

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 MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA**

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Third-Party Defendant Murray Huberfeld (“Huberfeld”) respectfully submits this memorandum of law in support of his motion (the “Motion”) to dismiss the third-party complaint (“TPC”) of Senior Health Insurance Company of Pennsylvania (“SHIP”) pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief may be granted.¹ A brief recitation of the facts and argument most relevant to SHIP’s claims directed to Huberfeld are set forth below.

RELEVANT FACTS

A. The Alleged Conspiracy

SHIP alleges a vast conspiracy operated by groups broadly referred to as the Platinum Entities, the Beechwood Entities, and the Co-Conspirators.² According to the TPC, Beechwood made several material misrepresentations and omissions of fact designed to induce SHIP to give Beechwood discretionary investment control over hundreds of millions of dollars in reserves supporting SHIP’s insurance policy obligations. (TPC ¶ 2.) SHIP avers that, contrary to Beechwood’s representations and its fiduciary duties to SHIP, Beechwood enabled “Platinum to surreptitiously and secretly direct [SHIP’s] reserve funds into Platinum investments, to use the reserves to rescue Platinum from its own bad investments, and to charge excessive, unearned and duplicative management fees and other compensation for so-called investment related services.” (TPC ¶ 2.)

SHIP has sued Beechwood in connection with this alleged conspiracy in the action styled *Senior Health Insurance Company of Pa. v. Beechwood Re Ltd., et al.*, 18 Civ. 06658-JSR (the

¹ For brevity, Huberfeld respectfully incorporates herein and joins with the motion to dismiss the TPC of Third-Party Defendant David Bodner (including the recitations of applicable law set forth in that motion), as well as the motions by all other moving Cross-Claim or Third-Party Defendants on the same or similar grounds.

² Capitalized terms not otherwise defined herein refer to the definitions set forth in the TPC.

“SHIP Action”), which is consolidated with the instant case for purposes of discovery. (TPC ¶ 4.) In the instant case, SHIP interposes third-party claims against numerous persons and entities for, *inter alia*, aiding-and-abetting Beechwood’s purported scheme described in the SHIP Action. SHIP readily concedes that its TPC relies largely on allegations made by Plaintiffs Melanie L. Cyganowski, as Receiver, by and for Platinum Partners Credit Opportunities Master Fund LP, *et al.* (“PPCO”) in the instant case (the “PPCO Action”), as well as the Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (“PPVA”) in the action styled *Trott et al. v. Platinum Management (NY) LLC et al.*, Case No. 18-cv-10936-JSR (the “Trott Action”), which is also consolidated with the SHIP Action and the instant case for purposes of discovery. (TPC ¶ 3 n.6.)

B. The Group Pleading Allegations That Indirectly Reference Huberfeld

SHIP lumps Huberfeld into at least four different group pleading designations: the Co-Conspirators, comprising 21 individuals and several more business entities (TPC ¶ 1, n.3); the Beechwood Insiders, comprising 12 individuals (TPC ¶ 4, n.7); the Platinum Insiders, comprising 15 individuals (TPC ¶ 29, n.16); and the Nordlicht Group, comprising 4 individuals (TPC ¶ 63).

SHIP’s group pleading allegations assert that beginning in 2012, the Platinum Insiders, along with others, “devised a scheme to gain indirect access [to assets] under the guise of reinsurance.” (TPC ¶ 62.) Specifically, “in early 2013, [the Nordlicht Group] entered into a conspiracy with [the Feuer Group] to establish a reinsurance company, Beechwood Re, and to use it as a vehicle to fraudulently induce insurers to entrust funds to Beechwood through reinsurance agreements or other contractual arrangements. Beechwood would then invest those funds at the direction of Platinum, keeping Platinum afloat, generating fees, and enriching all of the Co-Conspirators.” (TPC ¶ 63.)

The TPC avers that in April of 2014, Beechwood transmitted information to SHIP – through its “sales pitch” (TPC ¶ 143, *see also* ¶¶ 137-161) – after which SHIP entered into three Investment Management Agreements with Beechwood. (*See* TPC ¶¶ 162-231.) According to SHIP, after receiving its funds, the “Co-Conspirators, led by Mark Nordlicht, set about funneling money into investments aimed at propping up illiquid investment positions Platinum funds were invested in with the aim of enriching the Co-Conspirators, against the best interests of SHIP” (TPC ¶¶ 235, 248-320.) SHIP further alleges that Beechwood overvalued its investments and collected inflated performance fees. (TPC ¶¶ 321-366.) All of SHIP’s allegations concerning this misconduct either refer collectively to actions taken by the broadly-defined group of Co-Conspirators, or specifically allege conduct taken by the defendants in the SHIP Action. (TPC ¶¶ 232-383.)

