

Davis v Port
2020 NY Slip Op 32546(U)
July 31, 2020
Supreme Court, New York County
Docket Number: 654027/2013
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 49

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PAUL DAVIS, in his individual capacity and as assignee of
claims of SCOTTISH RE GROUP LIMITED,

DECISION AND ORDER

Index No. 654027/2013

Plaintiff,

- against -

LARRY PORT, RAYMOND WECHSLER, JEFFREY
HUGHES, AND CERBERUS CAPITAL MANAGEMENT,
L.P.,

Defendants.

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O. PETER SHERWOOD, J.:

Motion sequence nos. 011 and 012 are consolidated for disposition.

In motion sequence no. 011, defendants Larry Port (Port) and Raymond Wechsler (Wechsler) (together, Port/Wechsler) move, pursuant to CPLR 3013, 3016 (b), 3211 (a) (1) and (7), for an order dismissing the second cause of action in the second amended complaint against them. In motion sequence no. 012, defendant Cerberus Capital Management, L.P. (Cerberus) moves, pursuant to 3211 (a) (1) and (7), for an order dismissing the complaint against it.

BACKGROUND

The underlying facts and allegations have been discussed at length in prior decisions of this court, as well as those from the Appellate Division, First Department and the Court of Appeals. Briefly, Scottish Re Group Limited (Scottish Re or the Company) is an exempted company organized in the Cayman Islands that had been engaged in the business of reinsurance (Second Amended Complaint (Complaint) ¶¶ 15, 30 [NYSCEF Doc. No. 534]). Scottish Re's capital structure consisted of ordinary shares (Ordinary Shares), Convertible Cumulative Participating Preferred Shares (CCPPS), and Non-Cumulative Perpetual Preferred Shares (PPS). Different

certificates of designation governed the CCPPS and PPS, and these two classes of shares enjoyed different liquidation preferences and dividend accrual rates (*id.* ¶¶ 33, 39). Significantly, the CCPPS would automatically convert into 150 million Ordinary Shares if those holders did not exercise their options to convert prior to 2016 (*id.* ¶ 40).

Plaintiff Paul Davis owns more than 2.4 million shares of PPS, and until 2011, he owned more than 13 million Ordinary Shares (*id.* ¶ 14). Port, Wechsler and defendant Jeffrey Hughes (Hughes) (collectively, the Director Defendants) served on Scottish Re's Board of Directors (the Board) (*id.* ¶ 21). Cerberus together with Massachusetts Mutual Life Insurance Company and its affiliates (together, MassMutual) (collectively, the Investors) own 100% of Scottish Re's 1 million shares of CCPPS (*id.* ¶¶ 33, 38 and 41). As of June 2007, the Investors held 68.7% of the voting shares of Scottish Re, and effectively controlled the Company's operations (*id.* ¶ 40). MassMutual ceded control of its investment in Scottish Re to Cerberus (*id.* ¶¶ 2, 41).

This dispute concerns a series of actions undertaken by Scottish Re allegedly at Cerberus's direction. First, in 2011, the Investors purportedly engineered a reverse subsidiary merger (the Merger) between Scottish Re and SRGL Benton Ltd. (*id.* ¶ 46). To secure approval for the proposed Merger, the Director Defendants allegedly disseminated an information statement (the Information Statement) filled with "inaccurate and biased" and "intentionally misleading" information to Scottish Re's minority shareholders (*id.* ¶¶ 5, 49). In addition, plaintiff alleges that the special committee (the Special Committee), which had formed for the express purpose of examining the merits of the potential Merger, was tainted by conflicts of interest because two of its members, Robert Joyal (Joyal) and James Chapman (Chapman), had significant relationships with the Investors (*id.*, ¶¶ 59, 62). Once Scottish Re secured the minority shareholders' approval, it canceled the Ordinary Shares, paid those shareholders an undervalued \$0.30 per share, and

issued new Ordinary Shares to the Investors (*id.* ¶ 47). As a result, the Investors avoided the automatic conversion of their CCPPS into Ordinary Shares.

The second action complained of involves two Scottish Re subsidiaries, Orkney Holdings LLC (Orkney Holdings) and Orkney Re Inc. (together, Orkney), and the issuance by Orkney Holdings of \$850 million in debt securities (the Notes), a substantial number of which had been purchased by AIG (*id.* ¶ 71). Scottish Re intended to unwind the Orkney structure by repurchasing the Notes that had been sold to outside investors and canceling the debt (the Orkney Unwind) (*id.* ¶ 72). Plaintiff claims that Cerberus used confidential information it had learned as Scottish Re's controlling shareholder to purchase the Notes from AIG at 42% of their face value (the Orkney Note Acquisition), and after threatening to withdraw from the Merger, sold the Notes back to Scottish Re at 65% of par value (*id.* ¶¶ 75-77, 83-85). On April 15, 2011, the Director Defendants and the Special Committee approved the Merger and the Orkney Unwind (*id.* ¶ 52). Cerberus purportedly gained a windfall profit of \$161 million from the sale of the Notes, which caused a \$149 million loss to Scottish Re's GAAP book value (*id.* ¶ 85).

The third action complained of concerns a purportedly discriminatory and wrongful dividend policy. Plaintiff alleges that the Director Defendants have made just one dividend payment of \$1.2 million to the PPS shareholders whereas the Investors received \$100 million, which included \$35 million for the Ordinary Shares (*id.* ¶¶ 3, 99).

PROCEDURAL HISTORY

Plaintiff has previously asserted shareholder derivative claims for breach of fiduciary duty against Scottish Re's directors. In a decision and order dated October 14, 2014, this court dismissed the derivative claims for lack of standing based on plaintiff's failure to satisfy order 15, rule 12A of the Grand Court Rules of the Cayman Islands (Rule 12A) (*see Davis v Scottish Re*

Group Ltd. (46 Misc 3d 1206[A], 2014 NY Slip Op 51898[U], *11-12 [Sup Ct, NY County 2014], *affd as mod* 138 AD3d 230 [1st Dept 2016], *mod on other grounds* 30 NY3d 247 [2017]). The Court of Appeals concluded that Rule 12A constituted a procedural rule for purposes of this state's choice of law rules, and therefore was inapplicable because plaintiff sought to litigate his derivative claims in New York (*see Davis*, 30 NY3d at 250). The Court remitted the matter to the Appellate Division, First Department for consideration of whether plaintiff had standing under *Foss v Harbottle* ([1843] 67 Eng Rep 189, 2 Hare 461) (*id.*). The Appellate Division, First Department concluded that plaintiff lacked standing to maintain the derivative claims (*see Davis v Scottish Re Group Ltd.*, 160 AD3d 114, 119 [1st Dept 2018]).

