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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	18-cv-06658 (JSR)
MELANIE L. CYGANOWSKI, Plaintif, -v- BEECHWOOD RE LTD., et al., Defendants.	:	18-cv-12018 (JSR)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF BEECHWOOD'S MOTION TO DISMISS CNO'S CROSS-CLAIMS AND THIRD-PARTY COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE(S)**

The Beechwood Parties, through their counsel, respectfully submit this reply brief in further support of their motion to dismiss CNO's Cross-Claims and Third-Party Complaint.[1]

ARGUMENT

I. CNO'S CIVIL RICO CLAIMS SHOULD BE DISMISSED

As a preliminary matter, this Court has already held that identical claims advanced by SHIP were barred by the RICO Amendment. *See In re Platinum-Beechwood Litig.*, No. 18-CV-6658, 2019 WL 1759925, at *8 (S.D.N.Y. Apr. 22, 2019); ECF No. 488, at 11-17. Here, as in the related complaints, the TPC alleges that cash and assets that CNO ceded to Beechwood through the Reinsurance Agreements were funneled to Platinum to prop up the hedge fund and further Platinum's purported Ponzi scheme. (*See, e.g.*, TPC ¶¶ 5, 117, 125, 127-29, 275, 490, 501, 522-24, 532, 606, 644, 682, 684, 686, 691, 711, 798, 836, 869, 924, 926.)

CNO ignores the Court's earlier decision. Instead, it points to dicta from a footnote in *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 458 n.9 (S.D.N.Y. 2009)—a case where the court dismissed the RICO claims against all defendants—to suggest that the RICO Amendment to the PSLRA should not apply in this case. But *Kottler* is plainly inapposite. Here, unlike *Kottler*, CNO alleges that the object of the scheme was to further a securities fraud (Platinum's purported Ponzi scheme) and that the cash and assets it ceded to Beechwood were used to keep that scheme alive. Conduct undertaken to keep a Ponzi scheme alive is conduct undertaken "in

[1] Because this matter is before the Court on a motion to dismiss, there is no point responding line by line to CNO's account of the "facts" underlying the case. That said, CNO has taken the art of *ipse dixit* to giddy new heights. CNO litters its brief with assertions that supposedly "everyone agrees" to, "no one disputes," or "Defendants admit." That is all nonsense. Defendants did not defraud CNO. CNO converted tens of millions of dollars from Beechwood and then set out on a search-and-destroy mission against its former business partner and its employees, of which their third-party complaint is only the latest foray.

connection with the purchase and sale of securities." *See Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012) (Rakoff, J.).

The other case CNO cites, *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 371 (S.D.N.Y. 2005), is not good law. Courts in this district and others have criticized *OSRecovery* for its analysis of the RICO Amendment and have explicitly rejected its reasoning.[2] Moreover, the logic of *OSRecovery* is completely incompatible with *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 643 (S.D.N.Y. 2017), which this Court recently cited with approval in this consolidated action. ECF No. 488 at 10.

To the extent CNO argues that the RICO Amendment does not apply to allegations concerning the valuation of trust assets, that argument has been rejected too. *See* ECF No. 488, at 15. In *Trott*, the Court held that it "cannot not conclude that misstatements of PPVA's NAV were 'merely incidental or tangentially related to the sale of securities.'" *Id*. Instead, "they were made … to sustain defendants' Ponzi scheme," and were thus "in connection with the purchase and sale of securities." *Id.* The TPC alleges the same about the valuations here. (TPC ¶ 691.)

Even were this not the case, the RICO claims would still be subject to dismissal. The TPC fails to charge the Beechwood Parties with enough predicate acts over a sufficient period of time to state a RICO claim. *See* ECF No. 488 at 16. Thus, CNO's allegations fall short of satisfying the minimum duration necessary to find closed-ended continuity. (*See* Mot. 12 n.6.) CNO does not allege that Beechwood Re's withdrawal of trust assets occurred over a two-year period.[3] Nor does it even bother to respond to this point, effectively conceding the issue.