C. The Scant And Circumstantial Allegations Against Huberfeld

SHIP alleges that Huberfeld was a founder of Platinum Management and “instrumental in Beechwood’s creation,” namely through his purported “solicitation of the initial funds that seeded Beechwood.” (TPC ¶ 23.) In addition, SHIP asserts that Huberfeld “maintained an office, phoneline, and computer at Beechwood’s offices and was provided a full-time secretary,” “directed many of the private loans into which Beechwood invested SHIP’s assets, including to business and social acquaintances,” and generally “maintained control over Beechwood throughout the relevant period, regardless of official titles.” (TPC ¶¶ 23, 110-112, 240-241.)

SHIP accuses Huberfeld of being a “direct or indirect owner of Beechwood.” (TPC ¶ 23.) Although conceding that Huberfeld did not own any of the Beechwood Entities himself, or through any of his business entities, SHIP alleges that certain of Huberfeld’s family members owned or co-owned certain business entities that, in turn, owned other companies related to the Beechwood

Entities. (TPC ¶ 23.) Namely, SHIP avers that (i) Beechwood Trust Nos. 15-19, which allegedly held minority ownership interests in Beechwood Holdings and BBL, were beneficially owned by Huberfeld's children (TPC ¶¶ 26, 87); and (ii) [REDACTED]
[REDACTED]
[REDACTED] (TPC ¶ 30.) Without any direct factual underpinning, SHIP asserts that Huberfeld was an alter ego of the Beechwood Trust Nos. 15-19 and [REDACTED]
[REDACTED] (TPC ¶¶ 26, 30). The TPC also conclusorily asserts that Huberfeld used the entities owned or co-owned by his family members to "exert . . . control over the Beechwood Entities." (TPC ¶ 96.)

SHIP alleges only two specific affirmative acts as against Huberfeld. First, [REDACTED]
[REDACTED]
[REDACTED]

(TPC ¶ 64.) Second, SHIP alleges that [REDACTED]
[REDACTED]
[REDACTED] (TPC ¶ 113).³

³ Although not an affirmative act, SHIP also asserts that [REDACTED]
[REDACTED]

(TPC ¶ 66.)

D. PPCO's Allegations Of Fraud Against SHIP

In stark contrast to the story told in the TPC, PPCO alleges that SHIP (together with its affiliate Fuzion Analytics, Inc.) were complicit in the same fraud that SHIP now alleges. (PPCO Action, First Amended Complaint, Doc. No. 83 (the "PPCO FAC"), ¶¶ 7-16.) Specifically, PPCO alleges that SHIP "substantially assisted, and participated with, Beechwood and the Platinum insiders to commit fraud and breach their fiduciary duties to the PPCO Funds." (PPCO FAC ¶ 7.) PPCO further avers that SHIP had "knowledge of the deep ties between the Platinum Funds and Beechwood, including their common ownership and management and deep personal relationships," that its funds were "fueling the fraud," and that SHIP "substantially assisted Beechwood and certain of the Platinum insiders in carrying out their fraud and the Platinum insiders in breaching their fiduciary duties through their decisions and directives." (PPCO FAC ¶ 9.) Among other wrongful action, SHIP – acting through Beechwood – "structured and implemented a series of transactions that ultimately saddled the PPCO Funds with approximately \$69.1 million of debt owing to Beechwood, as agent for BCLIC, WNIC and SHIP, secured by liens on substantially all of the PPCO Funds' assets, including those of nearly all of their portfolio companies, in consideration for assets that were worth a fraction of that amount." (PPCO FAC ¶ 10.)

E. SHIP's Claims Against Huberfeld

SHIP asserts four claims against Huberfeld:

- Count 1: for aiding-and-abetting the alleged fraud by the Beechwood Entities, Levy, Feuer, and Taylor against SHIP related to (1) "the nature of the relationship" between Beechwood and Platinum; (2) "the nature, suitability, and advisability of its investments of SHIP's funds"; and (3) "the accurate, good faith value of those investments, which

misrepresentations led to the payment of unearned performance fees under the IMAs” (*see* TPC ¶ 411);

- Count 2: for aiding-and-abetting the alleged breach of fiduciary duty by the Beechwood Entities, Levy, Feuer, and Taylor to SHIP related to Beechwood’s investment decisions, and omissions concerning the relationship of Beechwood and Platinum and the performance of investments (*see* TPC ¶ 420);
- Count 5: for civil conspiracy; and
- Count 7: for unjust enrichment.

