESTAR LLC II, AND WHITESTAR LLC III IN FURTHER 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 (collectively, the "Whitestar Entities" or "Whitestar") respectfully submit this reply in further 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 opposition brief fails to address the deficiencies in the TPC regarding its wholly conclusory and unsupported allegations that Whitestar somehow sheltered or benefitted from ill-gotten proceeds of the fraudulent "scheme" alleged in the TPC. SHIP does not point to a single allegation, either specific to Whitestar or group-pled against the BRILLC Series Members, that reflects Whitestar receiving or holding any money, much less indicating where that money came from, or that such money was the fruit of a fraudulent scheme. Without such allegations, as SHIP apparently recognizes, its claim that Whitestar served as a vehicle to hide the proceeds of a fraud cannot survive this motion to dismiss.

Unsurprisingly then, SHIP pivots to a different argument, one that also depends on impermissible group pleading – that the Whitestar Entities are liable, not for the money they allegedly received as proceeds of a fraud, but as "alter egos" of David Bodner and Murray Huberfeld, the husbands of Whitestar's owners. This argument also fails. SHIP alleges that Whitestar purchased, through the BRILLC Series Members, preferred stock of Beechwood, and issued a demand note to fund the purchase. Even assuming that Bodner and Huberfeld directed Whitestar's purchase of this preferred stock, that transaction is not actionable by SHIP, since SHIP was not injured by it and because there was nothing unusual or dishonest about it. SHIP thus effectively seeks to hold Whitestar responsible for the broader scheme of allegedly tortious

conduct undertaken by Bodner and/or Huberfeld – e.g., their alleged role in inducing SHIP to enter investment management agreements with Beechwood, or their alleged assistance in Beechwood investing SHIP's assets in unsuitable investments – notwithstanding the TPC's lack of any factual allegations connecting Whitestar itself, or its principals, to any such allegedly actionable fraudulent conduct.

Finally, the TPC's allegations of unjust enrichment against Whitestar fail, for two reasons: first, because of the lack of any non-conclusory allegation that Whitestar was enriched at all; and second, because even if the TPC did make such a non-conclusory allegation of enrichment, this Court has already found that such a claim would be legally barred by the existence of the IMAs.

Because there are no well-pleaded allegations that Whitestar itself committed any actionable wrongs against SHIP, and because there are no alleged facts to support Whitestar's designation as an alter ego of Bodner and Huberfeld, the allegations against Whitestar must be dismissed.

ARGUMENT

A. SHIP's Arguments Rely on Improperly Group Pled Allegations.

SHIP does not – and cannot – point to specific allegations in the TPC against the Whitestar Entities themselves that could survive a motion to dismiss. The two paragraphs in the TPC that reference Whitestar do not allege facts that even approach a cognizable cause of action against them. (TPC ¶¶30, 381.)

Effectively acknowledging the TPC's lack of specific allegations about Whitestar, SHIP resorts to reliance on, and defense of, its group-pled allegations against the BRILLC Series Members. To justify doing so, SHIP references this Court's April 11, 2019 decision in which it found that certain defendants had fair notice of the claims against them despite SHIP's use of

group pleading. (Opp'n Br., at 1-2.) However, in that instance the Court found the allegations sufficient because the TPC described "in exhaustive detail" not only the alleged Beechwood fraud but also the relevant defendants' individualized roles in it. (ECF No. 225).[1] Here, however, SHIP just broadly alleges that the "BRILLC Series Entities, with the BRILLC Series Members acting on their behalf," engaged in transactions to fund and conceal the ownership of Beechwood. (Opp'n Br., at 11; TPC ¶¶433-35.)

The TPC does not provide any detail beyond that group-pled allegation to indicate, for example, Whitestar's purported role in or knowledge of the transactions, what (if any) documents Whitestar executed in connection with the transactions, or whether any of the Whitestar Entities funded the transactions. The TPC simply presumes that all of the BRILLC Series Members knowingly and actively funded and participated in these transactions, without any factual allegations to support that presumption. For example, none of the portions of the TPC that SHIP's opposition cites in support of its arguments that Whitestar "seeded" Beechwood actually alleges that Whitestar provided any funding to Beechwood. (TPC ¶¶29, 68, 97.)

Thus, contrary to SHIP's arguments, the presumptions on which it relies do not provide any clarity about Whitestar's supposed role in the transactions and are insufficient to withstand a motion to dismiss, particularly given the heightened pleading standard SHIP must meet under Rule 9(b). *See Fezzani v. Bear, Stearns & Co.*, 592 F. Supp. 2d 410, 428-29 (S.D.N.Y. 2008); *Welch v. TD Ameritrade Holding Corp.*, No. 07-cv-6904 (RJS), 2009 WL 2356131, at *21 (S.D.N.Y. July 27, 2009).

