

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE PLATINUM-BEECHWOOD
LITIGATION

:
:
: 18-cv-06658 (JSR)
:
:

SENIOR HEALTH INSURANCE COMPANY
OF PENNSYLVANIA,

:
:
:
:
: 18-cv-12018 (JSR)
:
:

Third-Party Plaintiff,

- against -

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

Third-Party Defendants.

**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)**

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Third-Party Defendant Elliot Feit (“Defendant” and/or “Feit”) submits this memorandum of law in support of his motion to dismiss 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).

For the reasons set forth below, as well as for the reasons set forth in the accompanying Affidavit of Elliot Feit, dated July 15, 2019 (“Feit Aff.”), the Court should 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 may be just and proper.

PRELIMINARY STATEMENT

The Complaint in this third-party action should not have been filed – at least not as stated against Defendant Feit. Even if SHIP has a legally cognizable claim against one or more of the Third-Party Defendants, the Complaint fails to state any such claim against Defendant Feit.

In its Complaint, SHIP alleges a broad-brush conspiracy, involving dozens of alleged actors over a period of years, “to gain and retain, by means of artifice and fraud, access to the reserves of SHIP and other insurance companies in order to perpetuate the Ponzi-like scheme being carried out by Platinum and to otherwise enrich themselves and their related parties (the ‘Platinum-Beechwood Scheme’).” (Complaint at ¶ 1.) The Complaint, however, fails to set forth – because it cannot set forth – any specific and detailed allegations regarding Defendant Feit’s involvement in the Platinum-Beechwood Scheme.

And the reasons for this are as simple and straightforward as they are numerous. For example: (i) Defendant Feit did nothing more than carry out his ministerial and administrative duties as a finance director at Beechwood; (ii) Defendant Feit gained nothing as a result of the alleged Platinum-Beechwood Scheme; (iii) Defendant Feit never was employed by, or performed

any work for, any Platinum entity; and (iv) Defendant Feit had nothing to do with Platinum or any of its investments.

Nonetheless, SHIP has brought four separate causes of action against Defendant Feit; namely: (i) aiding and abetting fraud (count one); (ii) aiding and abetting breach of fiduciary duty (count two); (iii) civil conspiracy (count five); and unjust enrichment (count seven). For a variety of reasons, each of these causes of action, against Defendant Feit, must be dismissed.

First, the Complaint is devoid of any specific allegation showing that Defendant Feit had “actual knowledge” of any fraud or breach of fiduciary duty (Point I(A), *infra*) or that he provided any “substantial assistance” in the furtherance of any such fraud or breach (Point I(B), *infra*). As a result, the Court must dismiss the Complaint’s claims for aiding and abetting fraud (count one) and aiding and abetting breach of fiduciary duty (count two), as stated against Defendant Feit. (Point I, *infra*.)

Second, the Court also must dismiss the Complaint’s non-specific and unsubstantiated claim for civil conspiracy (count five) as stated against Defendant Feit. SHIP does not – because it cannot – specifically name Defendant Feit, allege a specific agreement involving Defendant Feit, allege that Defendant Feit took any over act in furtherance of any agreement, or allege any intentional participation by Defendant Feit in furtherance of a plan or purpose. What’s more, because the Complaint’s claim for civil conspiracy arises out of the same alleged facts and circumstances as its other claims against Defendant Feit, the Court must dismiss that claim. (Point II, *infra*.)

Finally, the Court must dismiss the Complaint’s claim for unjust enrichment (count seven) because – as with the civil-conspiracy claim – Defendant Feit is not named separately and specifically. What’s more, the Complaint fails to allege – because it cannot allege – that Defendant Feit was enriched, in any way, at SHIP’s expense. (Point III, *infra*.)

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

STATEMENT OF FACTS

SHIP named Feit as a Defendant in this third-party action, lumping Feit together with a number of alleged “Co-Conspirators” (Complaint at ¶ 1, n.3), “Co-Conspirator Defendants” (*id.*), and “Beechwood Insiders” (*id.* at ¶ 4, n.7).¹ Aside from carrying out certain of his administrative and ministerial work responsibilities, however, SHIP does not allege – specifically or with the requisite level of factual detail – that Defendant Feit engaged in any specific wrongdoing or had any specific knowledge of any such wrongdoing.