The Appellate Division, First Department also granted plaintiff leave to replead the fourth and sixth causes of action as direct claims (*see Davis*, 138 AD3d at 233). On May 3, 2016, plaintiff filed a first amended complaint (NYSCEF Doc No. 240). As a seventh cause of action, he asserted a derivative claim for breach of fiduciary duty against Scottish Re's directors stemming from the Orkney Note Acquisition and the Orkney Unwind (together, the Orkney Transactions) (*id.* ¶¶ 139-145). This court dismissed the seventh cause of action based on the law of the case doctrine (*see Davis v Scottish Re Group Ltd.*, 2017 WL 3084988, *7-8 [Sup Ct, NY County, July 19, 2017], *affd as mod* 159 AD3d 528 [1st Dept 2018], *lv denied* 32 NY3d 913 [2019]).

In 2018, Scottish Re entered into winding up proceedings in the Cayman Islands (NYSCEF Doc No. 534, ¶ 12). As a result, court-appointed Joint Official Liquidators (JOL) now control the Company (*id.*). Pursuant to an Assignment and Ratification agreement dated September 20, 2018, JOL assigned Scottish Re's right to assert certain claims to plaintiff. Plaintiff, as assignee, was granted leave to amend the complaint a second time (*see Davis v Scottish Re Group, Ltd.*, 2019 NY Slip Op 31008[U], *5 [Sup Ct, NY County 2019]). In the second amended complaint, plaintiff

removed several of Scottish Re's directors, including Joyal and Chapman, and investors, including MassMutual, as direct defendants. The only defendants who remain are the Director Defendants and Cerberus.¹ As against the Director Defendants, the complaint pleads claims under Cayman law for (1) breach of the duty of sufficient information with regard to the Merger and (2) breach of fiduciary duty related to the Orkney Transactions. As against Cerberus, the complaint pleads five causes of action under Cayman law concerning the Orkney Transactions. They are (3) unlawful conspiracy; (4) knowing receipt; (5) dishonest assistance; (6) breach of confidence; and (7) breach of fiduciary duty. In lieu of answering the complaint, Port/Wechsler move to dismiss the second cause of action as against them, and Cerberus moves separately for dismissal.

DISCUSSION

The parties agree that New York's pleading standards shall apply to determine whether the complaint states a cause of action under Cayman law. In support of their positions, the parties proffer detailed affirmations from attorneys with expertise in Cayman law, Colette Wilkins (Wilkins) for Port/Wechsler and Graeme Alexander Halkerston (Halkerston) for plaintiff, together with copies of the case law and treatise excerpts cited in those affirmations.

A. Legal Standards

A motion brought under CPLR 3211 (a) (7) addresses the sufficiency of a pleading (*see Aristy-Farar v State of New York*, 29 NY3d 501, 509 [2017]). The court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," the motion will

¹ Plaintiff alleges that Hughes has passed away, and that he intends to substitute the administrator of Hughes's estate (NYSCEF Doc No. 534, ¶ 22).

be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). But, “allegations consisting of bare legal conclusions ... are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted]). Additionally, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). “When documentary evidence is submitted by a defendant ‘the standard morphs from whether the plaintiff stated a cause of action to whether it has one’” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]).

Under CPLR 3211 (a) (1), dismissal is warranted “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable’” (*VXI Lux Holdco S.A.R.L. v Sic Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta*, 73 AD3d at 86-87).

A pleading must give “notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense” (CPLR 3013). A “plaintiff cannot rely upon mere ‘buzz words’ or vague or conclusory allegations, but must instead set forth facts that truly address the underlying transactions and occurrences and the material elements of the claim” (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 131 [2d Dept 2009], *affd* 16 NY3d 775 [2011] [Dillon, J., concurring in part, dissenting in part] [internal citations omitted]). A pleading fails to comport with CPLR 3013 if

the claims “are pleaded against all defendants collectively without any specification as to the precise ... conduct charged to a particular defendant” (*Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1st Dept 1981]).

CPLR 3016 (b) states, in relevant part, that “[w]here a cause of action ... is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” As such, a claim for breach of fiduciary duty or breach of trust is subject to a heightened pleading standard under CPLR 3016 (b) (*see Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw*, 158 AD3d 494, 496 [1st Dept 2018]; *Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570, 571 [1st Dept 2016]). The purpose underlying CPLR 3016 (b) is “to inform a defendant with respect to the incidents complained of” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). Therefore, vague and conclusory allegations of misconduct will not suffice (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015]; *Berardi v Berardi*, 108 AD3d 406, 406-407 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]). That said, the pleading requirements under “CPLR 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*Pludeman*, 10 NY3d at 492).

B. Motion Sequence No. 011

In the second cause of action, plaintiff claims the Director Defendants breached their fiduciary duties to Scottish Re by providing confidential strategy information to Cerberus; failing to consider whether the Orkney Transactions were in the Company’s best interests and whether those transactions were fair; failing to extract concessions from Cerberus during the buyback of the Notes; allowing Cerberus to appropriate 85% of the value of the Orkney Unwind; and failing to disclose Joyal’s and Chapman’s conflicts of interest (NYSCEF Doc No. 534, ¶ 108).

Port/Wechsler seek dismissal of the breach of fiduciary duty claim, arguing that the complaint does not contain specific factual allegations describing each director's conduct as required under CPLR 3013 and 3016 (b), nor does it contain descriptions of each director's intentional conduct as required under Cayman law. Port/Wechsler also argue that conclusory allegations, made upon information and belief, that the Director Defendants were acting at Cerberus's direction are insufficient, and that the documentary evidence utterly refutes these conclusory allegations. Port/Wechsler submits that the complaint also fails to plead both the damage and causation elements for a breach of fiduciary duty claim. Last, Port/Wechsler contend that Article 116 (i) of Scottish Re's Articles of Association bars this claim.

Plaintiff advances three arguments in opposition. He contends that Port/Wechsler wrongly state that a breach of fiduciary duty requires an intentional breach. Plaintiff argues that directors owe a duty to "exercise the care, skill and diligence that would be exercised by a reasonably diligent person having the general knowledge, skill and experience to be expected of a person acting as a director" (NYSCEF Doc No. 662, Halkerston affirmation, ¶ 41), and here, he has pleaded a claim for a breach of the duty of reasonable care in addition to a breach of loyalty.

