UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EDGEWOOD ELM HOUSING, INC., ET AL., Plaintiffs, v. SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST, ET AL., Defendants.	Case No.: 3:21-cv-00457-VAB MAY 10, 2021

DEFENDANTS' MOTION TO DISMISS COUNT TWO OF THE COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Selective Insurance Company of the Southeast ("Selective Southeast"), Selective Insurance Company of South Carolina ("Selective South Carolina"), and Selective Insurance Company of America ("Selective America") (collectively referred to as the "Selective Companies" or "Defendants"), hereby move to dismiss Count Two of the Complaint, (ECF Doc. 19), filed by Plaintiffs Edgewood Elm Housing, Inc. ("Edgewood Elm"), Edgewood Village, Inc. ("Edgewood Village"), and Yedidei Hagan, Inc. ("Yedidei Hagan") (collectively referred to as "Plaintiffs").

As set forth in greater detail in the Selective Companies' accompanying Memorandum of Law, Count Two, which alleges a claim for breach of the implied covenant of good faith and fair dealing, should be dismissed because Plaintiffs' allegations fail to state a plausible cause of action. Specifically, Count Two does not contain any factual allegations demonstrating a sinister or dishonest motive on the part

of the Selective Companies, which is necessary in order to support a claim for breach of the implied covenant of good faith and fair dealing.

WHEREFORE, Defendants Selective Insurance Company of the Southeast, Selective Insurance Company of South Carolina, and Selective Insurance Company of America respectfully request that the Court dismiss Count Two of the Complaint.

DEFENDANTS,
SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST, SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, AND SELECTIVE INSURANCE COMPANY OF AMERICA

By: */s/ Gerald P. Dwyer, Jr.*

James A. Wade (ct00086)
Gerald P. Dwyer, Jr. (ct20447)
Charles F. Modzelewski (ct30564)
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
Phone: 860-275-8200
Fax: 860-275-8299
jwade@rc.com
gdwyer@rc.com
cmodzelewski@rc.com

Certificate of Service

I hereby certify that on May 10, 2021, a copy of the foregoing DEFENDANTS' MOTION TO DISMISS COUNT TWO OF THE COMPLAINT was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent via e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing though the Court's CM/ECF System.

By: */s/ Gerald P. Dwyer, Jr.*
Gerald P. Dwyer, Jr.

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS COUNT TWO OF THE COMPLAINT

I. INTRODUCTION

In this matter, Plaintiffs Edgewood Elm Housing, Inc. ("Edgewood Elm"), Edgewood Village, Inc. ("Edgewood Village"), and Yedidei Hagan, Inc. ("Yedidei Hagan") (collectively referred to as "Plaintiffs") seek to enforce — as binding contractual obligations —alleged promises to make certain charitable gifts. Plaintiffs also seek to recover these alleged gifts under a theory of promissory estoppel. Plaintiffs claim additional damages based on an alleged breach of the implied covenant of good faith and fair dealing. While none of these claims hold legal or factual merit,[1] in the instant motion,

[1] The Selective Companies dispute the existence of any contracts between them and Plaintiffs concerning tax credits awarded under the Connecticut Neighborhood Assistance Act Tax Credit Program. Nonetheless, the motion is directed solely to the failure of Count Two to state a claim upon which relief may be granted for breach of the implied covenant of good faith and fair dealing. The Selective Companies reserve all rights to dispute the existence of any contracts between the Selective Companies and Plaintiffs in further proceedings. The Selective Companies also dispute that Plaintiffs are entitled to equitable relief under their claim for promissory estoppel in Count Three. The Selective Companies reserve all rights to raise all defenses to these claims in these proceedings.

Defendants Selective Insurance Company of the Southeast ("Selective Southeast"), Selective Insurance Company of South Carolina ("Selective South Carolina"), and Selective Insurance Company of America ("Selective America") (collectively referred to as the "Selective Companies" or "Defendants") focus only on the alleged bad faith count (Count Two), and respectfully request that the Court dismiss this count as it fails to set forth factual allegations demonstrating the requisite intent needed to state a viable claim for relief under Connecticut law.

II. ALLEGATIONS OF THE COMPLAINT

In Count One of the Complaint, Plaintiffs allege that they are non-profit organizations that are located in New Haven, Connecticut. (ECF Doc. 19, Count One, ¶¶ 1-4). Plaintiffs further allege that their primary mission is to "acquire, restore and maintain housing for low and moderate-income tenants and families" in the New Haven area. (*Id.*, ¶ 5). According to the Complaint, Plaintiffs assert that the Selective Companies promised to make donations to them, but ultimately did not complete these gifts. (*Id.*, ¶ 10, et seq.). Plaintiffs allege that the Selective Companies' "stated reason" for not completing the gifts was because "they had received information from Clocktower and Jacobson that Sarah Greer's husband had been 'in prison' and was allegedly involved in some unspecified 'fraud'." (*Id.*, ¶ 43). Plaintiffs contend that the Selective Companies breached their "contracts" with Plaintiffs by not completing the promised gifts. (*Id.*, ¶ 46).

