

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
: :
IN RE PLATINUM-BEECHWOOD LITIGATION : 18-cv-6658 (JSR)
: :

----- X
: :
MELANIE L. CYGANOWSKI, as Equity Receiver for : 18-cv-12018 (JSR)
PLATINUM PARTNERS CREDIT OPPORTUNITIES :
MASTER FUND LP, *et al.*, :
: :

Plaintiffs,

v.

BEECHWOOD RE LTD., *et al.*,

Defendants.

----- X
: :
WASHINGTON NATIONAL INSURANCE COMPANY and :
BANKERS CONSECO LIFE INSURANCE COMPANY, :
: :

Third-Party Plaintiffs,

v.

MARK NORDLICHT, *et al.*,

Third-Party Defendants.

----- X

**REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION BY THIRD-PARTY
DEFENDANT DAVID BODNER TO DISMISS THIRD-PARTY COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY REPLY STATEMENT 1

REPLY POINTS..... 3

I. Conseco Has Not Rebutted Bodner’s Arguments that the Aiding and Abetting Claims Should Be Dismissed..... 3

 A. The Court’s Group Pleading Opinion Is Inapposite 3

 B. Conseco Wildly Mischaracterizes Exhibit 33..... 4

II. Conseco Has Not Rebutted Bodner’s Arguments that the RICO Claims Should Be Dismissed 7

 A. Conseco Wrongly Argues that the PSLRA Does Not Apply 7

 B. Conseco Has Not Alleged a Pattern by Bodner 8

III. Conseco Has Not Rebutted Bodner’s Arguments that the Indemnity and Contribution Claims Should Be Dismissed 9

IV. Conseco Has Not Rebutted Bodner’s Arguments that the Unjust Enrichment Claim Should Be Dismissed 10

CONCLUSION..... 10

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>Anwar v. Fairfield Greenwich Ltd.</i> , 728 F. Supp. 2d 372 (S.D.N.Y. 2010)	3
<i>Barbagallo v. Marcum</i> , No. 11-CV-1358, 2012 U.S. Dist. LEXIS 66550 (E.D.N.Y. May 11, 2012)	9
<i>Corsello v. Verizon N.Y., Inc.</i> , 18 N.Y.3d 777 (2012)	10
<i>DeFalco v. Bernas</i> , 244 F.3d 286 (2d Cir. 2001)	9
<i>Dickens v. Chemical Bank</i> , 573 F. Supp. 1129 (S.D.N.Y. 1983)	4
<i>First Capital Asset Mgmt. v. Satinwood, Inc.</i> , 385 F.3d 159 (2d Cir. 2004)	9
<i>ICP Strategic Credit Income Master Fund Ltd. v. DLA Piper LLP (US)</i> , Adv. Pro. No. 14-01835 (REG), 2015 Bankr. LEXIS 3128 (Bankr. S.D.N.Y. Sept. 15, 2015). 4	
<i>In re Agape Litig. v. Cosmo</i> , 773 F. Supp. 2d 298 (E.D.N.Y. 2011)	4
<i>In re Platinum-Beechwood Litig.</i> , No. 18-cv-10936 (JSR), 2019 U.S. Dist. LEXIS 62745 (S.D.N.Y. Apr. 11, 2019)	2, 3
<i>Kottler v. Deutsche Bank AG</i> , 607 F. Supp. 2d 447 (S.D.N.Y. 2009)	7
<i>Law Debenture v. Maverick Tube Corp.</i> , No. 06 Civ. 14320 (RJS), 2008 U.S. Dist. LEXIS 87438 (S.D.N.Y. Oct. 15, 2008)	10
<i>McLaughlin v. Anderson</i> , 962 F.2d 187 (2d Cir. 1992)	9
<i>SEC v. Zandford</i> , 535 U.S. 813 (2002)	8
<i>Senior Health Ins. Co. v. Beechwood Re Ltd.</i> , No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 67952 (S.D.N.Y. Apr. 22, 2019)	7, 8
<i>Trott v. Platinum Mgmt. (NY) LLC (In re Platinum-Beechwood Litig.)</i> , No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 104562 (S.D.N.Y. June 21, 2019)	3, 7, 8
RULES	
Fed. R. Civ. P. 12(b)(6)	1
Fed. R. Civ. P. 9(b)	2, 10