1. Unless otherwise noted, citations to the docket reference *In re Platinum Beechwood Litigation*, No. 1:18-cv-6658-JSR.

B. The TPC Lacks Sufficient Allegations to Establish That the Whitestar Entities Were Alter Egos of Bodner and Huberfeld.

Even if the Court ascribes the TPC's allegations against the BRILLC Series Members to Whitestar, those allegations are still insufficient to state a cause of action. SHIP's opposition and the TPC rely on repeated summary assertions that Bodner and Huberfeld directed Whitestar's investment in Beechwood preferred stock, and that fact somehow made the Whitestar Entities their alter egos. (TPC ¶¶ 30, 31, 96, 436, 442.) But such a conclusory, unsupported claim cannot gain validity through mere repetition.

As an initial matter, neither the TPC nor SHIP's opposition brief describes how Bodner or Huberfeld used any authority they had with respect to the Whitestar Entities in connection with any conduct relevant to SHIP. Instead, SHIP effectively seeks to hold the Whitestar Entities liable for tortious acts allegedly committed by Bodner and Huberfeld far removed from investing Whitestar capital in Beechwood preferred stock – e.g., allegedly helping others to induce SHIP to enter IMAs or to make unsuitable investment choices for SHIP) even though that conduct is not alleged to have any connection to Whitestar. The TPC's repeated assertion that Whitestar's ties to Bodner and Huberfeld somehow mean that, ipso facto, Whitestar took actions that injured SHIP is both logically and legally incorrect, as well as wholly unsupported by any factual allegation.

At bottom, SHIP relies on nothing other than the fact that Naomi Bodner and Laura Huberfeld owned Whitestar to support an argument that Whitestar is liable for their husbands' alleged conduct, even when that alleged conduct is outside the scope of Whitestar's investments in Beechwood preferred stock. SHIP cartoonishly mischaracterizes Whitestar's stance as, "the Whitestar Entities are owned by the wives of Bodner and Huberfeld, and so they must not be involved in the conspiracy perpetrated by their husbands." (Opp'n Br., at 23 (emphasis added).)

In fact, Whitestar's arguments are based on the unremarkable proposition that a wife and husband are not automatically co-conspirators in a fraud one of them allegedly perpetrates, merely by virtue of their marital relationship.

Indeed, under New York law, establishing that two parties are alter egos requires the same proof as that necessary to pierce the corporate veil. *MWH Int'l v. Inversora Murten, S.A.*, No 11-cv-2444, 2015 WL 728097, at *11 (S.D.N.Y. Feb. 11, 2015). Generally, "New York law requires the party seeking to pierce a corporate veil to make a two-part showing: (i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party." *Am. Fuel Corp. v. Utah Energy Dev. Co., Inc.*, 122 F.3d 130, 134 (2d Cir. 1997) (emphasis added). Put another way, even allegations reflecting "complete domination . . . standing alone, [are] not enough; some showing of a wrongful or unjust act toward plaintiff is required." *Morris v. N.Y. State Dep't of Taxation and Fin.*, 82 N.Y.2d 135, 141- 142 (1993) (emphasis added).

Accordingly, the plaintiff must allege and prove that the bad actors, "through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against" the plaintiff. *Id.* (reversing decision that pierced the corporate veil in part because there was no evidence that the actions actually taken by the corporation reflected an intent to defraud); *Michaels v. Banks*, 959 F. Supp. 2d 244, 245-46 (N.D.N.Y. 2013) (plaintiff failed to prove that individual caused a corporation to "perpetrate a wrong against plaintiffs that caused them unjust loss or injury").

Here, the TPC contains no allegations that Bodner or Huberfeld exercised domination over Whitestar with respect to any conduct that could conceivably be construed as tortious against SHIP. It simply alleges that Bodner and Huberfeld's wives owned the Whitestar Entities