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[2] *See*, *e.g.*, *Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F. Supp. 2d 267, 281 (S.D.N.Y. 2009); *Cohain v. Klimley*, No. 08-cv-5047, 2010 WL 3701362, at *8 (S.D.N.Y. Sept. 20, 2010); *Baron v. Chehab*, No. 05-3240, 2006 WL 156828, at *9 (C.D. Ill. Jan. 20, 2006).

[3] Not only did the withdrawals occur over a period of less than two years, but the well-pleaded allegations in the TPC are limited to a period of less than one year; it includes no well-pleaded

II. CNO'S CONTRIBUTION AND INDEMNITY CLAIMS SHOULD BE DISMISSED

In their moving brief, the Beechwood Parties argued that CNO's claims against Feuer, Taylor, and BCG for contribution and indemnification should be dismissed because, as before, they arise from or relate to the Reinsurance Agreements and are subject to mandatory arbitration. (Mot. 11-12 (citing *Starke v. Gilt Groupe, Inc.*, No. 13-cv-5497 LLS, 2014 WL 1652225, at *4 (S.D.N.Y. Apr. 24, 2014); *Googla Home Decor LLC v. Uzkiy*, No. 09-cv-1049, 2009 WL 2922845, at *6 (E.D.N.Y. Sept. 8, 2009)). In their answering papers, despite dedicating nearly six pages to the issue of contribution and indemnification, CNO chose not to respond. Accordingly, the contribution and indemnification claims against Feuer, Taylor, and BCG should be deemed abandoned and dismissed. *In re Platinum-Beechwood Litig.*, No. 18-cv-10936, 2019 WL 1570808, at *19 (S.D.N.Y. Apr. 11, 2019).

The remaining contribution and indemnification claims against the Beechwood Parties should be dismissed for the reasons set forth in the moving brief as well.

First, "as a matter of law, there is no right to contribution under RICO." *Dep't of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.)*, 747 F. Supp. 922, 932 (S.D.N.Y. 1990).

Second, while contribution is available in certain circumstances for federal securities fraud violations, it is not available here. CNO fails to engage with the controlling authority, which requires a showing that "the Third-Party Defendant either knowingly or recklessly made material misrepresentations to the Plaintiff on which the Plaintiff relied in the purchase of the securities and which proximately caused loss to the Plaintiff." *Monisoff v. Am. Eagle Invs., Inc.*, 955 F. Supp. 40, 42 (S.D.N.Y. 1997) (Rakoff, J.). Here, CNO does not allege that any of the

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allegations supporting an inference that trust assets were overvalued following Lincoln's departure in February 2015. (*See* TPC ¶¶ 648-52). Indeed, CNO has not sued the valuation firm that replaced Lincoln, Beechwood's auditors, or the Nationally Recognized Statistical Rating Organization that rated Beechwood's Level-3 securities—all of which reviewed these valuations.

Beechwood Parties made a misrepresentation to PPCO. Instead, the TPC is fundamentally at odds with such a theory, alleging that Beechwood conspired *with* Platinum to defraud CNO. In other words, what is alleged is, at most, "an independent fraud on the third-party plaintiffs." *Id.*

CNO's reliance on *Epstein v. Haas Secs. Corp.*, 731 F. Supp. 1166 (S.D.N.Y. 1990) is misplaced. While CNO is not required to concede liability, it is required to allege in the TPC that Beechwood defrauded PPCO and that it was a joint tortfeasor. CNO has failed to do either. (*See* TPC ¶ 922.) Indeed, nothing in the TPC can be read as an allegation or concession of fraudulent conduct by CNO. Thus, its claim for contribution must be dismissed. *Schnabel v. Sullivan*, No. 04-cv-5076 (TCP), 2007 WL 9719284, at *2 (E.D.N.Y. May 24, 2007).

