

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION

Case No. 1:18-cv-06658 (JSR)

MELANIE L. CYGANOWSKI, AS RECEIVER,
BY AND FOR PLATINUM PARTNERS CREDIT
OPPORTUNITIES MASTER FUND LP, *et al.*,

Plaintiffs,

v.

BEECHWOOD RE LTD., *et al.*,

Defendants.

Case No. 1:18-cv-12018 (JSR)

SENIOR HEALTH INSURANCE COMPANY OF
PENNSYLVANIA,

Third-Party Plaintiff,

v.

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

Third-Party Defendants.

**REPLY MEMORANDUM OF LAW OF THIRD PARTY DEFENDANTS
MICHAEL NORDLICHT AND KEVIN CASSIDY IN FURTHER
SUPPORT OF THEIR MOTION TO DISMISS THE THIRD PARTY COMPLAINT**

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PRELIMINARY STATEMENT

Michael Nordlicht and Kevin Cassidy unequivocally established that the four claims SHIP alleges against them are based solely upon 12 paragraphs of allegations. Dkt. No. 476 at 1, *citing* TPC ¶¶ 48-49, 58, 272-73, 288, 296, 304, 308, 449, 465. These claims relate solely to SHIP's investment in AGH Parent LLC when AGH Parent bought the convertible note issued by Agera Holdings LLC from PGS. Dkt. No. 476 at 3-9. SHIP concedes that its claims against Michael Nordlicht and Kevin Cassidy hang on only these 12 paragraphs and relate solely to its investments in AGH Parent outside of the IMAs. Dkt. No. 522 at 16-17. SHIP does not rebut the showing that the factually sparse 12 paragraphs utterly fail to connect Michael Nordlicht or Kevin Cassidy to (a) SHIP, (b) the "Platinum-Beechwood Scheme," (c) Beechwood's efforts to induce SHIP to invest in AGH Parent, (d) any wrongful conduct directed to SHIP, (e) any false or misleading statement made to SHIP, or (f) a purported fraud against, or breach of duty owed to, SHIP.

As a matter of law, the scant and conclusory allegations simply do not establish plausible claims that the Agera Executives aided and abetted Beechwood's primary fraud against, or breach of fiduciary duty owed to, SHIP. Nor do these allegations establish a viable claim of civil conspiracy or that Michael Nordlicht or Kevin Cassidy was unjustly enriched at the expense of SHIP. SHIP's opposition resorts to mischaracterizing the TPC's factual allegations and arguing facts that are not (and could not be) pleaded in the TPC. SHIP's desperate tactics do not remedy the pleading deficiencies that are fatal to its claims against the Agera Executives.¹

Moreover, the acquittal of the three Platinum executives on all criminal charges relating to the Platinum funds has destroyed the foundation upon which SHIP's third-party claims rest. In sum, the third-party claims must be dismissed as against the Agera Executives.

¹ All defined terms set forth herein shall have the same meanings as defined in the Agera Executives' Moving Memorandum of Law. Dkt. No. 476.

ARGUMENT

I. THE TPC FAILS TO STATE A CLAIM FOR AIDING AND ABETTING.

A. The TPC Fails to Plead Actual Knowledge of a Primary Tort

The Agera Executives established that, in order to survive dismissal, the TPC must plead facts sufficient for the Court to draw an inference that Kevin Cassidy or Michael Nordlicht actually knew that Beechwood fraudulently induced SHIP to invest in AGH Parent or breached the fiduciary duties owed to SHIP in connection with the AGH Parent-related transactions. Dkt. No. 476 at 11-12, citing *Sharp Int'l Corp. v. State St. Bank & Trust Co.*, 403 F.3d 43, 49 (2d Cir. 2005). The Agera Executives showed that the TPC does not meet this burden to plead facts establishing actual knowledge. Dkt. No. 476 at 12. SHIP argues that the TPC establishes actual knowledge because (1) the allegations of the TPC are “equivalent” to the allegations pleaded by the JOLs in *Trott* that survived dismissal, and (2) the TPC “goes further than PPVA’s Complaint.” Dkt. No. 522 at 36. Both of SHIP’s arguments are wrong as a matter of fact and law.