Third-party defendant David Bodner respectfully submits this reply memorandum of law in further support of his motion to dismiss the Third-Party Complaint (ECF No. 75)¹ of WNIC and BCLIC (jointly, Conseco) pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY REPLY STATEMENT

Bodner observed at page 1 of his opening memorandum that “there is not a single fact alleged in the TPC to support the conclusory assertions that Bodner directed, supervised, or assisted any conduct by others that allegedly harmed Conseco, or had anything at all to do with Conseco.” (ECF No. 188). Conseco’s opposition memorandum (ECF No. 253) (the “Opposition” or “Opp.”) proves Bodner correct, bringing the absence of facts against Bodner into stark relief: in Exhibit H to the Polivy Declaration, Conseco presents a digest of every TPC mention of Bodner, where not one specific fact can be located other than his: (i) ownership of Beechwood equity through family trusts, and (ii) receipt of the email referenced as Exhibit 33 to the *Trott* Second Amended Complaint (“SAC”) (ECF No. 285-3 at p. 109 in Case No. 18-cv-10936 (JSR) (“Exhibit 33”).

In contrast, the TPC and Opposition detail dozens of explicit encounters between Conseco and various managers and executives at Beechwood. Conseco lists numerous allegations of transactional misconduct and mis-valuations of investment assets by numerous Beechwood and Platinum managers and employees—but again supplies no factual detail regarding Bodner. Conseco nonetheless strives to defend its aiding and abetting and other claims against him, even though no one at Conseco ever had any contact or communication with him.

¹ Unless stated otherwise, ECF citations refer to the *Cyganowski* docket, Case No. 18-cv-12018 (JSR). Capitalized terms not defined herein shall have the meanings ascribed to them in the Memorandum of Law in Support of Motion by Third-Party Defendant David Bodner to Dismiss Third-Party Complaint (ECF No. 188) (the “Bodner Motion”). Emphasis is supplied throughout this memorandum unless otherwise noted.

First, Conseco returns over and over to Exhibit 33, an email sent by Bodner's secretary on July 29, 2015, with no attribution to an author or source, and communicated to no one other than Bodner. As shown below, its anonymous message is contradicted entirely by the detailed facts alleged by Conseco, and, in any event, does nothing to support the "substantial assistance" prong of Conseco's aiding and abetting claims.

Second, Conseco erroneously relies on this Court's Opinion dated April 11, 2019 in *Trott* addressing motions to dismiss under the group pleading doctrine. *In re Platinum-Beechwood Litig.*, No. 18-cv-10936 (JSR), 2019 U.S. Dist. LEXIS 62745 (S.D.N.Y. Apr. 11, 2019) (the "Group Pleading Opinion"). The Group Pleading Opinion sustained, for pleading purposes only, the JOLs' claim against Bodner for an alleged role in publishing false NAV statements to PPVA investors. *Id.* at *59. Here, Conseco invokes no group published written statement, and the group pleading doctrine has no place.

Third, Conseco seeks leave to re-plead should the Court conclude on the basis of the near-vacant record that Conseco's TPC does not satisfy Rule 9(b) against Bodner. (Opp. at 3, 67). On June 16, however, Bodner advised Conseco that if Conseco had additional facts with respect to Bodner's alleged role, Bodner would address those facts in this reply if Conseco filed a supplemental pleading by June 18. (*See* Declaration of B. Feuerstein, dated June 26, 2019, at Ex. A). Conseco did not file a supplemental pleading (or otherwise respond), and the Court may thus properly conclude that there are no supplemental facts. Dismissal should be with prejudice.