Third, as set forth in the moving brief, CNO's claim for contribution as to any judgment that might be obtained by the Receiver on her common law claims fails for the same reason. *Id.*[4]

Fourth, CNO's claim for contribution in connection with the Receiver's fraudulent conveyance claims should also be dismissed. As explained in the moving brief, there is no express or implied right of contribution in Article 10 of the Debtor & Creditor Law, the statute under which each of the Receiver's fraudulent conveyance claims arises. (Opp. 11). Under New York law, "a private cause of action is implied where it can be shown that plaintiff belongs to the class of legislatively intended beneficiaries and that a right of action would be 'clearly in furtherance of the legislative purpose.'" *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 276 (1987). Here, CNO has made no attempt to argue that, as the alleged recipient of a fraudulent transfer, it is part of the class for whose benefit the statute was enacted. Indeed, CNO has (again) failed to respond to the argument that there is no right to contribution in connection with the Receiver's fraudulent conveyance claim. Thus, these claims should be dismissed as well.

[4] CNO states that the Beechwood Parties "ignore the issue" of intentional torts. That is not accurate. (*See* Opp. 11 (citing *Monisoff* , 955 F. Supp. at 42).)

Finally, CNO's claim for indemnification should be dismissed. In their moving briefs, defendants set forth a number of bases on which CNO's claim for common law indemnification fails as a matter of law. Rather than engage with these arguments, CNO attempts to recast that claim as one seeking express contractual indemnification. Because a party may not amend its pleading through its opposition brief, CNO's claim should be dismissed. ECF No. 488 at 58.

Under New York law, a party seeking common law indemnity must establish that the alleged indemnitor was actively at fault in bringing about the injury or damages at issue, and that the alleged indemnitee is vicariously liable therefor. *See Sands Harbor Marina Corp. v. Wells Fargo Ins. Servs. of Or., Inc.*, 156 F. Supp. 3d 348, 361 (E.D.N.Y. 2016). That is what CNO alleged in Count 18 of the TPC, asserting that if it is liable to the PPCO Receiver, it "will be wholly as a result of the fraudulent and other wrongful conduct of each of the Cross-claim and Third-party Defendants that WNIC and BCLIC sue in this action." (TPC ¶ 921.)

A party seeking contractual indemnification, on the other hand, must establish that it had an express agreement, which included an indemnification provision, and that the indemnification provision covers the liability for which the party may be held liable. *Sands Harbor Marina Corp.*, 156 F. Supp. 3d at 361. Here, the TPC cannot reasonably be construed as stating a claim for indemnity based upon the Reinsurance Agreements. The TPC does not allege that CNO has a right to express contractual indemnification from Beechwood Re, let alone set forth the specific language of the contract. Indeed, the TPC makes no reference to § 8.2 of the Reinsurance Agreements.[5] Thus, to the extent that CNO now purports to base its indemnity claims on a claim for contractual indemnification, the claims should be dismissed.

[5] In any event, even if CNO had intended to proceed on this express indemnification theory, which it clearly did not, it still fails to state a claim. CNO cites to ¶¶ 470 and 518-21 for the proposition that the Beechwood Parties are all alter egos of Beechwood Re, but conclusory allegations like these are not sufficient. Indeed, Narain and BCG are not even mentioned.

III. CNO'S CLAIM FOR UNJUST ENRICHMENT SHOULD BE DISMISSED

The unjust enrichment claims against the Feuer and Taylor-Lau Family Trusts,[6] Narain, Beechwood Re Holdings, BAM, BAM Admin, BBL, BBIL, and Beechwood Investments fail for two independent reasons: (1) an unjust enrichment claim cannot stand where an express agreement governs the rights at issue; and (2) merely alleging a general, non-specific benefit is insufficient to plead an unjust enrichment claim. (Mot. 13-14.)[7]

Here, CNO does not dispute that express agreements govern the rights at issue. To the contrary, CNO's opposition brief leans into the Reinsurance Agreements, explaining that Beechwood Re "avoided its obligations under the Reinsurance Agreements to top-up the Trust assets by using bogus valuation reports to claim that the Trusts were adequately capitalized with investments having a fair market value which they in fact did not have." (Opp. 61.) As this Court has explained, "an unjust enrichment claim is not available where it simply duplicates, or replaces a conventional contract or tort claim." See ECF No. 488, at 44 (quoting ECF No. 290, at 27). To the extent that CNO seeks to recover "surplus" that it claims was improperly distributed, the appropriate vehicle is a breach of contract action against Beechwood Re.