In general, SHIP alleges that the Co-Conspirators, including Defendant Feit, carried out an alleged conspiracy “to gain and retain, by means of artifice and fraud, access to the reserves of SHIP and other insurance companies in order to perpetuate the Ponzi-like scheme being carried out by Platinum and to otherwise enrich themselves and their related parties (the ‘Platinum-Beechwood Scheme’).” (*Id.* at ¶ 1.) Devoid of any specific allegations regarding Defendant Feit, the Complaint asserts four separate causes of action against the alleged Co-Conspirators Defendants, including Feit; namely: (i) aiding and abetting fraud (*id.* at ¶¶ 410-418 (count one)); (ii) aiding and abetting breach of fiduciary duty (*id.* at ¶¶ 419-428 (count two)); (iii) civil conspiracy (*id.* at ¶¶ 445-453 (count five)); and (iv) unjust enrichment (*id.* at ¶¶ 461-466 (count seven)).

¹ As recognized by courts in this District, such group pleading is impermissible. *See In re Alstrom SA Secs. Litig.*, 406 F. Supp. 2d 433, 450 (S.D.N.Y. 2005); *Elliot Assocs., L.P. v. Hayes*, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000) (explaining that group pleading may be appropriate only “where the defendants are a narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document”).

Although Defendant Feit worked as a finance director at Beechwood, he was employed by MSD Administrative Services, LLC and was never employed by, or had any affiliation with, any Platinum-related entity. (Feit Aff., ¶¶ 3-8, Exh. A.) The Complaint (at ¶ 35), therefore, incorrectly identifies Feit as “BAM I’s CFO,” and Defendant Feit cannot be alleged to have undertaken any kind of “dual role” with respect to Beechwood and Platinum (*see, e.g., id.* at ¶ 424 (erroneously alleging that Defendant Feit and other alleged Co-Conspirators “served in dual roles at Platinum *and* Beechwood” (emphasis in original)). Indeed, Defendant Feit was employed by a Beechwood-related entity for the purpose of carrying out administrative and ministerial tasks for certain Beechwood entities and *not* for any Platinum entities. (Feit Aff., ¶¶ 3-8, Exh. A.)

In fact, SHIP implicitly admits Defendant Feit’s limited role. In its Complaint, SHIP alleges that “Feit was responsible for *calculating* any performance fees to which any of the Beechwood Advisors were allegedly entitled, for *submitting* the performance fee requests to SHIP, and for *responding* to request from SHIP for information about those requests.” (Complaint at ¶ 35 (emphases added); *see also id.*, ¶¶ 347, 354, 360, 378, 414).) SHIP further alleges that Feit “was on [Beechwood’s] Finance Committee and made monthly presentations to the board on the financial performance of the Beechwood Advisors, including the assets under the IMAs” (*id.*, ¶ 35), and “worked with the valuation firms to get confirmation of Beechwood’s inflated valuations” (*id.*).

Such alleged calculations, submissions, responses, presentations, and other work – even if/when assumed to be true, for purposes of the present motion – do not form the factual predicate to any legally viable cause of action against Defendant Feit. Nonetheless, SHIP attempts to attribute liability to Defendant Feit for the alleged actions of certain alleged groups – in which he rarely participated – and in connection with which Defendant Feit’s alleged actions

were nothing more than administrative and ministerial (*e.g.*, calculations, submissions, responses, presentations, and other work).

What's more, the Complaint only rarely mentions Defendant Feit, and any allegations with respect to his understanding or knowledge of any alleged wrongdoing is conclusory and devoid of any specific factual allegations (*e.g.*, "Feit had actual knowledge of all aspects of the Platinum-Beechwood Scheme and took material steps to further its ill goas, to the detriment of SHIP" (Complaint, ¶ 35)). In fact, the Complaint's more specific allegations, regarding Defendant Feit's actual alleged conduct, fall far short of demonstrating any wrongful knowledge or (in)action. (*Id.*, ¶¶ 347, 354, 360, 378, 414.)

Put simply, without more, the claims asserted by SHIP against Defendant Feit must be dismissed. Fed. R. Civ. P. 12(b)(6).

ARGUMENT²

"[I]n order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," Fed. R. Civ. P. 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When a plaintiff has failed "to state a claim upon which relief can be granted," a defendant's motion to dismiss should be granted. Fed. R. Civ. P. 12(b)(6).