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty" (*Bristol & W. Bldg. Socy. v Mothew*, [1998] 1 Ch 1, 18, 1996 WL 1092374; *Renova Resources Private Equity Ltd. v Gilbertson*, 2012 [2] CILR 416, 427). The "[b]reach of [a] fiduciary obligation ... connotes disloyalty or infidelity. Mere incompetence is not enough" (*Bristol & W. Bldg. Socy.*, [1998] 1 Ch at 18). As such, "[a] fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not

act for his own benefit or the benefit of a third person without the informed consent of his principal” (*id.*).

Under Cayman law, “[d]irectors owe fiduciary duties to their companies to act *bona fide* in what they consider to be the best interests of the company, to exercise their powers for the purposes for which they are conferred and not to place themselves in a position where there is a conflict between their personal interests and their duty to the company” (*Weaving Macro Fixed Income Fund Ltd. v Peterson*, 2011 [2] CILR 203, 211; *Renova Resources Private Equity Ltd.*, 2012 [2] CILR at 421). A director may not engage in self-dealing without the company’s informed consent (*see Neptune (Veh. Washing Equip.) Ltd. v Fitzgerald*, [1995] BCC 1000, 1003, 1995 WL 1083108). Thus, a director must “exercise his powers (i) in what he (not the court) honestly believes to be the company’s best interests, and (ii) for the proper purposes for which those powers have been conferred on him” (*Extrasure Travel Insurances Ltd. v Scattergood*, [2003] 1 BCLC 598, 618, 2002 WL 31599760; *Matter of Acorn Intl., Inc.*, FSD No. 109 of 2014 at 16 [AJJ]).

The parties’ experts largely agree on the precepts described above (NYSCEF Doc No. 548, Wilkins affirmation, ¶¶ 14-20; NYSCEF Doc No. 662, ¶¶ 25-31). Therefore, to state a cause of action for breach of fiduciary duty under Cayman law, a plaintiff must plead “(1) a fiduciary duty; (2) a breach of the duty; and (3) a showing that the breach caused a loss to the beneficiary of the duty or resulted in a profit for the fiduciary” (*Matter of Refco Inc. Sec. Litig.*, 826 F Supp 2d 478, 500 [SD NY 2011], citing *Boardman v Phipps*, [1967] 2 A[1]C 46, 47F [U.K.]).

As applied herein, the complaint fails to adequately plead a claim for breach of fiduciary duty against Port/Wechsler (*see Retirement Plan for Gen. Empls. of the City of N. Miami Beach*, 158 AD3d at 496). A close reading of the complaint establishes that plaintiff complains of actions undertaken by the full Board or the Special Committee without ascribing a specific act or omission

to Port or Wechsler (*see 16 E. 96th Apt. Corp. v Neubohn*, 50 AD3d 397, 397 [1st Dept 2008] [dismissing a breach of fiduciary duty counterclaim where the defendants failed to particularize the independent tortious conduct by any individual director]; *Aetna Cas. & Sur. Co.*, 84 AD2d at 736 [dismissing causes of action pleaded “against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant”]). While the failure to particularize each individual defendant’s conduct may be excused in some instances (*see 47-53 Chrystie Holdings LLC v Thuan Tam Realty Corp.*, 167 AD3d 405, 406 [1st Dept 2018]), such is not the case here, where, in view of the prior procedural history, the defendants originally named in this action represent a diverse group of individuals or entities (NYSCEF Doc No. 1 at 1). As such, the complaint does not afford Port or Wechsler with sufficient notice of their specific actions that would give rise to a breach of fiduciary duty claim against them. Plaintiff agrees that he did not plead “individualized allegations by name” (NYSCEF Doc No. 731, oral argument tr at 62).

Even assuming that the complaint is sufficiently particular as to Port’s and Wechsler’s actions, the complaint fails to adequately plead the elements for a fiduciary duty claim with the requisite specificity under CPLR 3016 (b) (*see Retirement Plan for Gen. Empls. of the City of N. Miami Beach*, 158 AD3d at 496). As discussed, to prevail on a claim for breach of fiduciary duty, a plaintiff must prove that the fiduciary did not act in good faith or for an improper purpose.

A director’s duty to act in good faith is a subjective one, with the primary question being “whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director’s state of mind” (*Regentcrest plc (in liquidation) v Cohen*, [2001] 2 BCLC 80, 105, 2000 WL 1027165). Where a director honestly believes that he or she acted in the company’s best interests, then there is no breach of the fiduciary duty even if the action is

unreasonable or harms the company (*see Extrasure Travel Insurances Ltd.*, [2003] 1 BCLC at 619). Though Wilkins and Halkerston disagree whether intent is a necessary element, both agree that a determination involves an assessment of the director's state of mind (NYSCEF Doc No. 548, ¶¶ 21, 25; NYSCEF Doc No. 662, ¶¶ 28, 30-31). Plaintiff identifies six purported breaches of fiduciary duty related to the Orkney Unwind (NYSCEF Doc No. 534, ¶ 108). However, the complaint is devoid of any particularized allegations that Port or Wechsler failed to direct their minds to Scottish Re's best interests with regard to those actions. The fact that Port and Wechsler are associated with MassMutual and Cerberus, respectively, does not establish their disloyalty to Scottish Re because those affiliations were fully disclosed in the Information Statement furnished to the shareholders (*see Davis*, 160 AD3d at 119; NYSCEF Doc No. 545, affirmation of Jason I. Kirschner [Kirschner], exhibit A at 106). The assertion that the Port/Wechsler concealed two Special Committee members' affiliations with the Investors also lacks merit, as the Board published Joyal's and Chapman's affiliations in the Information Statement (NYSCEF Doc No. 545 at 105-106).

The documentary evidence also utterly refutes plaintiff's contention that Wechsler did not act in good faith or that he was conflicted. Wechsler was not a member of the Special Committee (NYSCEF Doc No. 545 at 23). More significantly, the minutes from the April 15, 2011 Board meeting disclose that Wechsler recused himself from voting to approve the Merger and the Orkney Unwind (NYSCEF Doc No. 546, Kirschner affirmation B at 3). Plaintiff concedes that Wechsler did not vote (NYSCEF Doc No. 731 at 36). Plaintiff has not offered any documentary evidence or other factual averments describing Wechsler's alleged misconduct.