CNO's unjust enrichment claim against Beechwood Bermuda is similarly covered by the Reinsurance Agreements. CNO argues that Beechwood Bermuda was unjustly enriched by the purported Demand Note Transfer. Putting aside the fact that this claim is totally bogus—part of CNO's typical practice of calling anything that is complicated "fraud"—this allegation is covered by the Reinsurance Agreements, which set forth Beechwood Re's capital requirements. Sections 4.2 and 4.3 of the Reinsurance Agreements require insurance reserves to be secured by

[6] The Trusts have been sued here improperly. *See NFS Servs. Inc., v. Dorchester Trust,* No. 78-cv-4758, 1979 U.S. Dist. LEXIS 11052, at *4 (S.D.N.Y. July 13, 1979) (citing cases).

[7] CNO incorrectly states that it sued BCG for unjust enrichment. (Opp. 62). It did not.

assets in trust with an overcollateralization of 7%. To the extent that CNO believes that the trusts were not properly collateralized, such claim is covered by the parties' express agreement.

Finally, stating that the Beechwood Parties were unjustly enriched does not make it so. CNO does not even attempt to dispute that the allegations in support of its unjust enrichment claims against the Beechwood Parties are entirely conclusory. Instead, in a footnote, CNO argues that data showing how the Beechwood Parties were purportedly enriched is "uniquely within Defendants' possession." (Opp. 63 n.28.) That assertion is specious. The Beechwood Parties have produced more than 1.2 million pages of documents to CNO in connection with the arbitration—information that CNO has had access to for roughly two years. This is far more discovery than a typical plaintiff would ever have, even after years of litigation. In light of that, CNO has no excuse for failing to plead its claims with the requisite specificity.[8]

IV. CNO'S CLAIM AGAINST NARAIN FOR BREACH OF FIDUCIARY DUTY SHOULD BE DISMISSED

The TPC's allegations fall far short of alleging that Narain owed or breached a fiduciary duty to CNO.[9] CNO concedes that it did not even meet Narain until sometime in 2016, long after CNO claims it was fraudulently induced to enter the Reinsurance Agreements. (TPC ¶ 508.) Despite this, CNO repeatedly mischaracterizes routine emails concerning Beechwood Re's relationship to CNO—many of which were sent years before Narain joined Beechwood—to establish that Narain *personally* owed a fiduciary duty to CNO. But none of these emails convert CNO's fiduciary duty claims against Beechwood Re into personal claims against Narain.

[8] For this reason, to the extent any of CNO's claims are dismissed, it should be with prejudice.

[9] The Beechwood Parties hereby incorporate all applicable arguments made by Daniel Saks in connection with Point IV and V, including its discussion of the "special facts" doctrine.

For example, CNO does not—because it cannot—explain how Narain solicited CNO's trust personally *apart from CNO's pre-existing relationship with Beechwood*. The only direct interaction with Narain to which CNO points was on June 23, 2016, long after CNO entered the Reinsurance Agreements. Moreover, these supposedly "personal" interactions relate only to the alleged Quest Livery and Atlantic Coast Life Insurance investments, which Narain removed from CNO's trusts in his capacity as CIO. Managing trust assets was a responsibility Narain "bore . . . in [his] capacity as [an] employee[]" of BAM, "not because of [his] relationship" with CNO. *In re MF Glob. Holdings Ltd. Inv. Litig.*, 998 F. Supp. 2d 157, 182 (S.D.N.Y. 2014). Such "personal" interactions are "not sufficient to extend the relationship of trust and confidence" between the companies into such a relationship between SHIP and Narain individually. *Id.*

CNO also fails to plead that Narain breached a duty to CNO. Contrary to what CNO alleges in the TPC, CNO now appears to concede that it has not alleged any affirmative misrepresentation by Narain. (Opp. 26.) Instead, with a somewhat tortured reference to Sherlock Holmes, CNO suggests that Narain somehow breached his fiduciary duty to CNO by omission. (*Id.*) But that allegation does not appear in the TPC (*see* TPC ¶ 869), and CNO cannot amend its pleadings by adding new claims in an opposition to a motion to dismiss.

