UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Civil Action No. 1:18-cv-00658
MELANIE L. CYGANOWSKI, AS RECEIVER, BY AND FOR PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC, *Plaintiffs*, v. BEECHWOOD RE LTD., *et al.*, *Defendants*.	Civil Action No. 1:18-cv-12018

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF THIRD-PARTY DEFENDANT PB INVESTMENT HOLDINGS, LTD.

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PB Investment Holdings, Ltd., as successor-in-interest to Beechwood Bermuda Investment Holdings, Ltd. ("PBIHL"), asks the Court to dismiss the Third-Party Complaint [ECF 75] filed by Bankers Conseco Life Insurance Company and Washington National Life Insurance Company ("BCLIC and WNIC"). The Third-Party Complaint should be dismissed in its entirety for want of jurisdiction and failure to state a claim under Rules 9(b), 12(b)(2) and 12(b)(6).

PRELIMINARY STATEMENT

The Third-Party Complaint is nothing more than a desperate attempt by BCLIC and WNIC to diffuse their likely liability in this proceeding to persons with no, or next-to-no, connection to the core facts giving rise to this litigation.

One of the principal theories of the Receiver's First Amended Complaint [ECF 83] is that BCLIC and WNIC were intimately aware of, and went along with, the massive fraud that Platinum insiders allegedly perpetrated. (First Am. Compl. ¶¶ 1 – 16). BCLIC and WNIC apparently recognize that they have obvious, significant exposure to liability under this theory. This exposure is so significant, in fact, that BCLIC and WNIC are desperately casting about for ways to soften the expected blow. They have settled on suing PBIHL (which did not exist at the time of the alleged fraud) and many others under a theory that these persons aided, abetted and conspired with the principal defendants to divert $75 million out of Beechwood Re to purchase assets and render Beechwood Re insolvent, to BCLIC and WNIC's detriment. (*See* Third-Party Compl. ¶¶ 618 – 620).

BCLIC and WNIC attempt to support this theory with vague and conclusory allegations and group pleadings. For instance, every non-natural person that BCLIC and WNIC have sued that has "Beechwood" in its name is lumped together as "Beechwood" for the sake of the allegations in the Third-Party Complaint, and every such person with "Bermuda" in its name—

that is, Beechwood Bermuda Ltd., Beechwood Bermuda International Ltd., and PBIHL—are further sub-lumped together as "Beechwood Bermuda." (*Id.* ¶ 470 n.3). This makes for curious and confusing pleadings where one or more of these persons—PBIHL, for example—were not involved in the principle acts of the alleged conspiracy.

BCLIC and WNIC are aware that they have little to no support for their claims against PBIHL, so they hope that lumping together PBIHL with other parties will create enough uncertainty (or frustration) that the Court throws up its hands and allows at least one claim against PBIHL to survive. This is exactly the sort of pleading that BCLIC and WNIC call out and object to in their Memorandum of Law in Support of Motion to Dismiss the Receiver's First Amended Complaint [ECF 170].[1]

BCLIC and WNIC's pleading strategy notwithstanding, dismissal of the Third-Party Complaint is proper for several other reasons. For one, BCLIC and WNIC fail to establish that the Court has personal jurisdiction over PBIHL. BCLIC and WNIC admit that PBIHL is a Bermuda entity with its principal place of business in Bermuda. (*Id.* ¶ 517). BCLIC and WNIC allege no facts that PBIHL has availed itself of jurisdiction in this forum, because they cannot meet their burden to do so.

For another, BCLIC and WNIC's theory of liability runs headlong into the doctrine of *in pari delicto*. This doctrine prevents a plaintiff from recovering for misconduct in which it also participated. *See Picard v. HSBC Bank PLC*, 454 B.R. 25, 37 (S.D.N.Y. 2011) (Rakoff, J.), *amended, In re Bernard L. Madoff Inv. Sec. LLC*, ADV. 08-1789 BRL, 2011 WL 3477177 (S.D.N.Y. Aug. 8, 2011), *aff'd*, 721 F.3d 54 (2d Cir. 2013). BCLIC and WNIC ask the Court to

[1] "Here, the Receiver lumps all the CNO Defendants together even though . . .. Making the pleadings even lumpier, she groups SHIP and the CNO Defendants together even though . . .. She then lumps . . .. [A] reader cannot discern from the pleading what BCLIC or WNIC allegedly did or did not do that is distinct from what is being alleged against . . . Beechwood and Platinum. This flunks pleadings tests." (Brief in Support at 9).

hold PBIHL liable for aiding and abetting in the massive fraud that BCLIC and WNIC are alleged to have perpetrated in concert with the other principal defendants to this lawsuit.