To survive such a motion, therefore, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570 – *i.e.*, one where "the plaintiff

² A number of other Third-Party Defendants have moved to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), the same causes of action that SHIP has asserted against Defendant Feit (*e.g.*, counts one, two, five, and seven of the Complaint), each of which must be dismissed to the extent asserted against Defendant Feit. Although the moving Defendants have made their motions separately and each is individually situated, many of the factual and legal bases supporting dismissal of SHIP's claims against those Defendants apply equally to Defendant Feit and the present motion.

pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (adding that “[w]here a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief” (citation and quotation omitted)). What’s more, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citation omitted).

If the factual allegations are well pleaded, a “two-pronged approach” should be employed in which the motion court: (i) assumes the veracity of the allegations; and (ii) determines whether they “plausibly give rise to an entitlement to relief.” *Id.*; *see also Thule AB v. Advanced Accessory Holdings Corp.*, 2010 U.S. Dist. LEXIS 45046, at *10-11 (S.D.N.Y. May 4, 2010). If “the well-pleaded facts do not permit the court to infer more than the *mere possibility* of misconduct,” dismissal is appropriate. *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 321 (2d Cir. 2010) (emphasis added; quotation omitted).

Employing this two-pronged approach, it becomes readily evident – as shown more fully below – that the Complaint does not set forth any plausible or legally valid claim for relief as stated against Defendant Feit. Accordingly, the claims asserted by SHIP against Defendant Feit must be dismissed in their entirety.

POINT I

BECAUSE PLAINTIFF FAILS TO STATE AIDING AND ABETTING CLAIMS AGAINST DEFENDANT FEIT, THOSE CAUSES OF ACTION (COUNTS ONE AND TWO) MUST BE DISMISSED

SHIP alleges that Defendant Feit – along with other alleged members of the group of “Co-Conspirator Defendants” – aided and abetted Beechwood’s alleged fraud and breach of fiduciary duty through Defendant Feit’s alleged participation in or related to Platinum. (Complaint at ¶¶ 414-415, 423-424.) SHIP also alleges that Defendant Feit – as a member of the

alleged group of “Beechwood Insiders” – “aggressively encouraged SHIP to participate in [the allegedly] fraudulent transactions.” (*Id.* at ¶¶ 416, 425.)

SHIP claims that Defendant Feit – as a member of the alleged group of “Co-Conspirators” – provided “knowing and substantial assistance” that caused SHIP damages when SHIP: (i) was “fraudulently induced into entering the IMAs with Beechwood;” (ii) did not “terminate the IMAs sooner” or “take other actions that might mitigate the damages that SHIP suffered while the IMAs remained in effect;” (iii) paid “to Beechwood tens of millions of dollars in performance fees to which it was not entitled under the IMAs;” and (iv) “incur[red] millions of dollars in expenses. . . .” (*Id.* at ¶¶ 417, 426.)

To state a claim and establish liability for aiding and abetting fraud, SHIP must allege and eventually prove “(1) the existence of a fraud; (2) [Defendant Feit’s] knowledge of the fraud; and (3) that [Defendant Feit] provided substantial assistance to advance the fraud’s commission.” *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014) (“*Krys II*”); *see also In re WorldCom, Inc. Secs. Litig.*, 382 F. Supp. 2d 549, 560 (S.D.N.Y. 2005).

Here, even if SHIP somehow could allege the existence of some fraud or breach of fiduciary duty, the Complaint fails to allege either that Defendant Feit had “actual knowledge” of any such fraud or breach of fiduciary duty or that he provided “substantial assistance” in the furtherance of any such fraud or breach.

A. The Complaint is Devoid of Any Specific Allegation Showing that Defendant Feit Had Actual Knowledge of Any Fraud or Breach of Fiduciary Duty.

The knowledge required to substantiate the second element of a claim for aiding and abetting fraud is subjective and requires that the defendant actually knew of the fraudulent scheme, “not mere notice or unreasonable awareness.” *Samuel M. Feinberg Testamentary Tr. v. Carter*, 652 F. Supp. 1066, 1082 (S.D.N.Y. 1987). In the same manner, a claim for aiding and

abetting breach of fiduciary duty requires that the defendant had “actual knowledge of the breach of duty” and “knowingly induced or participated in the breach.” *Krys v. Butt*, 486 F. App’x 153, 157 (2d Cir. 2012) (“*Krys I*”).