V. CNO'S CLAIM AGAINST NARAIN FOR FRAUDULENT INDUCEMENT AND FRAUD SHOULD BE DISMISSED

CNO's fraud claims should be dismissed. As above, it effectively concedes that it has not alleged any affirmative misrepresentation by Narain. (Opp. 26.) Although it makes vague reference to representations that investments were "prudent and appropriate" (Opp. 33), this allegation is not pleaded with particularity and certainly does not satisfy the Rule 9(b) standard.[10]

[10] The TPC does not allege that Narain made any actionable misrepresentations or omissions to induce CNO to enter into any agreement. (Mot. 2.) Accordingly, CNO's claim against Narain for fraudulent inducement must be dismissed.

CNO suggests in its opposition that Narain is liable for a fraudulent omission. (Opp. 26.) But CNO has not pleaded a fiduciary duty with Narain personally and, accordingly, it cannot pursue a claim of fraud by omission against him. Moreover, "where the alleged fraud consists of an omission and [CNO] is unable to specify the time and place because no act occurred, the complaint must still allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled [CNO], and (4) what [Narain] obtained through the fraud." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000). CNO fails to do this here.

CNO's response to Narain's justifiable reliance and damages argument is completely inadequate. The very communication on which CNO's fraud claim against Narain purports to rely—the only interaction with Narain that CNO describes with particularity—unambiguously concerned the removal of Quest Livery from CNO's trusts. (*See* Lipsius Decl. Ex. A (requesting "written consent for the sale of Quest Livery from WNIC Sub" and explaining that the "objective of the sale" was to "clear space").) For CNO to suggest that it may have been unaware of this fact, or that it "controverts the facts alleged in the Complaint" suggests that the TPC was not pleaded with adequate care. In any event, this document is clearly incorporated into the TPC by reference because it provides the basis for CNO's fraud claim. Despite this, CNO fails to explain how it relied on any purported omissions made in connection with this exchange or how it was injured by that reliance. Accordingly, CNO's fraud claims against Narain must be dismissed.

VI. CNO'S CLAIMS AGAINST BEECHWOOD RE ARE BEING ARBITRATED

CNO does not dispute that its breach of contract claim against Beechwood Re (1) belongs in arbitration, (2) is already being arbitrated, and (3) was filed as mere pretext to invoke various state security statutes. Instead, CNO argues that Beechwood Re's claim should be stricken because Beechwood Re has supposedly failed to post security. CNO is wrong.

As set forth more fully in Beechwood Re's response to CNO's security motion, Beechwood Re has already posted $5 million in security in connection with the identical claims that are pending in arbitration—an award that this Court reduced to a judgment. ECF No. 293. Moreover, CNO's transparent attempt to use the security statutes as a vehicle to eliminate its liability to Beechwood Re, obtain a default judgment, and secure the $5 million posted for security in the arbitration is patently abusive. The security statutes were not designed to be wielded as a sword by a hyper-aggressive creditor seeking to advantage itself vis-à-vis the rest of the estate. *See In re Laitasalo*, 193 B.R. 187, 193 (Bankr. S.D.N.Y. 1996). Because that is all CNO seeks to do here, it would be "philosophically inconsistent" with the statutory scheme to require Beechwood Re to post security (again). *See id.*

Finally, CNO's contention that Beechwood Re should not be permitted to compel arbitration of its contribution claim is specious. Section 10.1 of the Reinsurance Agreements provides that "all disputes or differences between the Parties arising under or relating to [Reinsurance Agreements] . . . shall be decided by arbitration pursuant to the terms of this Section." (May 16, 2019 Lipsius Decl. Exs. 2-3.) The Receiver's claims clearly "aris[e] under or relat[e]" to the Reinsurance Agreements," as the allegations concern investments that Beechwood carried out as agent for, and at the direction of, CNO under these agreements. (*See, e.g.*, TPC ¶¶ 168-76.) This is not an argument that CNO can make with a straight face. Indeed, CNO's Twenty-Third Affirmative Defense states: "The Receiver's claims are subject to arbitration under the Reinsurance Agreements …." (TPC at 67.) Thus, CNO appears to concede that the underlying claims belong in arbitration.

CONCLUSION

For these reasons, the Beechwood Parties' partial motion to dismiss should be granted.

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