ARGUMENT

As previously noted, Huberfeld respectfully incorporates herein and joins with the arguments of Third-Party Defendant David Bodner in support of his motion to dismiss the TPC (including the recitations of applicable law set forth in that motion), as well as arguments of all other moving Cross-Claim or Third-Party Defendants on the same or similar grounds. Accordingly, only a brief recitation of the arguments most relevant to the TPPs’ claims directed to Huberfeld are set forth below.

I. SHIP’s TPC Fails To Allege Sufficiently That Huberfeld Substantially Assisted Beechwood’s Purported Fraud And Breach Of Fiduciary Duty

“To establish liability for aiding and abetting fraud under New York law, the plaintiffs must show (1) the existence of a fraud; (2) the defendant’s knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud’s commission.” Opinion, dated April 11, 2019, *In re Platinum-Beechwood* Litigation, ECF Doc. No. 225 (the “Trott Opinion”) at 26 (*citing Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014)). Similarly, “[a] claim for aiding and abetting a breach of fiduciary duty requires, *inter alia*, that the defendant knowingly induced or participated in the breach.” *Id.* at 24 (*citing Krys v. Butt*, 486 Fed. Appx. 153, 157 (2d Cir. 2012)). Critically, both claims require particularized allegations that Huberfeld provided substantial assistance to advance the predicate tort’s commission. *See* Trott Opinion at 26; *see also Kaufman*

v. Cohen, 307 A.D.2d 113, 126 (1st Dep’t 2003) (“A person knowingly participates in a breach of fiduciary duty only when he or she provides ‘substantial assistance’ to the primary violator. Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.”) (internal citations omitted).

Here, the TPC is deficient because it fails to sufficiently allege facts demonstrating that Huberfeld substantially assisted Beechwood’s fraud or breach of fiduciary duty. Initially, SHIP’s claims are vaguely pleaded, failing to allege with particularity *which* of Beechwood’s fraudulent misrepresentations or omissions, or breaches of fiduciary duty, Huberfeld purportedly aided-and-abetted. (See TPC ¶¶ 411-418 (charging aiding-and-abetting fraud), ¶¶ 420-428 (charging aiding-and-abetting breach of fiduciary duty).) Lacking the requisite specifics – the who, what, and when – of the purported conduct comprising the basis for Huberfeld’s liability, SHIP’s claims fail to comport with Rules 8 or 9(b). See *Lee v. City of New York*, No. 04 Civ. 2740(RCC)(KNF), 2005 U.S. Dist. LEXIS 42238, at *7 (S.D.N.Y. Sept. 22, 2005) (dismissing complaint that “alleges a wide-ranging conspiracy among unrelated entities concerning unrelated events”).

Moreover, the TPC does not sufficiently allege facts from which it can be reasonably inferred that Huberfeld engaged in conduct that substantially assisted the Beechwood Entities’ supposed scheme to misappropriate SHIP’s assets or to overinflate the value of SHIP’s investments. (See, e.g., ¶¶ TPC 415, 424.) Instead, the TPC alleges that Huberfeld is a member of several defined groups – the Co-Conspirators, the Beechwood Insiders, the Platinum Insiders, and the Nordlicht Group – and asserts that by virtue of otherwise innocuous acts [REDACTED]

Huberfeld is legally responsible for the sprawling scheme purportedly carried out by those groups. By lumping Huberfeld together with four different groups, however, with each alleged to have played a different part in a sprawling alleged scheme, SHIP fails to meet even the “minimum standard” of Rule 8, let alone the heightened standard of Rule 9(b). *See Atuahene v. City of Hartford*, 10 Fed. Appx. 33, 34 (2d Cir. 2001) (holding that a complaint that merely “lump[s] all the defendants together . . . and provide[s] no factual basis to distinguish their conduct” fails under Rule 8”).

The only relevant affirmative act that SHIP connects to Huberfeld is [REDACTED]

Finally, SHIP’s make-weight allegations that Beechwood invested SHIP’s funds in assets circumstantially connected to Huberfeld are legally insufficient to infer that Huberfeld had substantially assisted (or had any input at all) in Beechwood’s investment decisions.