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.) At most, SHIP alleges that, in addition to making monthly presentations and working with the valuation firms to get confirmations of Beechwood’s valuations, Defendant Feit calculated performance fees, submitted performance-fee requests, and responded to SHIP’s requests for information about those requests.³ (Complaint at ¶ 35 (emphases added); *see also id.*, ¶¶ 347, 354, 360, 378, 414).)

Because SHIP fails to allege any specific facts showing “actual knowledge” of any fraud or breach of fiduciary duty on Defendant Feit’s part, *see Krys I*, 486 F. App’x at 157; *Samuel M. Feinberg Testamentary Tr.*, 652 F. Supp. at 1082, Count One (aiding and abetting fraud) and Count Two (aiding and abetting breach of fiduciary duty), as stated against Defendant Feit, must be dismissed as a matter of law.

³ Even if certain undefined aspects of Defendant Feit’s should have raised certain “red flags” – something that SHIP does not allege – red flags alone merely plead notice or constructive knowledge of an alleged fraud, and not the actual knowledge necessary to survive a motion to dismiss for aiding and abetting. *See, e.g., Rosner v. Bank of China*, 349 F. App’x 637, 638-39 (2d Cir. 2009); *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 547 (S.D.N.Y. 2007) (explaining that “even alleged ignorance of obvious warning signs of fraud will not suffice to adequately allege actual knowledge”); *In re Agape Litig.*, 773 F. Supp. 2d 298, 310 (E.D.N.Y. 2011) (holding that there was no actual knowledge where plaintiff alleged facts to show that “the fraud was obvious”); *Zamora v. JPMorgan Chase Bank, N.A.*, 2015 WL 4653234, at *3 (S.D.N.Y. July 31, 2015); *Berman v. Morgan Keegan & Co.*, 2011 WL 1002683, at * 10 (S.D.N.Y. Mar. 14, 2011).

B. The Complaint is Devoid of Any Specific Allegation Showing that Defendant Feit Provided Substantial Assistance to Any Fraud or Breach of Fiduciary Duty.

To substantiate the third element of a claim for aiding and abetting fraud, SHIP must allege and eventually prove that Defendant Feit “provided substantial assistance to advance the fraud’s commission.” *Krys II*, 749 F.3d at 127. 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).

What’s more, the alleged “substantial assistance” provided by the defendant must be an actual, but for, and proximate cause of the plaintiff’s alleged injury. *See SPV OSUS Ltd.*, 2016 WL 3039192, at *6; *see also Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 479 F. Supp. 2d 349, 370 (S.D.N.Y. 2007) (explaining that “substantial assistance is intimately related to the concept of proximate cause” and “whether the assistance is substantial or not is measured by whether the action of the aidor and abettor proximately caused the harm on which the primary liability is predicated”).

Here, although SHIP alleges that Defendant Feit took certain actions that ultimately resulted in its alleged damages, those actions consist of nothing more than Defendant Feit carrying out his legitimate and appropriate job responsibilities as a finance director at Beechwood – and *only* at Beechwood and *not* at Platinum.⁴ (Complaint at ¶¶ 35, 347, 354, 360, 378.) As such, Defendant Feit’s alleged actions were neither “substantial” nor committed to

⁴ Because SHIP does not allege that Defendant Feit owned SHIP any fiduciary duty in his individual capacity, the substantial assistance necessary to support its claims can be pleaded only through overt acts, and not through inaction. *SPV OSUS Ltd.*, 2016 WL 3039192, at *6; *Fraternity Fund Ltd.*, 479 F. Supp. 2d at 370.

advance the commission of any alleged fraud or breach of fiduciary duty. *See Krys II*, 749 F.3d at 127; *Lerner*, 459 F.3d at 295; *SPV OSUS Ltd.*, 2016 WL 3039192, at *6; *Fraternity Fund Ltd.*, 479 F. Supp. 2d at 370.