In sum, Bodner had no contact or communication with Conseco. The aiding and abetting claims fail as the TPC does not plead particularized facts showing any substantial assistance by Bodner, or his actual knowledge of any misrepresentation or omission by anyone.

Conseco's throw-in claims—RICO, unjust enrichment, and indemnity/contribution—fail for the reasons stated in the Bodner Motion and again below.

REPLY POINTS

I. Conseco Has Not Rebutted Bodner's Arguments that the Aiding and Abetting Claims Should Be Dismissed

A. The Court's Group Pleading Opinion Is Inapposite

In support of its claim that Bodner aided and abetted a fraud and fiduciary breach by Beechwood and its principals, Conseco relies on the Group Pleading Opinion, arguing that “this Court has already found that both Bodner and Huberfeld were sufficiently senior to be charged with Platinum's misstatements.” (Opp. at 49). Conseco fails, however, to recognize the limited context of the Group Pleading Opinion.

The Group Pleading Opinion held that because Bodner was alleged by the JOLs “to have been a high-level corporate insider” at Platinum, at the pleading stage it was “therefore appropriate to charge [Bodner and others] with the misstatements of PPVA's NAV.” 2019 U.S. Dist. LEXIS 62745, at *59. The Court recognized that the group pleading doctrine is only appropriate to attribute “particular statements or omissions” in written group-published documents (such as NAV statements) “to individual defendants even when the exact source of those statements is unknown.” *Id.* at *35 (quoting *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 405 (S.D.N.Y. 2010)).

No such group-published statements are alleged here by Conseco. Indeed, it remains unclear, from both the TPC and the Opposition, what misstatement or omission to Conseco Bodner is alleged to have aided and abetted. (*See* Bodner Motion at 8-9). Nor is it at all evident whose statement or omission Bodner is alleged to have aided and abetted. In the *Trott* Opinion dated June 21, 2019, the Court dismissed certain Beechwood entities because the SAC

contained “no specific allegations that describe how these entities participated” in the primary fraud alleged there. *Trott v. Platinum Mgmt. (NY) LLC (In re Platinum-Beechwood Litig.)*, No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 104562, at *38 (S.D.N.Y. June 21, 2019).

Likewise here. In the nine pages of briefing where it defends its aiding and abetting claims (Opp. at 42-50), Consecro refers repeatedly to a “scheme” and “conspiracy,” but never a specific misrepresentation or omission substantially assisted by Bodner. In place of specificity, Consecro resorts to generalities, alleging that Bodner: “devised the scheme and directed it” (Opp. at 47); that “Bodner’s attempts to avoid [his] involvement in the scheme are comical” (Opp. at 49); that “a central pillar of the fraudulent scheme” was “a conspiracy to conceal Platinum’s ownership, control and funding of Beechwood” (Opp. at 45). None of these shrill labels, however, identifies a specific communication or omission that Bodner could be fairly alleged to have assisted. They thus fail under Rule 9(b). *See In re Agape Litig. v. Cosmo*, 773 F. Supp. 2d 298, 324 (E.D.N.Y. 2011) (dismissing aiding and abetting claim where plaintiffs failed to “identify[] the time, place, speaker and content of the alleged misrepresentations”) (citing *Dickens v. Chemical Bank*, 573 F. Supp. 1129, 1133 (S.D.N.Y. 1983); *ICP Strategic Credit Income Master Fund Ltd. v. DLA Piper LLP (US)*, Adv. Pro. No. 14-01835 (REG), 2015 Bankr. LEXIS 3128, at *44 (Bankr. S.D.N.Y. Sept. 15, 2015) (dismissing aiding and abetting claim where allegations were “implausible” and “stated in conclusory terms, without supporting evidentiary facts”).

Without doubt, none of these allegations references a group-published statement, and reference to the Group Pleading Opinion cannot save Consecro’s aiding and abetting claims.