Lacking any particularized facts connecting affirmative acts of Huberfeld to Beechwood’s purported fraud or breaches of fiduciary duty to SHIP, SHIP asserts that by mere virtue of the fact

that Huberfeld's family owned or co-owned certain business entities, which in turn owned other business entities that owned membership interests in the Beechwood Entities, Huberfeld "exerted significant control" over Beechwood's activity. (TPC ¶¶ 413, 422.) Even if Huberfeld could somehow be construed as an owner or investor in certain of the Beechwood Entities – and the allegations fall well short on such a claim – that alone is still insufficient to support the type of affirmative act necessary to plead the aiding-and-abetting claims against him. In any event, SHIP's claims that Huberfeld controlled his family's business entities are conclusory at best, and not supported by any factual underpinning. (*See id.*) Finally, to the extent that SHIP's claims could alternatively be construed to assert alter-ego liability against Huberfeld based on his alleged control of any business entities that owned Beechwood, the TPC is devoid of any particularized facts to support such a drastic veil piercing theory. *See, e.g., American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) (reversing finding of alter ego liability; holding that to state a claim for alter ego liability, plaintiff must allege with particularity that (i) parties exercised complete domination over an entity with respect to the transaction attacked, such that it had no separate will of its own, and (ii) that this domination was used to force the entity to commit the fraud or wrong against plaintiffs that caused them injury).

The TPC contains no allegations of communications between Huberfeld and SHIP at all, or between Huberfeld and the Beechwood Entities (or their managers, principally alleged as Mark Feuer, Scott Taylor, and David Levy) regarding any contacts or business that they were conducting with SHIP, comprising SHIP's predicate fraud claim against Beechwood. Nor does SHIP allege with particularity that Huberfeld directed Beechwood's investments, valuations, conduct, or otherwise participated in any conduct comprising the predicate breach of fiduciary duty. SHIP's conclusory and circumstantial averments as to Huberfeld are simply not sufficient to support the

substantial assistance element of claims for aiding-and-abetting fraud and breach of fiduciary duty. Accordingly, Counts 1 and 2 should be dismissed.

II. The Remaining Claims Fail As A Matter Of Law

New York recognizes no independent claim for civil conspiracy. *See Buchwald v. Renco Group, Inc.*, 399 B.R. 722, 774-75 (Bankr. S.D.N.Y. 2009). A plaintiff may, however, “plead conspiracy . . . with an actionable underlying tort and establish that those acts flow from a common scheme or plan.” *Id.* Specifically,

the claim of civil conspiracy thus requires a threshold determination that the plaintiff has adequately alleged an actionable underlying tort. After this threshold showing is made, a plaintiff must allege (i) facts constituting a common agreement or understanding, (ii) a common design or objective, (iii) the tortious or criminal acts committed in furtherance of the common agreement and objective, (iv) the intent and knowledge of the defendants regarding the acts, and (v) damage or injury as a result of the acts of the defendants.

Id. at 775. Here, for the same reasons that SHIP’s aiding-and-abetting claims fail, the TPC fails to allege sufficiently the requisite elements of a civil conspiracy against Huberfeld.

SHIP’s claim for unjust enrichment is also legally deficient. First, the equitable claim, sounding in the same alleged fraud as the claims for aiding-and-abetting, is not supported by particularized facts. *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). The claim also fails because the TPC does not allege sufficiently that SHIP bestowed any benefit upon Huberfeld, or that Huberfeld actually received any enrichment at all. *See M+J Savitt, Inc. v. Savitt*, No. 08 Civ. 8535 (DLC), 2009 U.S. Dist. LEXIS 21321, at *30 (S.D.N.Y. Mar. 17, 2009).

Additionally, “[a]lthough privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated.” *Mandarin Trading*

Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011). Absent any allegations of dealings between the parties, their relationship is simply too attenuated to state a claim for unjust enrichment. *See id.*, *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, 366 F. Supp. 3d 516, 558 (S.D.N.Y. 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). Here, SHIP does not aver that Huberfeld had any relationship with it, let alone one that is not so attenuated as to support a claim for unjust enrichment. Accordingly, SHIP’s claim for unjust enrichment should also be dismissed.

CONCLUSION

For all of the reasons set forth herein, as well as in the 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 14, 2019

Respectfully submitted,

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