Even assuming, *arguendo*, that Defendant Feit took certain overt actions in calculating, submitting, and requesting SHIP's approval of certain performance fees, those actions were merely ministerial and administrative in nature (*i.e.*, Defendant Feit was simply carrying out his appropriate and legitimate job responsibilities) – such actions were not the actual, but for, and proximate cause of SHIP's alleged injury. *See id.*

*** **

For all of the foregoing reasons, SHIP's aiding-and-abetting claims (aiding and abetting fraud (count one) and aiding and abetting breach of fiduciary duty (count two)), as stated against Defendant Feit, must be dismissed, pursuant to Federal Rule of Civil Procedure 12(b)(6).

POINT II

BECAUSE PLAINTIFF FAILS TO CONNECT DEFENDANT FEIT TO ANY UNDERLYING AGREEMENT, THE CAUSE OF ACTION FOR CIVIL CONSPIRACY (COUNT FIVE) MUST BE DISMISSED

To the extent the Complaint lumps Defendant Feit together with other alleged “Co-Conspirators” (Complaint at ¶ 1, n.3), SHIP asserts a non-specific and unsubstantiated claim for civil conspiracy (Count Five) against Defendant Feit (*id.* at ¶¶ 445-453). Notably, however: (i) SHIP does not – and cannot – specifically name Defendant Feit in connection with its claim for civil conspiracy; (ii) SHIP does not – and cannot – allege a specific agreement involving Defendant Feit; (iii) SHIP does not – and cannot – allege that Defendant Feit took any overt act in furtherance of any agreement; and (iv) SHIP does not – and cannot – allege any intentional participation by Defendant Feit in furtherance of a plan or purpose.

To state a valid claim under a theory of civil conspiracy, a plaintiff must allege: “(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties’ intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury.” *Treppel v. Biovail Corp.*, 2005 WL 2086339, at *5 (S.D.N.Y. Aug. 30, 2005).

Civil conspiracy is not an independent cause of action. *See, e.g., Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 531 (S.D.N.Y. 2018); *380544 Canada, Inc. v. Aspen Tech., Inc.*, 633 F. Supp. 2d 15, 36 (S.D.N.Y. 2009); *Powell v. Kopman*, 511 F. Supp. 700, 704 (S.D.N.Y. 1981). Instead, under certain circumstances – none of which is present here – civil conspiracy is a concept that may link a defendant to other defendants’ torts. *See Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir. 1956); *Brownstone Inv. Grp., LLC v. Levey*, 468 F. Supp. 2d 654, 661 (S.D.N.Y. 2007); *see also Burns Jackson Miller Summit & Spitzer v. Lindner*, 88 A.D.2d 50, 72 (2d Dep’t 1982), *aff’d*, 59 N.Y.2d 314 (1983).

Here, SHIP’s civil-conspiracy claim fails for a number of reasons. *First*, the Complaint is devoid of any specific allegations showing any agreement, whether formal/written or informal/oral, to which Defendant Feit was a party. (Complaint at ¶¶ 445-453.) The Complaint also is devoid any specific allegations to establish that Defendant Feit had any specific knowledge that led to any specific intentional wrongdoing by him. (*Id.*)

Second, the fact that Defendant Feit never was employed or worked for any Platinum-related entity – but instead, he worked *only* at Beechwood – dramatically distances Defendant Feit from any implicit suggestion that his employment history somehow suggests an agreement. In any event, Defendant Feit’s common employment, together with other alleged conspiracy members, is insufficient, standing alone, to support SHIP’s civil-conspiracy claim. *See, e.g., Brownstone Inv. Grp., LLC*, 468 F. Supp. 2d at 661; *see also Schwartz v. Soc’y of N.Y. Hosp.*, 199 A.D.2d 129, 130 (1st Dep’t 1993).

Third, because the Complaint’s civil-conspiracy claim (count five) against Defendant Feit arises out of the same allegations as the aiding-and-abetting claims (counts one and two), the civil-conspiracy claim must be dismissed as duplicative of the aiding-and-abetting claims. *See Briarpatch Ltd. v. Phoenix Pictures*, 312 Fed. Appx. 433, 434 (2d Cir. 2009) (dismissing conspiracy claim as duplicative of a claim for aiding and abetting fraud).