SHIP contends that the TPC sufficiently pleads actual knowledge because this Court found that “equivalent allegations” pleaded by the *JOLs* in *Trott* were enough at the pleading stage to survive a motion to dismiss the claims that the Agera Executives had actual knowledge of the *Platinum Defendants’* alleged breach of fiduciary duty owed to *PPVA*. Dkt. No. 522 at 36. However, the allegations are not equivalent and SHIP’s argument does not pass muster. This Court’s finding that the *JOLs’* pleading sufficiently alleged that the Agera Executives had knowledge that the *Platinum Defendants* breached the fiduciary duty owed to *PPVA* does not and cannot, without more, establish that the Agera Executives knew that different defendants – *Beechwood* – defrauded or breached fiduciary duties owed to a different party – *SHIP* – pursuant to a different alleged wrong – fraudulently inducing SHIP to invest in AGH Parent. SHIP’s reliance on the *Trott* decision is misplaced.

In tacit recognition that the JOLs' allegations in *Trott* do not save its deficient pleading, SHIP resorts to "facts" that exist *nowhere* in the TPC. Thus, SHIP argues that the TPC "goes further than PPVA's complaint in alleging that together, Cassidy and Michael Nordlicht provided information to SHIP regarding Agera's operations and had a first-hand role in assisting Beechwood and Platinum in soliciting SHIP's investment in Agera outside of the IMAs." Dkt. No. 522 at 36. Tellingly, SHIP does not cite to a single paragraph in the TPC to support this argument. Moreover, SHIP does not allege that any information relating to Agera's operations was false or misleading or that any purported "first-hand role" by the Agera Executives in soliciting SHIP involved any false, misleading or improper information or conduct. SHIP's fabricated embellishments thus do not establish the requisite actual knowledge of the primary tort.

The only *pleaded* fact that SHIP cites in an effort to support its claim of actual knowledge that Beechwood defrauded or breached its fiduciary duty owed to SHIP is the allegation that the Agera Executives had an unspecified "role" in "eventually preparing the documents by which various portions of the transactions were consummated." Dkt. No. 522 at 36. SHIP fails to cite to even a single paragraph of the TPC for support. The TPC conclusorily alleges that "Steinberg and Ottensoser – working with others, including Michael Nordlicht, Narain and Kevin Cassidy – were responsible for preparation of the documents by which various portions of the transactions were consummated." TPC ¶ 304. However, no document supposedly prepared by Michael Nordlicht or Kevin Cassidy, let alone a document tied to SHIP, is identified. The TPC does not identify any document suggesting that SHIP's investment in AGH Parent would be unfair, illicit, improper, offensive or at an artificially inflated price. This conclusory allegation does not establish that Michael Nordlicht or Kevin Cassidy had actual knowledge that the Platinum or Beechwood Defendants were defrauding or breaching a fiduciary duty owed to SHIP.

SHIP misplaces reliance on *Anwar v. Fairfield Greenwich, Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010), to support its argument that the Agera Executives had actual knowledge of the primary torts. Dkt No. 522 at 34-35. In *Anwar*, investors, who lost money investing with Madoff, sued a host of defendants that were outsiders of the Madoff business, including Citco, that contracted with plaintiffs to perform financial services. 728 F. Supp. at 387, 392-97. The court denied Citco's motion to dismiss the aiding and abetting claims because the allegations supported "a strong inference of conscious avoidance ... sufficient to satisfy the knowledge requirement." *Id.* at 443. Unlike the smattering of conclusory allegations that litter the TPC, plaintiffs in *Anwar* specifically pleaded a laundry list of demonstrable "red flags" relating to Madoff of which Citco was allegedly aware, including "the roles consolidated in Madoff, the lack of transparency to his operations, his family members' involvement in key positions at his firm, his lack of segregation of important functions, his use of an unknown auditing firm, his use of paper trading records, and his implausibly consistent investment returns." *Id.* SHIP does not (and cannot) plead *any* facts akin to those in *Anwar* that put the Agera Executives on notice that Beechwood was engaged in wrongdoing directed at SHIP.