Further, BCLIC and WNIC's allegations fail to meet the pleading standards for regular claims (under Rule 12(b)(6)) and fraud-based claims (under Rule 9(b)). The Third-Party Complaint concludes at numbered paragraph 926, yet at no point in the complaint do the allegations single out PBIHL for any wrongdoing. In every instance, the alleged wrongdoing is collectively perpetrated by "Beechwood" or "Beechwood Bermuda." Thus, PBIHL and the Court are left to wonder just how exactly PBIHL wronged BCLIC and WNIC, wrongfully benefitted from others' wrongdoing, or otherwise facilitated some sort of harm against BCLIC and WNIC.

The foregoing and additional reasons set forth below should illustrate just how desperate BCLIC and WNIC are to redirect blame in this lawsuit. BCLIC and WNIC have not asserted, nor can they assert, a factually plausible or legally cognizable claim against PBIHL. Therefore, dismissal of the BCLIC and WNIC's third-party claims against PBIHL is proper.

STATEMENT OF FACTS

I. The Parties.

The Court is familiar with this litigation, which is one of several proceedings that arise out of the failure of Platinum Partners. In the interest of economy, PBIHL's Statement of Facts focuses only on those allegations that are pertinent to BCLIC and WNIC's third-party claims against it.

BCLIC and WNIC allege that PBIHL is "an entity organized under Bermuda law, with its principal place of business in Bermuda." (Third-Party Compl. ¶ 517). BCLIC and WNIC further allege that PBIHL's predecessor, Beechwood Bermuda Investment Holdings, Ltd., "was a reinsurance and wealth management company domiciled in Bermuda that issued wealth management products for Beechwood entities." (*Id.*).

II. BCLIC and WNIC's Participation in the Platinum Fraud.

BCLIC and WNIC sought to reinsure several long-term care policies in 2013. (First Am. Compl. ¶ 225). A broker put the companies in touch with Beechwood Re. (*Id.* ¶¶ 226 – 28). BCLIC and WNIC entered into reinsurance agreements with Beechwood Re in which they transferred $596 million in assets to Beechwood Re. (*Id.* ¶¶ 237 – 38). The Receiver alleges that, after transferring these assets to Beechwood Re, BCLIC and WNIC became aware of the fraudulent scheme being perpetrated by the Platinum Insiders and, rather than pull out, chose to participate in and further the scheme. (*Id.* ¶¶ 350 – 51, 402 – 03, 478, 506).

III. BCLIC and WNIC's Conclusory Allegations against PBIHL as "Beechwood" and "Beechwood Bermuda."

BCLIC and WNIC's Third-Amended Complaint lumps PBIHL into "Beechwood" and "Beechwood Bermuda" and then flatly asserts that "Beechwood" and "Beechwood Bermuda" aided and abetted in defrauding, conspired to defraud, and defrauded, BCLIC and WNIC. However, the only instance in the entire 926-paragraph pleading where BCLIC and WNIC appear to even remotely contemplate PBIHL regards a transfer in 2014:

> Like BBL, BBIL, [PBIHL] was the transferee of certain so-called "capital" that Beechwood Re, in the persons of Feuer, Taylor and Levy, had represented to WNIC and BCLIC would support Beechwood Re's obligations to WNIC and BCLIC. In 2014, however, Beechwood Re and other Beechwood entities diverted the so-called "capital" that supported Beechwood Re's obligations to WNIC and BCLIC to [PBIHL] (among others), without disclosing the diversion to WNIC or BCLIC at the time of the diversion.

(Third-Party Compl. ¶ 517).