With regard to Port, he was associated with MassMutual, not Cerberus (NYSCEF Doc No. 545 at 106, 141). Port was not a Special Committee member (*id.* at 23). The allegation that

MassMutual gave Cerberus overall control over its investment (NYSCEF Doc No. 534, ¶ 14) is too general to support an inference that Port served Cerberus's interests (*see Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 416 [1st Dept 2016]). Similarly, the documentary evidence appears to refute any plausible inference that Port served Cerberus's interests. First, the Company's internal emails dated October 24, 2010 (NYSCEF Doc No. 576, Eric Brenner [Brenner] Aff., Exhibit 3), March 16, 2011 (NYSCEF Doc No. 578, Brenner Aff., exhibit 5), and March 30, 2011 (NYSCEF Doc No. 582, Brenner Aff., Exhibit 9), in which Port was a recipient, fail to disclose his specific misconduct. Port did not initiate those communications nor do the emails describe his actions. Second, the emails show that Scottish Re was aware the Orkney Unwind would not likely benefit MassMutual. In particular, an email from Michael Baumstein (Baumstein), a director of one of Scottish Re's subsidiaries (NYSCEF Doc No. 1, ¶ 14), to Chapman, the Special Committee's chair (NYSCEF Doc No. 545 at 23), on March 16, 2011 partially reads that "MassMutual ... although technically precluded from voting on the matter, has no pecuniary interest in such a transaction other than as the single largest un-conflicted equity holder of Scottish Re" (NYSCEF Doc No. 578 at 1). Furthermore, plaintiff maintains that by allowing Cerberus to misuse the Company's confidential information, the Director Defendants breached the "no profit rule" (NYSCEF Doc No. 662, ¶ 49 [c]), but the complaint does not allege that Port or Wechsler personally benefited from the Orkney Unwind (*see Davis*, 160 AD3d at 118).

As for an improper purpose, the court must identify the power exercised, the proper purpose for which the power was delegated, the substantial purpose for which the power was used, and determine whether the purpose was proper (*see Extrasure Travel Insurances Ltd.*, [2003] 1 BCLC at 619). Halkerston states the complaint satisfies this test because it alleges the Director Defendants acted in a manner that put Cerberus's interests first (NYSCEF Doc No. 662, ¶ 49 [b]).

The allegations of an improper purpose, though, are wholly conclusory and unsupported by specific factual averments. Importantly, as noted above, neither Port nor Wechsler were members of the Special Committee, and Wechsler refrained from voting.

On the issue of damages, plaintiff complains that Port/Wechsler allowed Cerberus to misuse Scottish Re's secret strategy information (NYSCEF Doc No. 534, ¶ 76). This allegation is too general, and fails to describe when or to whom the information was disclosed or the specific information that was revealed. The complaint refers to meetings between Scottish Re's managers and Cerberus (*id.* ¶ 73), but does not plead whether these unidentified managers revealed that the Company would likely repurchase the Notes at a substantial premium at those meetings (*id.* ¶ 76). Scottish Re had already excluded a Cerberus bond trader from one of the Company's strategy meetings (*id.*; NYSCEF Doc No. 562, Andrew D. Gladstein [Gladstein] Aff., Exhibit 2 at 1). Significantly, plaintiff admits that entities other than Cerberus sought to purchase the Notes, and that Scottish Re supplied those firms with information about a potential unwind/block sale (*id.* ¶¶ 72, 74; NYSCEF Doc No. 562 at 1-2).

Moreover, as has been determined previously, Scottish Re's directors did not breach their fiduciary obligations because "Cerberus purchased the notes on the secondary market, not from Scottish Re. Thus, the purchase and subsequent sale of these notes was not at the expense of Scottish Re" (*see Davis*, 160 AD3d at 118). This determination dispenses with the need to discuss causation. Incidentally, the Information Statement disclosed that Scottish Re would purchase Notes from noteholders unaffiliated with Cerberus at a 10% discount to par, whereas it would purchase Notes from Cerberus affiliates at a 35% discount to par (NYSCEF Doc No. 545 at 28-30). Although this second purchase involved a smaller tranche of Notes (NYSCEF Doc No. 731 at 45), Scottish Re paid more per Note to acquire them from the non-Cerberus noteholders.

Plaintiff has not alleged that Port/Wechsler breached their fiduciary obligations when the Company purchased this smaller tranche for a higher par value per Note.

Lastly, Article 116 (i) of Scottish Re's Articles of Association reads:

“Directors of the Company shall have no personal liability to the Company or its Members for monetary damages for breach of fiduciary duty or other duties as a director, except (i) for any breach of a director's duty of loyalty to the Company or its members, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) a payment of a dividend on stock of the Company or a purchase or redemption of stock of the Company in violation of law, or (iv) for any transaction from which a director derived an improper or personal benefit”

(NYSCEF Doc No. 547, Kirschner Aff., Exhibit C at 53). The parties' experts agree that under Cayman law, an exculpation provision, such as the one at issue here, excludes a director from being held liable for a breach of fiduciary duty (NYSCEF Doc No. 548, ¶ 34; NYSCEF Doc No. 662, ¶ 43). Similar exculpatory provisions are also enforceable in New York (*see Teachers' Retirement Sys. of La. v Welch*, 244 AD2d 231, 231-232 [1st Dept 1997]).

Nevertheless, plaintiff submits that the exculpatory provision is inapplicable. He contends that, in addition to alleging the Director Defendants failed to act in good faith, he has pled a claim for breach of a director's duty of reasonable care, skill and diligence in the exercise of his or her duties to a company (NYSCEF Doc No. 662, ¶¶ 49 [d], 51). The parties' experts recognize that a director owes a duty of reasonable care, skill and diligence in discharging his or her duties to a company (NYSCEF Doc No. 548, ¶ 22; NYSCEF Doc No. 662, ¶ 27), though they disagree on whether the exculpatory provision applies to claims predicated on the duty of care.

A plain reading of the exculpatory clause indicates that a director is subject to liability in four instances. With regard to the first and second instances, as explained above, the complaint fails to plead a breach of a director's fiduciary duty, i.e. the duty of loyalty and good faith, with

the requisite particularity. The third, the payment of a dividend in violation of law, is inapplicable based on the facts alleged. As to the fourth instance, plaintiff has not alleged that Port or Wechsler derived a personal benefit from the Orkney Transactions. Thus, Article 116 (i) bars plaintiff's claim for a breach of a director's duty of reasonable care, skill and diligence.

