

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,

18-cv-12018-JSR

v.

BEECHWOOD RE LTD., *et al.*,
Defendants.

**THIRD-PARTY DEFENDANT MURRAY HUBERFELD'S REPLY MEMORANDUM
OF LAW IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE THIRD-
PARTY COMPLAINT OF BANKERS CONSECO LIFE INSURANCE COMPANY AND
WASHINGTON NATIONAL INSURANCE COMPANY**

Third-Party Defendant Murray Huberfeld ("Huberfeld") respectfully submits this reply memorandum of law in further support of his motion (the "Motion") to dismiss the third-party complaint ("TPC") of Bankers Consec Life Insurance Company ("BCLIC") and Washington National Insurance Company ("WNIC", together with BCLIC, the "TPPs") pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Huberfeld, both individually and by joinder with the motion of Third-Party Defendant David Bodner, has moved to dismiss the TPPs' claims against him.

The Opposition¹ confirms that the TPPs' aiding-and-abetting fraud and breach of fiduciary duty claims against Huberfeld (Counts 7 and 12) are legally deficient. The TPPs do not – because they cannot – point to any allegations in the TPC pleading affirmative acts (or other conduct that can, as a matter of law, amount to substantial assistance) in which Huberfeld engaged, let alone any that causally connects him to the sprawling scheme purportedly carried out by the “Co-conspirators” or the “Nordlicht Group.” (*See* Opp. at 49.) As the TPPs effectively concede, the mere allegations that Huberfeld is alleged to have been the beneficial owner of certain entities that had an equity stake in Beechwood (TPC ¶¶ 518, 520, 654-655), [REDACTED] (TPC ¶¶ 588-589), and that he received (but never sent) a handful of communications from the alleged wrongdoers (TPC ¶¶ 569, 503, 604, 482, 486) do not pass Rule 9(b)'s muster. Nor does the TPC aver any factual underpinning connecting Huberfeld to any of the alleged misrepresentations, omissions, or other wrongful acts forming the predicate fraud and breach of fiduciary duty claims. (*See, e.g.*, TPC ¶¶ 524-525, 530, 605-606, 610, 644, 653-655.)

The only purported wrongful act that the TPPs attribute to Huberfeld in the Opposition is a purported email (the “July 30, 2015 Email”), in which the TPPs assert that Huberfeld “confessed to the fraud and conspiracy they engineered.” (Opp. at 49 (citing TPC ¶ 472, in turn referencing “Ex. 31 to the First Amended Complaint in the PPVA Action”).) However, as the TPPs set forth in the Opposition, and as is obvious from the face of the document, the July 30, 2015 Email was not written by Huberfeld and was not sent to Huberfeld. Nor is there any indication on the face of the exhibit that Huberfeld ever saw the July 30, 2015 Email. The Court has confirmed this same

¹ References to the “Opposition” or “Opp.” are to the Omnibus Memorandum of Law in Opposition to Motions to Dismiss Cross-Claims and Third-Party Complaint of Bankers Conseco Life Insurance Company and Washington National Insurance Company, and Beechwood Re's Motion to Compel Arbitration (Doc. No. 439.)

understanding. (*See* Opp. at 22 (quoting statement by the Court describing the July 30, 2015 Email as allegedly “conveying to Mr. Bodner” the information in the communications).) Despite the fact that the July 30, 2015 Email was not sent to or written by Huberfeld, the TPPs rely on this sole communication at least four times and as the primary basis of support for all of their claims. (*See, e.g.*, Opp. at 5, 22, 39, and 49.) The TPPs’ exclusive reliance on the July 30, 2015 Email is proof positive of the dearth of any other legally sufficient facts to support their claims against Huberfeld. To be sure, the supposed litany of other allegations identified by the TPPs as being directed to Huberfeld are either conclusory, or explicitly attributed to others. (*See* Declaration of Jenna C. Polivy, dated June 12, 2019, Doc. No. 440, at Exhibit J.) Absent any allegations of a single oral or written statement, or any fraudulent act, attributable to Huberfeld’s direction or supervision, the aiding-and-abetting claims must be dismissed.

For similar reasons, the TPPs’ unjust enrichment/constructive trust claim (Count 19) fails because the relationship between Huberfeld and the TPPs is too attenuated as a matter of law to state a claim for unjust enrichment. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011); *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, No. 15-CV-3538 (VSB), 2018 U.S. Dist. LEXIS 215143, at *74 (S.D.N.Y. Dec. 21, 2018) (dismissing unjust enrichment claim: “[a]lthough the nature of the relationship required to establish an unjust enrichment claim has not been clearly defined, the relationship is ‘too attenuated’ if the parties [are] not connected in a manner that ‘could have caused reliance or inducement,’ or if they ‘simply had no dealings with each other.’”) (citations omitted). In the Opposition, the only allegations to which the TPPs point to connect Huberfeld to the TPPs are that Huberfeld “secretly owned, controlled and bankrolled Beechwood Re through his Beechwood Trusts.” (Opp. at 62.) Because these allegations are conclusory and without any factual underpinning, they do not comply with Rule 9(b)’s requirement that the fraud underlying the unjust enrichment claim be pleaded with

particularity. *See, e.g., Welch v. TD Ameritrade Holding Corp.*, No. 07 Civ. 6904 (RJS), 2009 U.S. Dist. LEXIS 65584, at *32-33 (S.D.N.Y. July 27, 2009) (holding that Rule 9(b) applied to unjust enrichment claim premised on alleged fraudulent actions).

Finally, for brevity and to avoid repetition, Huberfeld respectfully joins in the reply memorandum of law of Bodner and other similarly situated moving defendants demonstrating that the TPPs' RICO claims (Counts 1-2) are barred by the PSLRA, and their contribution and indemnity claim (Count 18) is not available under the law or the facts alleged in the TPC.

CONCLUSION

For all of the reasons set forth herein and in Huberfeld's opening brief, as well as in the memoranda and reply memoranda of law filed by Bodner and other similarly situated moving third-party defendants, the TPC should be dismissed with prejudice against Huberfeld.

Date: June 26, 2019

Respectfully submitted,

/s/ Jeffrey C. Daniels

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