B. The TPC Fails to Plead Substantial Assistance and Proximate Causation

The Agera Executives showed that the TPC does not allege facts to establish that they substantially assisted Beechwood's alleged fraud and breach of fiduciary duty to SHIP or that any supposed assistance proximately caused the claimed damage on which the primary liability is based. Dkt. No. 476 at 12-15. SHIP has abandoned these elements and fails specifically to respond to a single argument raised in the Agera Executives' moving memorandum. *See* Dkt. No. 522 at 40-46. SHIP's only mention of the Agera Executives is to refer the Court to its summary of conclusory allegations regarding the Agera Executives (Dkt. No. 522 at 41), which the Agera Executives already have shown are patently insufficient and fail to establish that the Agera

Executives substantially assisted Beechwood. Dkt. No. 476 at 16-17. SHIP does not even purport to argue that Michael Nordlicht or Kevin Cassidy was a but-for cause of SHIP's purported loss.

Moreover, SHIP utterly fails to cite any legal authority, controlling or otherwise, to support the sufficiency of their conclusory allegations of substantial assistance and proximate causation. As this Court has recognized in *Trott*, allegations of "guilt by association" are insufficient to establish substantial assistance. See *In re Platinum-Beechwood Litig.*, No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 104562, at *66-67 (S.D.N.Y. June 21, 2019).²

SHIP generally argues that, where a plaintiff "allege[s] a highly interdependent scheme," as it purports to have done, proximate causation is adequately pleaded if the plaintiff alleges "that a defendant actively assisted and facilitated the fraudulent scheme itself." Dkt. No. 522 at 45, citing *ABF Capital*, 957 F. Supp. at 1328. In fact, the authority cited by SHIP shows that the TPC fails to allege "active assistance" by the Agera Executives sufficient to establish proximate cause as Agera Executives. For example, in *ABF Capital*, the court found that, unlike the typical relationship between brokers and customers, the funds relied on defendants to create new CMOs,

² SHIP cites to a litany of cases to argue that substantial assistance can take many forms, such as participation in "ordinary-course transactions" or presenting an enhanced financial picture. Dkt. No. 522 at 41. While SHIP cites generally to these cases, SHIP fails to demonstrate how the cases may be relevant to the Agera Executives who are not alleged to have so participated. By contrast, the facts alleged in the cited cases are much more specific and detailed than any fact pleaded by SHIP regarding the Agera Executives. For example, in *ABF Capital Mgmt. v. Askin Capital Mgmt., L.P.* 957 F. Supp. 1308, 1330 (S.D.N.Y. 1997), defendants allegedly induced their sales forces to market unmodelable securities to ACM by multiplying several-fold the commissions paid on such transactions and provided false and inflated performance marks for dissemination to investors. The court highlighted that defendants' participation "was not routine." *Id.* Similarly, in *Newby v. Enron Corp.*, 511 F. Supp. 2d 742, 807 (S.D. Tx. 2005), defendant issued 28 "true sales" opinion letters over three years that served as a basis for the accounting fraud aimed at deceiving the public. The court found that defendant's activity "was not an accidental, random, or a one-time event" and made possible the alleged deception. *Id.* No such facts are alleged here. Rather, SHIP alleges only vague conclusions unsupported by facts that the Agera executives "participated directly in the closing of" or were "intimately involved in all aspects" of the Agera Transaction, but fails to set forth a single detail. Dkt. No. 476 at 13. These conclusions do not establish the inference that Michael Nordlicht or Kevin Cassidy substantially assisted in wrongful conduct that proximately caused damage to SHIP.

to finance CMO purchases, and to maintain a general market for such securities, and that defendants assisted in directing millions of dollars' worth of these exotic securities. 957 F. Supp. at 1330. The TPC does not plead facts to establish similar "active assistance" or reliance upon such assistance by the Agera Executives of a fraudulent scheme directed to SHIP. The TPC instead alleges that SHIP relied upon Narain and Beechwood in determining to invest and remain with Beechwood and to invest in AGH Parent. Dkt. No. 476 at 15; TPC ¶¶ 285-301.

C. The TPC Fails to Satisfy Rule 9(b)

SHIP fails to address the moving memorandum's argument that it engages in impermissible group pleading by lumping all of the defendants together under "Co-Conspirators" or "Co-Conspirator Defendants" labels and by "providing no factual basis to distinguish their conduct." Dkt. No. 476 at 15. Instead, SHIP merely repeats that the "Court already has held that substantially identical allegations as to the Agera Executives satisfied Rule 8(a)" and that "[c]onsistent with its prior decision in the PPVA Action, the Court should do the same here." Dkt. No. 522 at 28-29. However, plaintiffs in the *Trott* action did not lump the Agera Executives together under "Platinum Defendants," "Beechwood Defendants" or "Co-Conspirators" or "Co-Conspirator Defendants." *See* No. 18-cv-10936 (JSR), Dkt. No. 156 at ¶¶ 158-60, 162-63.