In any event, the complaint fails to adequately plead a claim for a breach of this duty. As explained in *Bristol & W. Bldg. Socy.* ([1998] 1 Ch at 17), a director's fiduciary duty does not encompass the duty to exercise reasonable care (*see also Kryz v Aaron*, 106 F Supp 3d 472, 482 (D NJ 2015)). The duty to exercise reasonable care includes an objective element that a director "exercise the care, skill and diligence that would be exercised by a reasonably diligent person having the general knowledge, skill and experience reasonably to be expected of a person" in that position (*Weaving Macro Fixed Income Fund Ltd.*, 2011 [2] CILR at 212). The duty also includes a subjective element that a director "exercise the knowledge, skill and experience which they actually possess" (*id.*). A director must exercise independent judgment and keep himself or herself informed about the company's affairs (*id.* at 213). Here, the complaint does not plead the objective and subjective elements of the claim with specificity. For instance, plaintiff has not alleged that the formation of an independent Special Committee or Wechsler's recusal from voting constitute improper exercises of this duty or that a reasonable director or another director with a similar skill set to those held by Port/Wechsler would have acted differently. Thus, the motion to dismiss the second cause of action is granted.

C. Motion Sequence No. 012

On its motion, Cerberus argues that the complaints claims fail to meet the heightened pleading standard under CPLR 3016 (b).

1. The Third Cause of Action

In the third cause of action, plaintiff asserts that Cerberus conspired with Scottish Re to acquire the Notes from AIG based on Scottish Re's confidential information and usurp a corporate opportunity belonging to the Company; allow Cerberus to reap windfall profits when it sold the notes to Scottish Re; allow Scottish Re to transfer excessive funds to Cerberus; and further Cerberus's interests (NYSCEF Doc No. 534, ¶ 113).

Cerberus argues the cause of action for unlawful act conspiracy, which this court has dismissed twice previously, fails because plaintiff has not adequately pleaded a "combination" or damages under Cayman law. Plaintiff counters that a combination or understanding does not require a formal agreement, and submits that the court should infer that Scottish Re agreed to purchase the Notes at a price that would ensure Cerberus received a massive windfall.

The parties' experts recognize that the elements for unlawful act conspiracy claim are: (1) an unlawful action; (2) taken pursuant to a combination or agreement between the defendant and at least one other; (3) with the intent to injure the plaintiff by unlawful means, whether it was the defendants' predominant purpose to do so; (4) that damages the plaintiff (*see Kuwait Oil Tanker Co. SAK v Al Bader*, [2000] 2 All ER [Comm] 271, 312, 2000 WL 571379; NYSCEF Doc No. 565, Wilkins Aff., ¶ 14; NYSCEF Doc No. 662, ¶ 52). What conduct constitutes unlawful means depends on "whether there is a just cause or excuse for combining to use lawful means" (*JSC BTA Bank v Ablyazov*, [2018] 2 WLR 1125, 1135, 2018 WL 01400463). The commission of a tort, such as a breach of fiduciary duty, qualifies as an unlawful act (*see Fiona Trust & Holding Corp. v Privalov*, [2010] EWHC 3199 [Comm], at ¶ 69, 2010 WL 5152459). To establish a combination or agreement between co-conspirators, a plaintiff must show that two or more persons deliberately combined to achieve a common end (*see Kuwait Oil Tanker Co. SAK*, [2000] 2 All ER [Comm] at

312). It must also be shown that the defendant intended the loss (*see Meretz Investments N.V. v ACP Ltd.*, [2007] EWCA Civ 1303, at ¶ 146, 2007 WL 4266070), and that the defendant's conduct was caused by this intent (*see Digicel (St. Lucia) Ltd. v Cable & Wireless plc*, [2010] EWHC 774 (Ch), at ¶ 82, 2010 WL 1368737).

Here, the complaint fails to adequately plead the specific facts necessary to state a claim for unlawful act conspiracy. The complaint alleges in wholly conclusory terms that Cerberus combined with Scottish Re's directors and managers on the Orkney Transactions. Merely stating there is a combination, without any supporting factual averments on what the co-conspirators had actually agreed, does not mean that a combination exists. Importantly, the complaint does not identify the unnamed persons at Cerberus with whom Scottish Re's directors and managers allegedly conspired or the common understanding between them.

Halkerston submits that overt acts or omissions qualify as unlawful means (NYSCEF Doc No. 662, ¶ 57, citing *The Dolphina*, [2011] SGHC 273, 345), and that a tacit combination may be inferred from the surrounding facts and circumstances, taking into account "a meeting of the minds in the sense that the parties knew the essential facts and entertained the same object" (NYSCEF Doc No. 662, ¶¶ 54-55). Indeed, each participant in the conspiracy must be aware of the common agreement (*see Kuwait Oil Tanker Co SAK*, [2000] 2 All ER [Comm] at 313). The complaint, though, lacks an allegation describing a "meeting of the minds" such that each participant was aware of their agreement. Instead, the allegations largely concern the outcomes of the purported misconduct, not the specific acts deliberately undertaken in furtherance of a common agreement.

Even after affording the plaintiff every favorable inference, the documentary evidence does not support a reasonable inference of a combination between Scottish Re and Cerberus, acting through Chapman, as is suggested (NYSCEF Doc No. 731 at 38). For the most part, the emails

reveal that Chapman took care to scrutinize the Orkney Unwind because it would likely benefit Cerberus (NYSCEF Doc No. 574, Brenner Aff., Exhibit 1 at 1; NYSCEF Doc No. 580, Brenner Aff., Exhibit 7 at 2-3). In one email, Chapman observed that the Special Committee would likely need third-party advice and a fairness opinion in its dealings with Cerberus (NYSCEF Doc No. 574 at 1). In another, Chapman stated that the transaction as it had been presented at the time was not a “must do” (NYSCEF Doc No. 578 at 2). He wrote that “it behooves management to run the aforementioned queries to ground along with the Special Committee in order to efficiently and adequately discharged [sic] our collective fiduciary obligations” (NYSCEF Doc No. 579, Brenner Aff., Exhibit 6 at 6). Thus, the actions described in the emails do not give rise to a reasonable inference that Cerberus deliberately combined with Scottish Re’s directors or managers to cause a loss suffered by the Company. Hence, that part of the motion to dismiss the third cause of action is granted.

2. The Fourth Cause of Action

The fourth cause of action seeks damages for knowing receipt. The complaint alleges that Scottish Re transferred millions of dollars to Cerberus in breach of trust because Scottish Re’s directors breached their fiduciary obligations to the Company (NYSCEF Doc No. 534, ¶ 118).