Fourth, “in order to sustain an allegation of civil conspiracy that involves a conspiracy to breach a fiduciary duty, all members of the alleged conspiracy must independently owe a fiduciary duty to the plaintiff.” *Pope v. Rice*, 2005 U.S. Dist. LEXIS 4011, at * 42 (S.D.N.Y. Mar. 14, 2015). Here, the Complaint does not – because it cannot – allege that Defendant Feit owed any fiduciary duty to SHIP.

Finally, and perhaps most notably, the Complaint sets forth no times, facts, or circumstances to support SHIP’s conspiracy claim. *See Brownstone Inv. Grp., LLC*, 468 F. Supp. 2d at 661 (explaining that “to survive a motion to dismiss, a complaint must contain more than general allegations in support of the conspiracy. Rather, it must allege *the specific times, facts, and circumstances* of the alleged conspiracy” (emphasis added)), *quoting, Fitzgerald v. Field*, 1999 WL 1021568, at *4 (S.D.N.Y. Nov. 9, 1999).

As a result, SHIP’s civil-conspiracy claim (count five), as stated against Defendant Feit, must be dismissed, pursuant to Federal Rule of Civil Procedure 12(b)(6).

POINT III

BECAUSE DEFENDANT FEIT WAS NOT ENRICHED BY ANY ALLEGED WRONGDOING, THE CAUSE OF ACTION FOR UNJUST ENRICHMENT (COUNT SEVEN) MUST BE DISMISSED

SHIP’s claim for unjust enrichment (count seven) must be dismissed because the Complaint’s allegations fail to state a viable cause of action against Defendant Feit; namely: (i) that Defendant Feit benefited; (ii) at SHIP’s expense; and (iii) that equity and good conscience

require restitution. *See Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004); *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000). The Complaint contains no allegations to the effect that Defendant Feit owed SHIP any equitable obligations; nor was Defendant Feit an owner of any Beechwood entity or a beneficiary of any of the named trusts.

As with its claim for civil conspiracy (count five), SHIP fails to name Defendant Feit, separately and specifically, in connection with SHIP's cause of action for unjust enrichment. (Complaint at ¶¶ 461-466.) Although SHIP specifically names Feuer, Taylor, Levy, Nordlicht, Huberfeld, Bodner, and Cassidy (*id.* at ¶¶ 462, 465) and also names groups of other entities/persons (*i.e.*, the Beechwood Owner Trusts, the BRILLC Series Entities, the BRILLC Series Members, the 2016 Acquisition Trusts, the Feuer Family Trust, the Taylor-Lau Family Trust, and the Beechwood Trust Nos. 1-20) who allegedly were unjustly enriched (*id.* at ¶¶ 462-463), 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" (*id.* at ¶ 1 n.3). In other words, in contrast to other named Third-Party Defendants, SHIP does not separately and specifically name or identify Defendant Feit as having been unjustly enriched at SHIP's expense. (*Id.* at ¶¶ 461-466.)

What's more, SHIP alleges that:

To the extent that [Defendant Feit] received the proceeds of unearned Performance Fees or monies earned from transactions favoring Beechwood's or Platinum's interests over SHIP's and thus were enriched, and those proceeds are not recoverable or collectible from any other party, they were unjustly enriched in a manner that harmed SHIP and should be ordered to repay amounts they received, as a matter of equity.

(Complaint at ¶ 464 (emphasis added).) In other words, SHIP does not – because it cannot – allege that Defendant Feit was enriched, in any way, at SHIP's expense.⁵ This implicit

⁵ Although Defendant Feit received a base salary and discretionary incentive bonus, he

admission – that SHIP possesses no facts suggesting that Defendant Feit received any fees or other monies by which he was unjustly enriched – is fatal to SHIP’s claim.

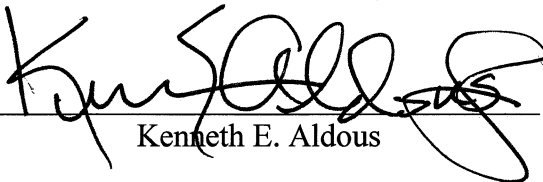
Accordingly, SHIP’s unjust-enrichment claim (count seven), as stated against Defendant Feit, must be dismissed, pursuant to Federal Rule of Civil Procedure 12(b)(6).

CONCLUSION

For all the foregoing reasons, 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
July 15, 2019

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received no remuneration specifically tied to the performance of any investments made by Beechwood. (Feit Aff. at ¶ 4; Exh. A.)