and presumes, in purely conclusory fashion, that Bodner and Huberfeld therefore dominated them in in all respects such that Bodner and Huberfeld's alleged knowledge and intent can be attributed to Whitestar, even with respect to transactions Whitestar did not participate in. Particularly in light of the law's requirement that a plaintiff must allege domination of an alter ego with respect to respect to specific, relevant transactions, such conclusory pleading is insufficient – let alone under a Rule 9(b) particularity standard – to demonstrate that Bodner and Huberfeld used the Whitestar Entities as vehicles to carry out tortious conduct that injured SHIP. *See, e.g., Plus Enters. v. Sun Trading Int'l, LLC*, No. 16-cv-8987 (VB)(FED), 2017 WL 6492117, at *6 (S.D.N.Y. Nov. 29, 2017) ("[A] failure to plead in nonconclusory language facts establishing all the elements [of a veil piercing or alter ego claim] requires dismissal"); *Sysco Food Serv. of Metro N.Y., LLC v. Jekyll & Hyde, Inc.*, No. 08-cv-2958 (BSJ)(JCF), 2009 WL 4042758, at *3 (S.D.N.Y. Nov. 17, 2009) (to demonstrate alter ego liability, a plaintiff "may not rely on conclusory statements, but must allege specific facts").

C. SHIP's Inability to Establish the Whitestar Entities as Alter Egos of Bodner and Huberfeld Precludes SHIP From Stating Valid Claims Against the Whitestar Entities.

Aside from its utterly conclusory and unsupported allegations that the BRILLC Series Members held and benefitted from the proceeds of the fraud alleged in the TPC, the remaining allegations against that group focus on the "seeding" transactions that SHIP alleges assisted in the alleged Beechwood fraud. (Opp'n Br., at 11.) However, as noted above, nothing about Whitestar's alleged participation in those transactions can be construed as nefarious.

SHIP claims that these transactions facilitated the Beechwood fraud because they allowed Beechwood to get "off the ground." (Opp'n Br., at 21.) But even if Whitestar is treated as an instrument of Bodner and Huberfeld with respect to those transactions, simply providing

funding for a business entity is not inherently tortious and cannot sustain SHIP's claims.[2] The funding transaction SHIP identifies is both commonplace as well as the type that others skilled in the insurance industry would manage. And the use of trusts and entities to represent the interests of individuals is neither unlawful nor indicative of a fraudulent scheme, regardless of whether those entities are named in a manner that reflects their beneficial owners or otherwise. That is particularly true where, as here, SHIP never asked who the beneficial owners of the relevant entities were at the time of the transaction, and such information was disclosed to regulators soon after the transaction occurred.

Given the routine nature of the transactions the BRILLC Series Members are alleged to have taken, SHIP's claims against Whitestar cannot survive, as the mere purchase of Beechwood preferred stock did not assist a fraudulent misrepresentation, omission, or fiduciary breach that harmed SHIP. SHIP attempts to skirt the issue by attempting to loosely tie the Whitestar Entities to the fraudulent "scheme" described in the TPC – conduct disconnected from Whitestar and outside the scope of anyone acting on behalf of Whitestar. But vague assertions that Whitestar was among dozens of players in a purported fraudulent scheme does not satisfy SHIP's burden.

To the contrary, and as noted in Whitestar's opening brief, a claim for aiding and abetting fraud requires that "the defendant had actual knowledge of the fraud." *Rosner v. Bank of China*, 349 Fed. App'x 637, 638 (2d Cir. 2009). And a claim for aiding and abetting a breach of fiduciary duty requires that the defendant "knowingly induced or participated in the breach." *Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, No. 00-cv-8688 (WHP),

2. To the extent the Court finds that Whitestar served as an alter ego of Bodner and Huberfeld, Whitestar incorporates the arguments Bodner and Huberfeld raise in their individual motions to dismiss. To the extent valid claims are not alleged against Bodner and Huberfeld, none can survive against Whitestar either.

2003 WL 22218643, at *7-8 (S.D.N.Y. Sept. 25, 2003).[3] There is simply no allegation in the TPC that the Whitestar Entities, or their principals, had any knowledge that Beechwood would eventually participate in an allegedly fraudulent scheme, intended to assist Beechwood in doing so, or themselves intended to participate or did participate in the alleged scheme. And, as noted above, the TPC's allegations regarding Bodner and Huberfeld's knowledge are unavailing, because of the TPC's failure to make non-conclusory allegations that Whitestar was an alter ego of Bodner and/or Huberfeld with respect to these transactions.

In opposition, SHIP acknowledges that an aiding and abetting claim requires that a defendant "affirmatively assists, helps conceal, or . . . enables the fraud to proceed" through inaction. (Opp'n Br., at 19.) The case SHIP cites for that standard dismissed an aiding and abetting claim against Citibank because the complaint failed to allege that Citibank had "actual knowledge of the primary wrong" despite allegations about red flags that might have alerted Citibank to the alleged fraud and possibly rendered Citibank's actions "grossly negligent." *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, No 98-cv-4960 (MBM), 1999 WL 558141, at *8-9 (S.D.N.Y. July 30, 1999).