Cerberus posits that plaintiff cannot pursue a knowing receipt claim because the existence of a valid contract for Scottish Re to purchase the Notes precludes the claim. Cerberus further argues that the transfer of assets was not made in breach of a fiduciary duty; a Cerberus affiliate, not Cerberus, received the funds; and the allegations of knowledge are too general. Plaintiff, in opposition, contends that he has pleaded facts sufficient to infer breaches by all of Scottish Re’s directors, not just Port/Wechsler. He submits that Cerberus was aware of a breach of trust because

it misused confidential information about the amount that the Company would pay to acquire the Notes (NYSCEF Doc No. 534, ¶ 81).

To state a cause of action for knowing receipt, “the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty” (*El Ajou v Dollar Holdings plc*, [1994] 2 All ER 685, 700, 1993 WL 965527). A knowing receipt claim imposes equitable liability upon a defendant “when he or she acts unconscionably by receiving and retaining trust property with the knowledge that it was transferred in breach of trust ... [or] breach of a fiduciary duty other than a breach of trust” (*Arthur v Attorney Gen. of the Turks & Caicos Is.*, [2012] UKPC 30, ¶ 31, 2012 WL 3062611). “[T]he recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt” (*Bank of Credit & Commerce Intl. (Overseas) Ltd. v Akindete*, [2001] Ch 437, 455, 2000 WL 742040). Dishonesty is not an element (*id.* at 450).

While the parties largely agree on the basic elements for this cause of action, they disagree on whether assets transferred pursuant to a valid contract that has not been set aside bars a knowing receipt claim. According to Wilkins, the existence of a valid contract that has not been set aside precludes a claim for knowing receipt, citing *Criterion Properties plc v Stratford UK Properties LLC* ([2004] 1 WLR 1846, 2004 WL 1174227) in support (NYSCEF Doc No. 565, ¶ 41). Halkerston submits that Wilkins’s reliance on *Criterion Properties plc* is misplaced. First, Halkerston explains that *Criterion Properties plc* involved a claim for knowing assistance, not knowing receipt, and involved a challenge to a contract that had not yet been performed (NYSCEF

Doc No. 662, ¶ 79). Second, Halkerston states that the proposition in *Criterion Properties plc* cited by Wilkins is obiter dictum, and is not the main holding in that action (*id.* ¶ 78).

Halkerston's argument is unpersuasive. In *Madoff Sec. Intl. Ltd. (In Liquidation) v Raven* ([2013] EWHC 3147 [Comm], ¶¶ 368-369, 2013 WL 5338134), the Court applied the principle cited as obiter dictum in *Criterion Properties plc* to conclude that payments made under a valid contract that had not been set aside was fatal to a claim of knowing receipt. There, as here, the parties fully performed under the terms of the contract. Thus, because the transfer of assets was made pursuant to a valid contract, plaintiff's knowing receipt claim fails.

The claim fails for the additional reason that the complaint does not adequately plead the elements for knowing receipt. As discussed earlier, the complaint has not articulated a cause of action for breach of fiduciary duty with specificity. As to the second element, "[k]nowledge ... means not merely notice, but, in accordance with *Akindede*, such knowledge as to make the recipient's conduct unconscionable" (*Arthur*, [2012] UKPC 30, at ¶ 36). The allegation that "Cerberus had sufficient knowledge of the breach of trust by the Company's directors to make it unconscionable for them to retain the benefit of this payment" (NYSCEF Doc No. 534, ¶ 119) is conclusory, and unsupported by a detailed factual basis for Cerberus's knowledge. Therefore, the motion insofar as it seeks dismissal of the fourth cause of action is granted.

3. The Fifth Cause of Action

As for the fifth cause of action for dishonest assistance, Cerberus argues that the complaint fails to identify the Cerberus agents who dishonestly induced or assisted Scottish Re's directors to breach their fiduciary obligations to the Company. Plaintiff responds that there are strong bases to infer that Cerberus pressured Scottish Re's directors to breach their fiduciary duties.

To prevail on a claim for dishonest assistance under Cayman law, the plaintiff must plead and prove: (1) a disposal of assets in breach of a trust or fiduciary duty; (2) that the defendant assisted in that breach or disposal; and (3) that the defendant assisted the breach of trust or fiduciary duty dishonestly (*see Ritter v Butterfield Bank (Cayman) Ltd.*, 2018 [1] CILR 529, 595). Dishonesty “means simply not acting as an honest person would in the circumstances” and advertent conduct or conscious impropriety (*Royal Brunei Airlines v Tan*, [1995] 2 AC 378, 389, 1995 WL 1081657). Whether a defendant acted dishonestly is determined on an objective standard (*see Islena De Inversiones S.A. de C.V. (trading as Islena Airlines) v Jefferson*, 1998 CILR 148, 160; *Royal Brunei Airlines*, [1995] 2 AC at 389). “As dishonesty is a serious allegation it is not to be pleaded lightly” (*Ritter*, 2018 [1] CILR at 604). As against a corporate defendant, the plaintiff must identify and particularize the individual at the corporate defendant who acted dishonestly, and “identify and particularize what the defendant did to assist in the breaches of fiduciary duty or trust, how the assistance caused, contributed or resulted in the plaintiff’s loss and how the defendant is alleged to have acted dishonestly in assisting the main perpetrator” (*id.* at 603-604). Wilkins and Halkerston agree that under Cayman law, a company may only act through its agents (NYSCEF Doc No. 565, ¶ 16; NYSCEF Doc No. 662, ¶ 68).

Although the complaint alleges that Cerberus induced Scottish Re’s directors to breach their fiduciary obligations, these general allegations of dishonest assistance are unsupported by particularized facts. Importantly, the complaint does not identify the Cerberus agents who engaged in the dishonest assistance or describe how these agents procured the alleged breaches. Plaintiff also does not identify which Scottish Re directors breached their obligations, only speculating that “some or all” of them committed a breach (NYSCEF Doc No. 572, plaintiff’s memorandum of law at 19). Thus, that part of the motion seeking to dismiss the fifth cause of action is granted.

4. The Sixth Cause of Action

The sixth cause of action asserts a claim for breach of confidence. The complaint alleges that Scottish Re's fiduciaries or managers disclosed confidential information concerning the Orkney Transitions, that Cerberus was aware the disclosures constituted a breach of confidence, and that it misused the information for its own benefit (NYSCEF Doc No. 534, ¶¶ 129-130).

Cerberus contends that the complaint fails to describe the confidential information or to whom that information was shared. It submits that such bare pleadings are plainly insufficient. For its part, plaintiff argues that Cerberus's conduct in sending bond traders to Scottish Re's strategy meetings and approaching Scottish Re immediately after purchasing the Notes from AIG strongly supports an inference that Cerberus knew of Scottish Re's plans for the Orkney Unwind.