B. Consecro Wildly Mischaracterizes Exhibit 33

Throughout the TPC and its Opposition brief, Consecro repeatedly returns to Exhibit 33 to the *Trott* SAC, a July 29, 2015 email sent to Bodner by his secretary, Angela

Albanese, as evidence that Bodner had knowledge of the alleged fraud. Instead of describing Exhibit 33 as an unsourced email from Bodner's secretary, Consecos outrageously characterizes the document as a "confession" by Bodner. (Opp. at 22, 49; TPC ¶¶ 472, 482, 572). Consecos has no basis for calling this email a "confession" where Consecos knows that Bodner did not write it, and no "insider" to the Platinum-Beechwood relationship could have written it. The email makes no sense in light of what Consecos has alleged about the status of that relationship in July 2015, when the email was sent.

Exhibit 33 was sent to Bodner on July 29, 2015. The operative paragraph states "I'm really concerned that if Ed Bonach from CNO Financial Group Finds out we invested beechwoods money into Platinum with its illiquid investments (since it didn't exactly fit their investment objective) he won't trust us and he will take all of the aprox 500 mil, he has invested in beachwood - Out." The clear statement of the author is that Consecos did not know as of that date—July 29, 2015—that Beechwood's funds had been invested in Platinum into illiquid investments, or so-called "level 3 assets."

Nothing could be further from reality. As Consecos sets forth in the TPC, "throughout 2014 WNIC and BCLIC continued questioning the discretionary investment of trust assets that Beechwood Re and its agents were making in Level 3 assets, a class of assets that are particularly illiquid and speculative. Some were investments in Platinum-controlled funds and entities." (TPC ¶ 630). Consecos alleges further that, at the end of 2014, it was aware that David Levy, as investment manager for Beechwood, was "overly reliant on Platinum-controlled funds and entities as his source of investments for the trust assets" because he had been formerly employed by Platinum, and that Consecos had discussed this with Feuer and Taylor. (TPC ¶ 631). Thus, by July 29, 2015, anyone with actual knowledge of the Beechwood-Consecos

relationship would not be “really concerned” about “Ed Bonach from CNO Financial Group find[ing] out” that Beechwood money was invested with Platinum, because that person would know for a fact that Bonach and Conseco already knew it well, and for nearly a year prior.

It is not for this motion to speculate how or why the secretary sent this email to Bodner, or how the use of the word “we” could plausibly include Bodner, who never had any contact with Ed Bonach or Conseco. But comparing the operative paragraph in Exhibit 33 with the allegations made in the TPC makes it clear that the alleged co-conspirators—who were fielding complaints and criticism from Conseco with respect to the illiquid investments and the investments in Platinum in 2014—could not have written this email in 2015. For certain, it was not authored by Bodner, or an alleged conspirator, and does not reflect reality according to the TPC itself. It was no “confession” by Bodner.²

Again, Bodner took an opportunity in 2013 to make a capital investment to establish Beechwood Re alongside his former partners in Platinum and two individuals (Feuer and Taylor) who had bona fide credentials in the insurance business. He had no knowledge that anyone at Platinum or Beechwood had a nefarious intent—to hide anything from Beechwood clients, or to mismanage Beechwood assets—and there are no facts or plausible allegations in the TPC to the contrary. When Exhibit 33 is placed in the context of the flatly inconsistent allegations in the TPC regarding what Conseco already knew in July 2015, the multiple communications described in the TPC between Conseco and the alleged co-conspirators (but never Bodner), and the dozens of communications identified among the alleged co-conspirators

² Indeed, Bodner’s one-line response to the secretary, in its entirety, was “hwerblowsky@platinumlp.com,” referring to Platinum Management’s in-house lawyer, Harvey Werblowsky.