II. THE TPC FAILS TO STATE A CLAIM FOR CIVIL CONSPIRACY.

SHIP's civil conspiracy claim must be dismissed because it is duplicative of its aiding and abetting claims. Where the allegations supporting a conspiracy claim are "essentially the same allegations that support the aiding and abetting claim," the duplicative conspiracy claim should be dismissed. *See Amusement Indus. Inc. v. Buchanan Ingersoll & Rooney, P.C.*, No. 11 Civ. 4416 (LAK) (GWG), 2012 U.S. Dist. LEXIS 50527, at *27 (S.D.N.Y. Apr. 10, 2012). This Court recently dismissed a conspiracy claim in the *Trott* action because it was duplicative of the aiding and abetting claims. *In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 104562, at *39-41.

So too, here, SHIP's conspiracy claim allegations are the same allegations that support its aiding and abetting claim (*see* TPC ¶ 449) and must be dismissed.

Moreover, the Agera Executives demonstrated that the TPC does not allege facts to establish a civil conspiracy claim. Dkt. No. 476 at 15-16. In opposition, SHIP does not rebut the Agera Executives' arguments, distinguish the controlling authority cited by the Agera Executives, or remedy the TPC's fatal pleading deficiencies. Instead, SHIP relies upon fabricated allegations that are not mentioned in the TPC. Dkt. No. 522 at 50. This does not withstand scrutiny.

SHIP argues that “[b]oth [Michael Nordlicht and Kevin Cassidy] played their role in the conspiracy and acted to induce SHIP to invest \$50 million of its assets ... in a sham business deal to funnel money into Platinum subsidiary PGS with little to no possibility of positive return for SHIP.” Dkt. No. 522 at 50. For factual support, SHIP cites to 26 paragraphs (TPC ¶¶ 285-310), but only four actually even mention the Agera Executives. TPC ¶ 288, 296, 304, 308. As a threshold matter, there is not a single allegation in the TPC supporting the conclusion that Michael Nordlicht “acted to induce SHIP to invest \$50 million of its assets” in a “sham transaction.” The TPC conclusorily alleges only that “Michael Nordlicht participated in meetings with SHIP to discuss the Agera Transactions.” TPC ¶ 48. However, the TPC is devoid of any facts establishing that Michael Nordlicht knew of any representations, false or otherwise, made to SHIP by Beechwood or agreed to participate in any proposed wrongful act directed to SHIP. Indeed, the TPC does not allege any facts to establish that Michael Nordlicht knew that SHIP contemplated investing into AGH Parent or any representations made to SHIP regarding such investment, let alone that it was a “sham” transaction. At most, the Court may infer that Michael Nordlicht acted as a lawyer for a company and performing usual tasks in that role.

The TPC also falls far short of pleading facts to establish that Kevin Cassidy “conspired” or acted to induce SHIP to invest \$50 million in AGH Parent. Dkt. No. 522 at 50. SHIP’s opposition relies on the conclusory allegations that Kevin Cassidy participated in a meeting with Narain and Feuer with SHIP representatives to solicit SHIP’s investment in AGH Parent. *Id.* at 16, *citing* TPC ¶¶ 49, 288. However, the moving memorandum acknowledged this conclusory allegation that Kevin Cassidy “participated” with unidentified “others from Agera Energy” and “provided [unidentified] information to SHIP regarding corporation operations and assisted Beechwood and Platinum in soliciting SHIP’s investment” and demonstrated that this does not supply the missing conspiratorial link. Dkt. No. 476 at 7. The moving memorandum highlighted that no specific facts are pleaded as to what type of operations information was provided by Kevin Cassidy or how he assisted Beechwood in soliciting SHIP’s investment. *Id.* It noted the glaring absence of facts to establish that any information that Kevin Cassidy allegedly provided was false, misleading, or otherwise used to perpetuate some wrongdoing or that anything occurred at the meeting to put Kevin Cassidy on notice of a purported fraud or breach of fiduciary duty being perpetrated against SHIP, let alone an illicit agreement by him to participate in it. SHIP’s dead silence is opposition to this showing is deafening.