"[A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others" (*Attorney-General v Observer Ltd.*, [1990] 1 AC 109, 281, 1988 WL 622820). An obligation of confidence may arise from a transaction or relationship between the parties, such as an express contract, or in equity (*id.*). The information must also be objectively confidential (*see Condoco Grand Cayman Resort Ltd. v Broadhurst Dacosta*, 2004-05 CILR 236, 243), as information that has entered the public domain is not considered secret (*see Attorney-General*, [1990] 1 AC at 281). The parties' experts agree that the elements for a cause of action for breach of confidence are: (1) information that is confidential in nature; (2) information that was communicated in circumstances importing an obligation of confidence; and (3) unauthorized use of the information (*see Condoco Grand Cayman Resort Ltd.*, 2004-05 CILR at 243).

Here, the complaint fails to plead a claim for breach of confidence with particularity (*see RSSM CPA LLP v Bell*, 162 AD3d 554, 555 [1st Dept 2018]). Plaintiff alleges that Cerberus misused confidential information that Scottish Re “would likely repurchase the Notes at a substantial premium” (NYSCEF Doc No. 534, ¶ 75). However, the complaint does not state the specific content of the information disclosed in anything other than vague, general terms. Plaintiff admits it was publicly known that there was potential value in Scottish Re purchasing the Notes (*id.*, ¶ 74), but does not attempt to distinguish the allegedly secret information Cerberus purportedly received from the information publicly disclosed to others. Plaintiff concedes that directors owe a duty of confidentiality (*see Bolkih v KPMG*, [1999] 2 AC 222, 235 1998 WL 1043853), but the complaint does not set forth the identities of the directors who disclosed the confidential information or those at Cerberus who received it or when the information was revealed. In fact, on October 14, 2010, Baumstein wrote that “I (nor anyone else here) did not tell anyone in Cerberus what the bid was and who it was from” (NYSCEF Doc No. 576 at 1). Plaintiff also complains that Cerberus persisted in sending bond traders to Scottish Re’s strategy meetings (NYSCEF Doc No. 534, ¶ 73), but the documentary evidence refers to just one such instance. On that occasion, Scottish Re asked the bond trader to leave the meeting (NYSCEF Doc No. 562 at 1). Thus, that part of the motion seeking to dismiss the sixth cause of action is granted.

5. The Seventh Cause of Action

As a seventh cause of action, the complaint alleges that Cerberus acted as a “shadow director” for Scottish Re, and that Cerberus breached its duty to act in Scottish Re’s best interests by “diverting value away from the Company in the Orkney Note Acquisition and Orkney Unwind, by diverting value away from the Company, and by profiting from the diversion of value and breaches of fiduciary duty” (NYSCEF Doc No. 534, ¶ 136).

Cerberus submits that it does not owe a fiduciary duty to the Company as either a shareholder or as a “shadow director.” Wilkins explains that a shadow director is a recent statutory creation in the Cayman Islands and applies only to situations where a company is the process of winding up its business. Plaintiff replies that it does not seek damages solely because Cerberus acted as a shadow director. Instead, he maintains that, based on its actions, Cerberus assumed a fiduciary duty under the common law.

At the outset, plaintiff’s assertion that it has not advanced a shadow director theory is unpersuasive, in view of the express statement in the complaint that Cerberus acted as a shadow director (NYSCEF Doc No. 534, ¶ 135). “The concept of a ‘shadow director’ [which] is a creature of UK statute ... is conspicuously absent from the Cayman statutes” and does not exist under English or Cayman common law (*Omni Sec. Ltd. v Deloitte & Touche*, 2000 CILR 102, 111). Although Part V of the Companies Law legislation introduced the shadow director concept to the Cayman Islands in 2009, its application is limited to circumstances where a company is winding up its business (NYSCEF Doc No. 565, ¶ 111). Plaintiff does not challenge Cerberus’s contention that Cayman law recognizes the existence of a shadow director only in the circumstances defined in the statute, none of which are applicable here. Thus, the complaint fails to plead a cause of action for breach of fiduciary duty against Cerberus based on a shadow director theory.

Nonetheless, plaintiff maintains that he has pleaded a claim for breach of fiduciary duty under the common law. Halkerston cites several cases for the proposition that the court should first look at a person’s conduct to determine whether that person assumed the duties of a director, and therefore, owed a fiduciary obligation to the company (NYSCEF Doc No. 662, ¶¶ 129-130). Plaintiff implies that, as the controlling shareholder, fiduciary duties arise based on the directions Cerberus purportedly gave to Scottish Re’s directors (*see Vivendi SA v Richards*, [2013] BCC 771,

806, 2013 WL 5336375). Plaintiff, though, ignores the principle advanced by Cerberus that a shareholder does not owe a fiduciary obligation to the company (NYSCEF Doc No. 565, ¶ 106, citing Hollington on Shareholders' Rights [8th ed 2019]). As Wilkins explains, the fact that a shareholder is in “a position of influence (even a position of strong influence) is not necessarily a fiduciary position” (NYSCEF Doc No. 726, Wilkins Reply Aff., ¶ 49, quoting *Instant Access Properties Ltd. (In Liquidation) v Rosser*, [2018] EWHC 756 [Ch], 2018 WL 01764180).

Assuming without deciding that Cerberus's conduct is sufficient to conclude that it is a fiduciary, the complaint fails to plead a cause of action for breach of fiduciary duty in conformity with CPLR 3016 (b). The allegations concerning Cerberus's directions and instructions to Scottish Re's directors are too general and conclusory (*see Retirement Plan for Gen. Empls. of the City of N. Miami Beach*, 158 AD3d at 496). As discussed above, bare legal conclusions will not suffice.

Nor does the documentary evidence salvage the claim that Cerberus “strongly pressured the Scottish Re directors to buy back the Notes at a price advantageous to Cerberus without regard for the impact on the Company” (NYSCEF Doc No. 534, ¶ 81). Internal emails suggest that the Special Committee's members, specifically Chapman, who is alleged by plaintiff to have a conflict of interest, were resistant to approving Scottish Re's purchase of the Notes from Cerberus. In particular, Chapman informed Baumstein by email on March 15, 2011 that “there has been little input received to overly persuade the Committee that the transaction, as most recently presented, is overly compelling” (NYSCEF Doc No. 578 at 2). Other emails show that Hannover Life Reassurance Company of America (Hannover), a nonparty with whom Scottish Re was negotiating a reinsurance agreement (NYSCEF Doc No. 585, Brenner Aff., Exhibit 12 at 1), may have pressured Scottish Re to act on the Orkney Unwind. According to a fairness opinion prepared by Houlihan Lokey, the Special Committee's independent advisor, Hannover agreed to “indemnity

reinsure” life term insurance policies that Scottish Re or its subsidiaries had issued between 2000 and 2003 (*id.*). In an email to Chapman dated March 16, 2011, Baumstein wrote, in part:

“The reason I was hoping to speak yesterday was to update you on two major developments affecting the transaction and, related, to seek your advice and direction on how to move the transaction forward in light of these developments. The first update is that we have circled final concessions (summarized below) from all parties except Cerberus, and are hoping to finalize Cerberus concessions this week. The second update comes by way of a discussion with Hannover Re in which Hannover has now provided a signing deadline of the first week of April. Hannover said that given the recent events in Japan and other reinsurance opportunities, and the relative size of the proposed Orkney transaction, there now exists a need for them to move expeditiously toward execution of a final agreement or else move on to other opportunities.