BCLIC and WNIC allege this transfer related to a $100 million demand note that was issued by "Beechwood Re Investors LLC" in order to capitalize Beechwood Re. (*Id.* ¶ 545). Still, BCLIC and WNIC do not allege what was actually transferred, that PBIHL made any representations regarding the transaction, or that PBIHL knew or should have known that the

transfer was improper. BCLIC and WNIC provide some detail later, but again muddy the waters with vague, incomplete, conclusory, and contradictory pleading:

> The Co-Conspirators then fraudulently diverted this $75 million in "capital" to Beechwood Bermuda. In May 2014, Beechwood was forming and commencing operations with its Beechwood Bermuda affiliates. Beechwood, however, needed to satisfy Bermuda insurance regulators that these new affiliates would be sufficiently capitalized. After consulting with [Platinum Insiders], Beechwood decided to divert the $75 million of the borrowing capacity under the $100 million Demand Note from Beechwood Re to Beechwood Bermuda (the "Demand Note Transfer"). . . . [The Demand Note Transfer] enabled the Co-Conspirators to launch Beechwood Bermuda. There was no consideration for the [Demand Note Transfer]. . . . Unbeknownst to WNIC and BCLIC, the Co-Conspirators instead used the $75 million in demand note capacity that the Co-Conspirators had diverted from Beechwood Re to Beechwood Bermuda to buy valuable assets for the Bermuda entities. . . . Beechwood Bermuda and the Co-Conspirators then sold these valuable assets in August 2017 for substantial consideration. . . . The [Demand Note Transfer] left Beechwood Re a mere shell company, grossly undercapitalized and with assets that were wholly inadequate to cover its obligations to WNIC and BCLIC[.] . . . Despite Beechwood Re's unilateral reduction of the Demand Note, Feuer and Taylor continued repeatedly reassuring WNIC and BCLIC that Beechwood Re had over $100 million in "capital."

(*Id.* ¶¶ 618 – 626) (emphasis added). These allegations again fail to specify how PBIHL was specifically involved—other than being an entity domiciled in Bermuda and with "Bermuda" in its name—and how it specifically benefited. BCLIC and WNIC do not detail what portion, if any, of this "Demand Note Transfer" was actually transferred to PBIHL. BCLIC and WNIC also do not identify any purchase or sale of "valuable assets" that PBIHL made or from which it benefited. Further, BCLIC and WNIC contend the Demand Note Transfer was part of a "unilateral reduction" of capital by Beechwood Re, but that the transfer was also made by agreement between "Co-Conspirators," "Platinum Insiders," and "Beechwood." BCLIC and WNIC's pleadings are wholly insufficient to state a claim for relief against PBIHL.

ARGUMENT

BCLIC and WNIC cite no facts in their Third-Party Complaint which plausibly suggest that PBIHL harmed them. Instead, BCLIC and WNIC generally conclude that several entities comprising "Beechwood" and "Beechwood Bermuda" engaged in a transfer of assets out of Beechwood Re and into "Beechwood Bermuda" and then lied about Beechwood Re's ability to cover its obligations to BCLIC and WNIC. (*See id.* ¶¶ 618 – 626). Generalized allegations like these are not sufficient to meet Rule 8's pleading requirements. *See In re JP Morgan Auction Rate Sec. (ARS) Mktg. Litig.*, 867 F. Supp. 2d 407, 425 (S.D.N.Y. 2012) (holding that generalized, vague, and conclusory statements are insufficient to state a claim for relief). BCLIC and WNIC's claims against PBIHL should be dismissed.

I. The Court Lacks Personal Jurisdiction Over PBIHL.

BCLIC and WNIC have the burden to establish personal jurisdiction over any person or entity that they sue. *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010). To survive dismissal for want of jurisdiction, BCLIC and WNIC must "make a prima facie showing that jurisdiction exists" by "making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant." *Id.* at 34-35. Courts "will not draw argumentative inferences in the plaintiff's favor" and are not "required to accept as true a legal conclusion couched as a factual allegation." *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012).

Personal jurisdiction may be either general or specific. General jurisdiction allows a defendant to be sued in its "home" forum on any topic. *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017). Specific jurisdiction allows a defendant to be sued in

another forum in limited circumstances. *Id.* Neither general nor specific personal jurisdiction exists in this proceeding.

A company is subject to general jurisdiction only where it is "fairly regarded as at home." *Id.* at 1780. A company's place of formation and principal place of business are all-purpose forums for a company. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). Attempts to broaden general jurisdiction have been soundly rejected. *See, e.g., id.* at 752, 761 ("substantial, continuous, and systematic" contacts with forum were insufficient to establish general jurisdiction).