SHIP also attempts to evade the requirement that a defendant must be "an active participant" to aid and abet fraud (Opp'n Br., at 19), but the case on which it relies makes clear that the conduct alleged against Whitestar is woefully deficient to establish liability for aiding and abetting. In *In re Refco Inc. Securities Litigation*, the court denied the defendant's summary judgment motion because there was evidence the defendant "engineer[ed] a major transaction to

3. Similarly, a claim for civil conspiracy requires allegations of "intentional participation in furtherance of the conspiracy." *Donni 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). SHIP does not address the TPC's failure to adequately plead intentional participation by the Whitestar Entities in any alleged conspiracy.

allow the fraudsters to cash out." No. 07-cv-8663 (JSR), 2011 WL 13261982, at *3 (S.D.N.Y. Apr. 11, 2011). The TPC's allegations against Whitestar do not approach the threshold applied by the *Citibank* and *Refco* cases SHIP itself relies on. The TPC contains no allegations that Whitestar knew facts that made them "grossly negligent" (or worse) in failing to detect a fraud. Nor does it allege that Whitestar "engineered" the transactions that purportedly facilitated the Beechwood fraud.

Ultimately, SHIP acknowledges this failure to plead these elements but attempts to circumvent it by pleading for the Court to eschew "formalistic adherence to the fiction that Huberfeld and Bodner had nothing to do with" Whitestar. (Opp'n Br., at 19.) However, the TPC alleges no facts to support the assumption SHIP asks the Court to adopt. Instead, SHIP asks the Court to ignore the law governing alter ego liability and impute all knowledge of David Bodner and Murray Huberfeld to Whitestar merely because SHIP baldly asserts that David Bodner and Murray Huberfeld *are* Whitestar, when in fact Whitestar is owned by Naomi Bodner and Laura Huberfeld, not their husbands. SHIP explicitly concedes this, asking the Court to "plausibly . . . infer[]" that Whitestar had actual knowledge of the alleged fraud. (Opp'n Br., at 18.) But without any allegations to support knowledge by Whitestar of any alleged fraud – and needing to meet the heightened pleading standard of Rule 9(b) – the scant allegations against Whitestar included in the TPC do not provide a valid basis for SHIP's claims against them.[4]

4. The cases on which SHIP's opposition relies do not provide support for SHIP's argument that the Court can "infer" the concededly inadequately pled elements of its claims. In *Thomas v. Shiloh Indus., Inc.*, No. 14-cv-7449 (KMW), 2018 WL 4500867, at *3-7 (S.D.N.Y. Sept. 19, 2018), the court discussed the possibility of imputing the scienter of a corporate employee to the corporation itself – not imputing the alleged fraudulent intent of a husband to a wife or of one corporate entity to a loosely related entity – and ultimately dismissed the plaintiff's complaint for lacking sufficient allegations to support the imputation the plaintiff sought.

D. The TPC Does Not Allege a Valid Basis for an Unjust Enrichment Claim Against the Whitestar Entities.

SHIP argues that because the Whitestar Entities were not parties to the IMAs, the existence of those contracts does not bar its unjust enrichment claims. However, SHIP's opposition fails to address settled law, cited previously by this Court, that a valid contract governing the subject matter of a case "preclude[s] a claim for unjust enrichment even against a third-party non-signatory to the agreement." *In re Platinum-Beechwood Litig.*, 377 F. Supp. 3d 414, 427 (S.D.N.Y. 2019) (emphasis added).

Additionally, SHIP argues that its allegations against the Whitestar Entities "are not based on performance fees payable under the IMAs." (Opp'n Br., at 27.) However, SHIP does not identify how, in the absence of allegations that Whitestar received performance fees, Whitestar was enriched in any way by its involvement in the alleged fraud described in the TPC. Thus, as noted in Whitestar's opening brief, not only is SHIP's unjust enrichment claim against Whitestar legally precluded, it is also insufficiently pled because the TPC contains no indication of any enrichment at all.

CONCLUSION

For the foregoing reasons, and those in the Whitestar Entities' opening memorandum of law in support of their motion to dismiss, the Whitestar Entities respectfully request that the Court dismiss SHIP's third-party claims against them.

In *Landesbank Baden-Wurttemberg v. RBS Holdings USA Inc.*, 14 F. Supp. 3d 488 (S.D.N.Y. 2014), unlike here, the complaint contained allegations as to each defendant's role in the alleged fraud, specifically alleged that the moving defendant itself had actual knowledge of the tortious conduct, and explained how its knowledge was inferable based on specific facts. *Id.*

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New York, New York

Respectfully Submitted,
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