In Count Two of the Complaint, Plaintiffs assert in a conclusory manner that the Selective Companies "breached the implied covenant of good faith and fair dealing when they cancelled their agreed-to payments to [Plaintiffs] without legal excuse or

justification." (*Id.*, Count Two, ¶ 49). Plaintiffs also contend that they incurred damages because of unspecified "improper conduct" that purportedly constituted a "violation of the implied covenant of good faith and fair dealing." (*Id.*, ¶ 50). In Count Three of the Complaint, Plaintiffs allege a claim for detrimental reliance/promissory estoppel. Specifically, Plaintiffs allege that the Selective Companies promised to donate funds to Plaintiffs, that Plaintiffs relied upon these promises, and that Plaintiffs incurred damages when the Selective Companies declined to donate funds to Plaintiffs. (*Id.*, Count Three, ¶¶ 45-52).

III. ARGUMENT

A. Legal Standard

A complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) when it does not contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted); *accord Gross v. Rell*, 695 F.3d 211, 215 (2d Cir. 2012). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Where a court is unable to infer more than the mere possibility of the alleged misconduct based on the pleaded facts, the pleader has not demonstrated that it is entitled to relief and the complaint is subject to dismissal. *Id.* at 679. Similarly, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of

entitlement to relief." *Kim v. State Farm Fire & Cas. Co.*, No. 3:15-cv-879 (VLB), 2015 WL 6675532, at *2 (D. Conn. Oct. 30, 2015) (internal quotation marks omitted).

The plausibility standard set forth in *Iqbal* and *Twombly* requires a plaintiff to offer more than labels and conclusions, "a formulaic recitation of the elements of a cause of action," or "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). A court considering a motion to dismiss "begins its analysis by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumptions of truth. . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Next, the court must determine whether the well-pleaded factual allegations, assumed to be true, plausibly give rise to an entitlement of relief." *Hawkeye, LLC v. Zurich Am. Ins. Co.*, No. 3:10-cv-899 (JCH), 2011 WL 1216408, at *1 (D. Conn. Mar. 29, 2011) (citations omitted; internal quotation marks omitted). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's factual allegations must "assert a cause of action with enough heft to show entitlement to relief." *Vizio, Inc. v. Klee*, No. 3:15-cv-929 (VAB), 2016 WL 1305116, at *4 (D. Conn. Mar. 31, 2016).

B. Count Two Fails As a Matter of Law Because It Is Devoid of Facts to Support a Claim for Breach of the Implied Duty of Good Faith and Fair Dealing

The allegations of Count Two do not state a cause of action for bad faith that is plausible on its face.[2] Connecticut courts have defined bad faith as "not simply bad

[2] As set forth in footnote 1, the Selective Companies dispute that there was a valid and binding contract entered into between the Selective Companies and Plaintiffs concerning the Program. The Selective Companies reserve all rights to dispute the existence of such a contract in further proceedings.

judgment or negligence, but rather . . . the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." *Buckman v. People Express, Inc.*, 205 Conn. 166, 171 (1987). "To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impede[d] the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." *Alexandru v. Strong*, 81 Conn. App. 68, 80–81 (2004) (citing *Gupta v. New Britain Gen. Hosp.*, 239 Conn. 574, 598 (1996)). "Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by *some interested or sinister motive*. . . . Bad faith means more than mere negligence; it involves a *dishonest purpose*." *Id.* (emphasis added) (quoting *Habetz v. Condon*, 224 Conn. 231, 237-38 (1992)); *see also De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 269 Conn. 424 (2004).

A claim for bad faith is legally insufficient if the complaint fails to allege *facts* sufficient to support an inference that the defendant acted with a dishonest purpose or sinister motive. *Alexandru*, 81 Conn. App. at 81. In order to survive a motion to dismiss, a plaintiff must allege more than bald assertions and mere conclusions of law. *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 344 (2d Cir. 2006). Instead, a plaintiff must "amplify a claim with some factual allegations to allow the court to draw the reasonable inference that the defendant is liable for the alleged conduct." *Iqbal*, 556 U.S. 662.