(but never Bodner), it becomes abundantly clear: Exhibit 33 cannot save Conseco's third-party claims from dismissal.³

II. Conseco Has Not Rebutted Bodner's Arguments that the RICO Claims Should Be Dismissed

A. Conseco Wrongly Argues that the PSLRA Does Not Apply

The Court has twice dismissed RICO claims in these consolidated cases under the "RICO Amendment" in the PSLRA. *Senior Health Ins. Co. v. Beechwood Re Ltd.*, No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 67952, at *30 (S.D.N.Y. Apr. 22, 2019) (the "*SHIP* RICO Opinion"); *Trott*, 2019 U.S. Dist. LEXIS 104562, at *23 (S.D.N.Y. June 21, 2019) (the "*Trott* RICO Opinion").

Conseco tries to save its RICO claims with an argument that *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447 (S.D.N.Y. 2009), a tax shelter case, is "similar" to this one. (Opp. at 10). But there is clear law-of-the-case in these consolidated cases that the PSLRA bars RICO claims "insofar as the gravamen of ... mail and wire fraud claims is that Beechwood funneled ... assets to Platinum." *SHIP* RICO Opinion, at *30. In any event, *Kottler* is distinguishable because the Court found that there was "nothing per se fraudulent from a securities standpoint about the financial mechanism and schemes used to generate the tax losses." 607 F. Supp. 2d at 457 n.9. Conseco has pleaded the opposite: according to Conseco, the alleged fraud was designed to take money from Conseco and invest it in securities, in or alongside Platinum, in alleged violation of the negotiated investment strategy. (TPC ¶¶ 532-33).

Conseco also overstates the Court's holding in the *SHIP* RICO Opinion, claiming that the Court held that "some—but not all—predicate acts alleged by SHIP were barred by the"

³ No matter what inference might be afforded the email on the issue of knowledge, neither the email nor anything else alleged in the TPC supports the requisite allegation of substantial assistance.

PSLRA. (Opp. at 8). In the *SHIP* RICO Opinion, the Court recognized that there could be a narrow carve-out for “allegations that defendants misrepresented the market value of SHIP’s assets in connection with defendants’ regular withdrawal of performance fees,” opining that such allegations are “arguably” not barred by the PSLRA but were nonetheless non-actionable due to other pleading failures. *Id.* at *30-31. Conseco does not explain how this carve-out saves its own RICO claims against Bodner, and never connects Bodner to any representation regarding the value of SHIP’s assets. In any event, this Court put the carve-out to rest in the *Trott* RICO Opinion, where it explained that allegations of “misstatement of asset values, and the attendant withdrawal of unearned fees” were in fact securities claims and were thus barred by the PSLRA’s RICO Amendment. *Trott* RICO Opinion at *23.

Conseco concedes that its theory of the alleged fraud is that “Beechwood’s transaction with [Conseco] was an outright fraud to gain control over [Conseco’s] cash” and that once Beechwood and Platinum had control over Conseco’s cash, they “secretly used [it] to engage in securities fraud.” (Opp. at 10). There can be no doubt that, under Conseco’s theory, the alleged fraud “coincided with the [securities] sales themselves.” *SEC v. Zandford*, 535 U.S. 813, 820 (2002). As this Court noted, the allegation is that Conseco’s “funds were obtained [by Beechwood] precisely for the purpose of acquiring the [Platinum] securities.” *SHIP* RICO Opinion, at *20. All of Conseco’s RICO claims are thus barred by the RICO Amendment.⁴

B. Conseco Has Not Alleged a Pattern by Bodner

Conseco ignores Bodner’s argument that the TPC fails to allege a pattern of racketeering activity as to him individually. *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385

⁴ Wanting it both ways, Conseco itself relies on the RICO Amendment in seeking to dispose of RICO claims asserted against Conseco by the PPCO Receiver. (ECF No. 496 at p. 11) (acknowledging that “[t]he RICO Amendment applies even when a plaintiff cannot itself pursue a securities fraud action against the defendant.”) (citation omitted).