SHIP makes no attempt to refute the showing that the claim of a civil conspiracy to breach a fiduciary duty fails because not all members of the conspiracy independently owed a fiduciary duty to plaintiff. Dkt. No. 476 at 16; *see Pope v. Rice*, No. 04 Civ. 4171 (DLC), 2005 U.S. Dist. LEXIS 4011, at *42 (S.D.N.Y. Mar. 14, 2005). SHIP’s concession is fatal.

SHIP also argues that, “[o]n the basis of similar allegations concerning the same transaction, the Court found that PPVA had adequately pled scienter against the Agera Executives.” Dkt. No. 522 at 50. However, this Court’s decision in *Trott* relating to the Agera

Executive's motion to dismiss is to no avail here because the JOLs in *Trott* did not assert a conspiracy claim against the Agera Executives. The Court's decision in *Trott* relating to aiding and abetting breach of fiduciary duty owed to PPVA has no relevance to whether *SHIP* has sufficiently pleaded that the Agera Executives conspired with Beechwood to defraud or breach fiduciary duties owed to SHIP.

III. THE TPC FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT.

SHIP does not dispute that, in order to state a claim for unjust enrichment, the TPC must allege that the Agera Executives received something of value *which belonged to SHIP*. Dkt. No. 476 at 17; Dkt. No. 522 at 51. The Agera Executives established that the unjust enrichment claim must be dismissed because the TPC completely fails to allege, even in conclusory fashion, that Michael Nordlicht or Kevin Cassidy was enriched by the Agera Transactions *to the detriment of SHIP*. Dkt. No. 476 at 17-19. SHIP devotes a single paragraph to each of Michael Nordlicht and Kevin Cassidy to try to bolster its unjust enrichment claim. Dkt. No. 522 at 53. However, SHIP does not (because it cannot) establish that either Michael Nordlicht or Kevin Cassidy received something of value that belonged to SHIP.

The allegation that Starfish Capital, Inc. received \$13 million in membership interests in AGH Patent (TPC ¶ 308) does nothing to establish that Kevin Cassidy was unjustly enriched to the detriment of SHIP. SHIP also was a member of AGH Parent. But SHIP does not show any basis to claim that Starfish's membership interest in AGH Parent somehow belonged to SHIP. SHIP argues that Michael Nordlicht held an equity interest in Agera Holdings "for no consideration" (Dkt. No. 522 at 53; TPC ¶¶ 48, 272), but does not explain (because it cannot) how that equity interest is connected to SHIP, which held an equity interest in a separate entity, AGH Parent. SHIP points to no facts to establish that Michael Nordlicht somehow held something of value that belonged to SHIP.

The unjust enrichment claim also fails because any cash or membership interests received by Kevin Cassidy (or Starfish) or Michael Nordlicht is governed by contracts. As this Court recognized, “courts in New York state and in this District have found that the 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.” *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 377 F. Supp. 3d 414, 427 (S.D.N.Y. 2019) (citation omitted). It cannot be disputed that the purchase agreement between PGS and Starfish Capital governs the sale by Starfish of its membership interest in PGS in exchange for \$13,552,000. *See* No. 18 Civ. 10936 (JSR), Dkt. No. 285 at Exh. 92. Similarly, the equity interest held by Michael Nordlicht in Agera Holdings LLC is governed by the operating agreements. Indeed, this Court recently held that the JOLs’ unjust enrichment claim was barred because an express contract governed the transfer of proceeds to defendant Seth Gerzberg from the Agera sale. *In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 104562, at *53-54. The same reasoning applies here. The unjust enrichment claim must be dismissed.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court enter an order (a) dismissing the First, Second, Fifth, and Seventh Counts of the TPC as against both Michael Nordlicht and Kevin Cassidy with prejudice and without leave to replead, and (b) granting Michael Nordlicht and Kevin Cassidy such further relief as the Court deems just.

Dated: New York, New York
July 12, 2019

**MINTZ, LEVIN, COHN, FERRIS, GLOVSKY
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