Applying these standards, Connecticut courts have routinely dismissed or stricken bad faith claims where those claims failed to include these essential factual allegations. For example, in *Martin v. Am. Equity Ins. Co.*, 185 F. Supp. 2d 162 (D. Conn. 2002), the District Court granted the defendant's motion to dismiss the plaintiff's bad faith claim because, although the complaint "included naked, conclusory allegations as to the legal status of defendant's acts," it failed to allege any "acts or conduct by defendant that would demonstrate a dishonest purpose, malice or bad faith." *Id*. at 165. Because the plaintiff never "specifie[d] how or in what manner" the defendant's actions were "'unreasonable, outrageous, malicious and done in bad faith'", the court found that "plaintiff's conclusory allegations provide no basis for this Court to reasonably infer bad faith." *Id*.[3]

In this case, Plaintiffs' Complaint is wholly devoid of any factual allegations of unreasonable, unconscionable, or malicious acts, dishonest purpose, moral obliquity, furtive design or ill will on the part of the Selective Companies. Instead, Plaintiffs merely allege that the Selective Companies "cancelled their agreed-to payments" and

[3] *See also Bacarella Transp. Servs., Inc. v. Rightway Logistics, LLC*, No. 3:08-cv-1487 (PCD), 2009 WL 322871, at *4 (D. Conn. Feb. 10, 2009) (dismissing bad faith claim because plaintiff "simply alleged 'bad faith' but did not expound on this contention in any manner or offer any factual allegations suggestive of bad faith on [the defendant's] part."); *Miller Auto. Corp. v. Jaguar Land Rover North America, L.L.C.*, 812 F. Supp. 2d 133, 137 (D. Conn. 2011), *aff'd* 471 F. App'x 37 (2d Cir. 2012) (dismissing bad faith claim because "the disagreement between the parties is, at its core, a simple business dispute" and plaintiff "failed to make any allegations that would support an inference that [defendant] acted with a 'dishonest purpose or moral obliquity'"); *Bepko v. St. Paul Fire & Marine Ins. Co.*, No. 3:04-cv-1996 (PCD), 2005 WL 3619253, at *3 (D. Conn. Nov. 10, 2005) (dismissing bad faith claim because plaintiff's factual allegations "fail[ed] to hint that Defendant's" actions were "the result of a conscious doing of a wrong because of dishonest purpose of moral obliquity") (internal citations omitted); *Calzone v. State Farm Fire & Cas. Co.*, No. 3:17-cv-518 (MPS), 2017 WL 5013234, at *2 (D. Conn. Nov. 2, 2017) ("While Plaintiff uses the watchwords of bad faith in his complaint, he does not provide the requisite facts to 'nudge [his] claim[] across the line from conceivable to plausible.'"); *Gurevitch v. James River Ins. Co.*, No. X10CV126016794, 2013 WL 3871354, at *2 (Conn. Super. Ct. July 3, 2013) (striking bad faith claim that merely incorporated breach of contract claim and added conclusory language that the conduct was intentional and malicious).

conclusorily assert that the alleged cancellation was "without legal excuse or justification." (ECF Doc. 19, Count Two, ¶ 49). Plaintiffs also allege, without any factual support, that the Selective Companies' engaged in unspecified "improper conduct." (*Id.*, ¶ 50). Importantly, despite this conclusory assertion of "improper conduct", Plaintiffs do not allege any facts showing wanton and malicious actions, evil or sinister motive and violence, dishonest purpose, moral obliquity, furtive design or ill will on the part of the Selective Companies. In other words, this conclusory assertion is simply a bald legal conclusion that is not supported by any specific factual allegations. *See Hawkeye, LLC*, 2011 WL 1216408, at *1 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Amron*, 464 F.3d at 344 (noting that "bald assertions and conclusions of law will not suffice" to state cause of action). These broad, legal conclusions lack any factual allegations that would even suggest the Selective Companies "affirmatively operat[ed] with furtive design or ill will" as required under *Buckman*, 205 Conn. at 171.

After stripping away the conclusory allegations of "improper conduct" and "without legal excuse or justification" what is left is at best an ordinary "contract" dispute as to whether the Selective Companies properly declined to donate certain funds to Plaintiffs. *See Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 132 Conn. App. 85, 99 (2011), *aff'd sub nom. Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Connecticut*, 311 Conn. 123, (2014) ("If the plaintiff fails to set forth factual allegations that the defendant acted in bad faith, a claim for breach of the implied covenant will not lie."). Moreover, if the allegations in Count Two were sufficient to allege a cause of action

for breach of the implied covenant of good faith and fair dealing, every breach of contract action could be turned into burdensome and expensive bad faith litigation. Thus, Count Two, like so many other claims that have been dismissed by state and federal courts applying Connecticut law, is patently insufficient to support a cause of action for breach of the implied covenant of good faith and fair dealing.

IV. CONCLUSION

For the foregoing reasons, Defendants Selective Insurance Company of the Southeast, Selective Insurance Company of South Carolina, and Selective Insurance Company of America respectfully request that the Court grant their Motion and dismiss Count Two of the Complaint.

DEFENDANTS,
SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST, SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, AND SELECTIVE INSURANCE COMPANY OF AMERICA

By: /s/ *Gerald P. Dwyer, Jr.*

James A. Wade (ct00086)
Gerald P. Dwyer, Jr. (ct20447)
Charles F. Modzelewski (ct30564)
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
Phone: 860-275-8200
Fax: 860-275-8299
jwade@rc.com
gdwyer@rc.com
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