United States District Court
Southern District of New York

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Anwar, *et al.*,

Plaintiffs,

v.

Master File 09 CV 118 (VM)

Fairfield Greenwich Limited, *et al.*,

Defendants.

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Memorandum of Law Submitted By Defendant Brian Francoeur In Reply to Plaintiffs' Memorandum In Opposition To His Motion To Dismiss And In Further Support Of His Motion To Dismiss The Second Consolidated Amended Complaint

Law Offices of Kenneth A. Zitter
Attorneys for Defendant
Brian Francoeur
260 Madison Avenue, 18th Floor
New York, New York 10016
212-532-8000
KAZ-3195

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Preliminary Statement

This Memorandum of Law is submitted by Defendant Brian Francoeur ("Francoeur") in reply to Plaintiffs' Memorandum in Opposition to his motion to dismiss and in further support of his motion pursuant to Fed. R. Civ. P. Rule 12(b)(6) to dismiss the Second Consolidated Amended Complaint (the "SCAC").

Plaintiffs' Memorandum in Opposition makes clear that Plaintiffs no longer assert any unjust enrichment claim against Francoeur (Count 33). Plaintiffs do not contest that the SCAC contains no allegation that Francoeur himself received fees or other remuneration by which he was allegedly unjustly enriched. Further, Plaintiffs have failed to respond in any fashion to Francoeur's motion to dismiss the unjust enrichment claim which constitutes an abandonment thereof.[1] The only claim remaining against Francoeur, therefore, is for breach of fiduciary duty (Count 32) which, for the reasons set forth herein and in Francoeur's moving Memorandum of Law, the Court should dismiss.

Argument

Point 1

The SCAC Fails To State A Claim Against Francoeur For Breach Of Fiduciary Duty

Plaintiffs' claim against Francoeur for breach of fiduciary duty stems solely from his position as a Director of the Defendant Fairfield Greenwich (Bermuda) Ltd. ("FGBL"). FGBL served as the

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[1]See *Burchette v. Abercrombie & Fitch Stores, Inc.*, 2009 WL 856682 at *8-9 (S.D.N.Y. Mar. 30, 2009).

investment manager for Plaintiffs Fairfield Sentry Limited Investors ("Fairfield Sentry") and Fairfield Sigma Limited Investors ("Fairfield Sigma"). FGBL also served as the corporate general partner of Plaintiffs Greenwich Sentry L.P. Investors ("Greenwich Sentry") and Greenwich Sentry Partners L.P. Investors ("Greenwich Sentry Partners") (SCAC ¶119). Plaintiffs claim that Francoeur, solely by virtue of his directorship, had a fiduciary duty to the investors in Fairfield Sentry and Fairfield Sigma and to the limited partners of Greenwich Sentry and Greenwich Sentry Partners.

Plaintiffs allege the identical breach of fiduciary duty claim against Defendant Ian Pilgrim ("Pilgrim") who also served as a director of FGBL when it was the investment manager for Fairfield Sentry and Fairfield Sigma. Francoeur, therefore, adopts the same reply to Plaintiffs' arguments as are set forth in Pilgrim's Reply Memorandum of Law to establish that Francoeur, as a director of FGBL, owed no fiduciary duty to the investors in Fairfield Sentry and Fairfield Sigma. (See Argument, Points I, II, IIIA and IIIB in Pilgrim's Reply Memorandum of Law). In summary, as set forth in Pilgrim's Reply Memorandum of Law: i) Plaintiffs have no standing to bring any breach of fiduciary duty claim against Francoeur because any such claim is derivative; ii) Francoeur did not owe Plaintiffs any fiduciary duty under Bermuda law, which governs Francoeur's obligations as a director of FGBL because it is a Bermuda corporation; iii) even if New York law applies (which it does not), under the circumstances alleged, New York law does not recognize any breach of fiduciary duty claim; and, iv) in any event, Plaintiffs have not adequately pleaded a breach of fiduciary duty claim. Francoeur also adopts the arguments set forth in the FG Defendants' Reply Memorandum of Law, Section VII(D), to establish that Francoeur, as a director of FGBL, owed no fiduciary duty to

the investors in Fairfield Sentry and Fairfield Sigma, and, as hereafter set forth, to the limited partners in Greenwich Sentry and Greenwich Sentry Partners.

Plaintiffs additionally argue that Francoeur, solely as a result of serving as a director of FGBL, owes fiduciary duties to the limited partners of Greenwich Sentry and Greenwich Sentry Partners because FGBL was the corporate general partner of those limited partnerships. (Plaintiffs do not assert that claim against Pilgrim because he was not a director of FGBL when it was the general partner of those partnerships). The same arguments, however, which negate any fiduciary duty on Francoeur's part to the investors in Fairfield Sentry and Fairfield Sigma also negate any fiduciary duty on Francoeur's part to the limited partners in Greenwich Sentry and Greenwich Sentry Partners.

With respect to Plaintiffs' claim that Francoeur owed fiduciary duties to the limited partners of Greenwich Sentry and Greenwich Sentry Partners, Francoeur argued (in his Moving Memorandum p. 6), along with the FG Defendants, that the exculpatory language in the Limited Partnership Agreements, and the applicable provisions of Delaware law under which those partnerships were formed, compel dismissal of the breach of fiduciary duty claims against Francoeur. Plaintiffs do not even address, let alone negate, that argument.[2]

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[2]Plaintiffs state in their Memorandum in Opposition to the FG Defendants' motion to dismiss, at p. 51, note 46, that to the extent those Defendants rely on the exculpatory provisions in the Delaware partnership agreements to dismiss the breach of fiduciary duty claims, Plaintiffs will address those arguments later in their Memorandum. Notwithstanding that statement, Plaintiffs never address that argument.