As we previously have discussed with (and provided supporting documentation to) the Committee and its advisors, the Executive Management team strongly believes that unwinding the Orkney structure and selling the Orkney block to Hannover Re as currently proposed produces a compelling positive economic impact to Scottish Re. As such, Management is in favor of finalizing terms with Cerberus and recommending the transaction to the Committee for approval within Hannover's timeframe. The proposed transaction is consistent with our strategy of managing an economic run-off of the insurance liabilities within the enterprise while seeking accretive dispositions of blocks. In addition, the proposed transaction has the support of the Delaware Regulator and is supported by Mass Mutual who, although technically precluded from voting on the matter, has no pecuniary interest in such a transaction other than as the single largest un-conflicted equity holder of Scottish Re”

(NYSCEF Doc No. 578 at 1).

In one email chain beginning March 30, 2011, Jonathan Bloomer (Bloomer), another Scottish Re director (NYSCEF Doc No. 1, ¶ 13), advised Chapman that “Hannover have said they want to finalise [sic] any Orkney transaction by 8 April. I would be extremely concerned by the value loss to the company if the opportunity of this deal is lost. I must say, I can see no reason to hold this up and risk them walking away if terms can be agreed” (NYSCEF Doc No. 582 at 2).

Bloomer also wrote, “I know the management team have been going through a further information request with Houlihan this morning. I suspect it was in that context they repeated my view that the Orkney and Merger transactions aren’t linked. Cerberus/Mass are willing to take the merger proposal off the table to ensure there is no linkage” between the Merger and the Orkney Unwind (*id.*). Chapman responded that “[t]he goal of the Special Committee is to efficiently deliberate on both transactions and provide fulsome feedback and ensure appropriate disclosure. As such, the Committee will take counsel/advice from Houlihan and Cahill, subsequent to which we will revert on both the Orkney and the Merger transactions” (*id.*). In the same email chain, Baumstein wrote, “[p]er Jim’s comments on management pushing IIL about not tying [sic] the transactions, your comment was correct. We emphasized your message that if the merger had a negative impact on the SC getting Orkney done, you would take it off the table. In addition, we reiterated that management viewed Orkney as the top priority given the relative value creation” (*id.* at 1).

As to the actual purchase of the Notes, plaintiff concedes that “[i]n the interim, Cerberus had been actively trying to sell some of its Notes to third parties,” although at a lower percentage of par value than what Cerberus had first proposed to Scottish Re (NYSCEF Doc No. 534, ¶ 78). Cerberus purportedly received a bid for half its Notes for a higher amount than Scottish Re’s initial bid of 50% (NYSCEF Doc No. 576 at 1). Bloomer indicated that “Cerberus ... made a firm offer of 67 to sell them ... [with] the 65 price offered 4 months ago adjusted for time value” and that Chapman was “agnostic re 60 or 65 or 67 cents – it doesn’t affect the Common [holders of the Ordinary Shares]” (NYSCEF Doc No. 582 at 1-2).

The Board approved the Orkney Unwind and the Merger on April 15, 2011. When viewed in this context, it is plausible to infer that the need to complete the reinsurance transaction with Hannover by a date certain or risk financial loss provided an incentive for Scottish Re to move

quickly on the Orkney Unwind, as opposed to pressure from Cerberus to raise the purchase price of the Notes. Further, it appears that Cerberus adjusted the purchase price for “time value.”²⁸ Therefore, the documentary evidence does not support plaintiff’s claim that Cerberus breached a fiduciary duty to the Company by pressuring Scottish Re to bow to its economic demands.

Finally, plaintiff complains that Cerberus received a windfall because it usurped a corporate opportunity and purchased the Notes from AIG before selling them to Scottish Re. The profit Cerberus received in reselling the Notes, though, is relative only to the amount Cerberus paid to acquire them. As stated earlier, “the purchase and subsequent sale of these notes was not at the expense of Scottish Re” (*see Davis*, 160 AD3d at 118). Consequently, that facet of the motion seeking to dismiss the seventh cause of action is granted.

6. The Statute of Limitations

In view of the foregoing, the court need not address the arguments raised by Cerberus that plaintiff’s claims against it are time-barred under the relation back doctrine or CPLR 205 (a).

Accordingly, it is

ORDERED that the motion of defendants Larry Port and Raymond Wechsler to dismiss the second cause of action (motion sequence no. 011) is granted, and the second cause of action is dismissed as against said defendants; and it is further

ORDERED that the motion of defendant Cerberus Capital Management, L.P. to dismiss the complaint against it (motion sequence no. 012) is granted, and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and
it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers
filed with the court bear the amended caption read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

-----X
PAUL DAVIS, in his individual capacity and as assignee
of claims of SCOTTISH RE GROUP LIMITED,

Index No. 654027/2013

Plaintiff,

- against -

LARRY PORT, RAYMOND WECHSLER, and
JEFFREY HUGHES,

Defendants.
-----X

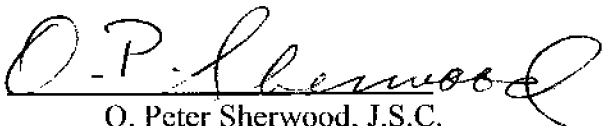
and it is further

ORDERED that defendants Larry Port and Raymond Wechsler shall each serve an answer
to the second amended complaint within 20 days from the date of service of a copy of this order
with notice of entry thereof; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 49 by video
conference on September 15, 2020 at noon. Counsel for plaintiff should contact the court (Mr.
Rivera) with email addresses of all scheduled participants no later than a week prior. He will send
invitations.

Dated: July 31, 2020

ENTER:


O. Peter Sherwood, J.S.C.