F.3d 159, 180 (2d Cir. 2004) (“[W]e evaluate the RICO allegations with respect to each defendant individually.”); *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001) (the pattern requirement of at least two predicate acts “must be established as to each individual defendant”); *McLaughlin v. Anderson*, 962 F.2d 187, 192 (2d Cir. 1992) (“[T]he bare minimum of a RICO charge is that a defendant personally committed or aided and abetted the commission of two predicate acts.”).

Instead of pointing to the requisite two predicate acts alleged against Bodner in the TPC, Consecos repeats its conclusory refrain that Bodner played a “central role[] . . . in controlling the Platinum-Beechwood conspiracy and orchestrating the fraud.” (Opp. at 12). Even if not barred by the PSLRA, Consecos cannot sustain its RICO claims against Bodner, as it alleged no facts against him.

III. Consecos Has Not Rebutted Bodner’s Arguments that the Indemnity and Contribution Claims Should Be Dismissed

Consecos’s statement that “Bodner ignores contribution entirely, moving to dismiss [Consecos’s] claim for indemnification on the Receiver’s federal securities law claim” is flat wrong. (Opp. at 57) (emphasis in original). Bodner stated explicitly that courts “will not permit indemnification or contribution claims that are based on federal causes of action where the federal statute in question does not explicitly or implicitly provide for such actions.” (Bodner Motion at 13).

Consecos ignores Bodner’s argument that “New York law . . . does not permit common law indemnification against intentional torts,” *Barbagallo v. Marcum*, No. 11-CV-1358, 2012 U.S. Dist. LEXIS 66550, at *17 (E.D.N.Y. May 11, 2012), and simply argues that Bodner must indemnify Consecos if for any reason Consecos is liable to the Receiver. Consecos is incorrect, as the law is clear that Bodner need not indemnify Consecos for its intentional torts, for

claims arising under RICO and federal securities laws, or for its unjust enrichment and fraudulent conveyance claims. (Bodner Motion at 13-15). Moreover, in the absence of a viable substantive claim against Bodner, Conseco can have no right to be indemnified by him.

IV. Conseco Has Not Rebutted Bodner's Arguments that the Unjust Enrichment Claim Should Be Dismissed

Conseco argues that its unjust enrichment claim is not duplicative of its breach of contract claim against Beechwood Re because Beechwood Re is judgment proof. (Opp. at 63). This did not stop Conseco from asserting a breach of contract claim against Beechwood Re (TPC ¶¶ 861-65) and, in any event, this argument ignores the legal standard that an unjust enrichment claim “is not available where it simply duplicates, or replaces, a conventional contract or tort claim.” *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012).

Contrary to Conseco's argument, there is no exception for an otherwise duplicative unjust enrichment claim where the defendant is judgment proof. *See also Law Debenture v. Maverick Tube Corp.*, No 06 Civ. 14320 (RJS), 2008 U.S. Dist. LEXIS 87438, at *35 (S.D.N.Y. Oct. 15, 2008) (“[T]he existence of a valid and binding contract governing the subject matter at issue in a particular case . . . preclude[s] a claim for unjust enrichment even against a third party non-signatory to the agreement.”).

Finally, Conseco does not contest that its unjust enrichment claim must satisfy Rule 9(b) because it sounds in fraud. And yet, neither the TPC nor the Opposition demonstrates with any specificity what Bodner is alleged to have been enriched by. There is not a single specific distribution, payment, or other remuneration to Bodner alleged in the TPC. The unjust enrichment claim against Bodner should be dismissed, as it was in *Trott*.

CONCLUSION

The TPC should be dismissed against Bodner.

Dated: June 26, 2019
New York, New York

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: /s/ Eliot Lauer

Eliot Lauer
Gabriel Hertzberg
Julia G. Gumpper
101 Park Avenue
New York, New York 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559
Email: elauer@curtis.com
ghertzberg@curtis.com
jgumpper@curtis.com

Attorneys for Third-Party Defendant David Bodner

35117871