Plaintiffs claim that under New York law a director of a corporate general partner in a limited partnership owes fiduciary duties to the limited partners (Plaintiffs' Memorandum in Opposition, p. 23). The cases cited by Plaintiffs (all cited on p. 23), however, do not support that proposition. *In re Kingston Square Associates*, 214 B.R. 713, 735-36 (S.D.N.Y. 1997) involved the question of whether the bankruptcy petition was filed in bad faith and whether the court should appoint a receiver for the bankrupt's assets. It did not involve any claim by any limited partner against any individual director of a corporate general partner for breach of fiduciary duty. The court certainly made no holding that such a fiduciary obligation exists. To the contrary, the court in that case explicitly stated that it was the corporate general partner which owed fiduciary obligations to the limited partners. ("It is inconceivable that he would not understand that the corporate general partners of which he was a director bore fiduciary obligations to the limited partners. (That is the stuff of a basic corporate law course in law school.).")

Although *Tobias v. First City Nat'l Bank and Trust Co.*, 709 F. Supp. 1266 (S.D.N.Y. 1989) does uphold a claim for breach of fiduciary duty asserted by a limited partner against a director of a corporate general partner, in that case the director was also the sole shareholder, director and officer of the corporation who made oral and written misrepresentation to the limited partners to induce them to purchase their limited partnership interests. Defendant therein never contested the proposition that a sole shareholder, director and officer of a corporate general partner owes fiduciary obligations to the limited partners. The only defense was that any alleged misrepresentations were made prior to the formation of the partnership when no fiduciary duties yet existed. The court refused to dismiss the breach of fiduciary duty claim on that ground.

Subsequent cases citing *Tobias* make clear that *Tobias* dealt with a unique fact situation - a corporation with a single shareholder who was also its sole director and who made misrepresentations directly to the limited partners - where it was appropriate to pierce the corporate veil and thereby hold the individual liable. See: *Maywalt v. Parker & Parsley Petroleum Co.*, 808 F.Supp. 1037, 1059 (S.D.N.Y. 1992) ("The one exception to this general rule arises when the actions of a shareholder of the general partner are such that it is appropriate to 'pierce the partnership veil' to hold him personally liable to the limited partners."); *Starr v. Fordham*, 420 Mass. 178, 185, 648 N.E.2d 1261, 1267, note 6 (Sup. Ct. 1995) ("As the sole shareholders of a corporate general partner, the judge concluded that Fordham and Starrett were personally liable for the breaches of fiduciary duty by the founding partners."). *Tobias*, therefore, has no application to this case in which Francoeur was not the sole shareholder, director and officer of FGBL and Plaintiffs do not allege that they had any dealings with Francoeur or that he misrepresented anything to them.

Crossen v. Bernstein, 1994 WL 281881 (S.D.N.Y. 1994) actually supports Francoeur's argument that the breach of fiduciary duty claim should be dismissed. In that case, the court dismissed the breach of fiduciary duty claims arising from plaintiff's losses allegedly sustained as a result of his investment in certain limited partnerships because the claims were not brought derivatively. In the course of dealing with a fraudulent concealment claim against certain defendants, however, the court noted, without so holding, that a fiduciary relationship may exist between individuals who wear the three hats of shareholder, officer and director of a corporate general partner, and the limited partners of the partnership when those individuals are the only shareholders,

officers and directors of the corporation, and those individuals made fraudulent misrepresentations directly to plaintiff to induce his investment in the limited partnerships.

Crossen is consistent with *Tobias* in finding that in the context of a small corporation, with one or two shareholders who also serve as the only directors and officers of that corporation, a fiduciary duty may exist between those individuals and the limited partners when those individuals had direct dealings with and were alleged to have made misrepresentations to the limited partners. Under those circumstances, it may be appropriate to disregard the corporate form and impose liability on the individuals notwithstanding their status as corporate directors or officers. Those cases are inapplicable on the facts pleaded herein against Francoeur. Those cases certainly do not establish any general rule that a director of a corporate general partner has fiduciary obligations to the limited partners of the partnership.[3]

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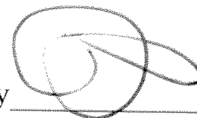
[3] The fact that the most recent case cited by Plaintiffs (*In re Kingston Square Associates*) is thirteen years old and the other two cases (*Tobias* and *Crossen*) are, respectively, twenty two and sixteen years old and have never been cited for the general proposition that an individual director of a corporate general partner owes fiduciary obligations to the limited partners of the partnership (which such cases do not hold) is a strong indication that no such general rule exists.

Conclusion

For the foregoing reasons, and for the reasons set forth in Francoeur's moving Memorandum of Law, the Court should dismiss the SCAC against Francoeur.

Respectfully submitted,

Law Offices of Kenneth A. Zitter



By________________________
Kenneth A. Zitter
Attorneys for Defendant Brian Francoeur
260 Madison Avenue, 18th Floor
New York, New York 10016
212-532-8000
KAZ-3195