Here, BCLIC and WNIC admit that PBIHL is a Bermuda limited company with its principal place of business in Bermuda. (Third-Party Compl. ¶ 517). BCLIC and WNIC also admit that PBIHL's predecessor in interest was domiciled in Bermuda. (*Id.*). BCLIC and WNIC do not allege any facts to suggest that New York could be PBIHL's home for purposes of this jurisdictional analysis because they cannot truthfully do so. Therefore, general jurisdiction does not exist in New York.

Specific jurisdiction exists where the plaintiff shows that (1) jurisdiction is warranted under New York's long-arm statute, and (2) exercising jurisdiction comports with the Fourteenth Amendment's Due Process Clause. *See, e.g., Sonera Holding, P.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224 (2d Cir. 2014).

New York's long-arm statute permits the exercise of specific jurisdiction over a foreign defendant in certain inapplicable limited circumstances. These inapplicable circumstances include where the defendant transacts business in, commits torts in, or owns real property in New York. N.Y. C.P.L.R. 302(a)(1)-(2), (4). BCLIC and WNIC only vaguely and generally allege that PBIHL was involved in a transfer of assets from Beechwood Re to "Beechwood Bermuda," and then as a passive transferee. (*See id.* ¶¶ 618 – 626). BCLIC and WNIC make no allegation that PBIHL's

conduct, or lack thereof, occurred in New York. Further, there is no allegation that PBIHL owns real property in New York. Indeed, it does not. (Decl. ¶ 3).[2]

The long-arm statute also permits jurisdiction over a defendant who commits a tort outside New York that causes an injury in New York if certain conditions are met. N.Y. C.L.P.R. 302(a)(3). BCLIC and WNIC do not allege facts that meets these conditions. For one, BCLIC and WNIC must show that PBIHL "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state" or "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." *Id.* 302(a)(3)(i)-(iii). BCLIC and WNIC do not allege any facts that tend to show these conditions have been met.

Further, no injury occurred in New York. The "situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are felt by the plaintiff." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 209 (2d Cir. 2001). BCLIC and WNIC's complaint concludes that PBIHL engaged in conduct in Bermuda that caused financial harm to BCLIC and WNIC in the United States, and presumably in New York. However, the "occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York." *Id.*

Finally, assuming jurisdiction even existed, due process forbids subjecting PBIHL to suit in New York. "[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires*

[2] The Declaration of Henry Komansky is attached and incorporated by reference herein.

Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). The defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *Id.* at 924. In other words, specific jurisdiction is concerned with the "defendant's contacts with the forum." *Bristol-Myers Squibb*, 137 S. Ct. at 1780. In-forum contacts of any other party are irrelevant. *See Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014) ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State.").

BCLIC and WNIC allege no facts showing that PBIHL purposefully availed itself of the privileges of doing business in New York. BCLIC and WNIC do not even allege that PBIHL did anything in New York at all. To the contrary, PBIHL has never been registered as a foreign corporation under New York law. (Decl. ¶ 3). It has no agent for service of process in New York. It does not own property in the State of New York. (*Id.*). It has no officers, directors or employees residing in New York. (*Id.*). It maintains no office or books and records in New York. (*Id.*). It does not maintain a post office box, telephone listing or mailing address in New York. (*Id.*). It does not do business in New York. (*Id.*). Therefore, the third-party claims against PBIHL should be dismissed under Rule 12(b)(2) for want of jurisdiction.

II. The Third-Party Complaint Violates the Group Pleading Rule.

Even if BCLIC and WNIC were able to establish personal jurisdiction over PBIHL, their third-party claims must be dismissed as a group pleading that violates Rule 9(b).

Rule 9(b) reflects "the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing." *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972). Rule 9(b) "generally forbid[s]" group pleading "because each

defendant is entitled to know what he is accused of doing." *In re Dreier LLP*, 452 B.R. 391, 409 (Bankr. S.D.N.Y. 2011). Accordingly, "[t]he Court must be especially vigilant in applying Rule 9(b) where a complaint is made against multiple defendants" because "the complaint should inform each defendant of the nature of his alleged participation" in the tort. *Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 388 (S.D.N.Y. 2016).

BCLIC and WNIC's pleadings fail this most basic rule of pleading because the allegations simply lump together PBIHL with: (1) Beechwood Re Ltd., Beechwood Re Holdings, Inc., Beechwood Capital Group LLC, B Asset Manager LP, BAM Administrative Services LLC, Beechwood Bermuda Ltd., Beechwood Bermuda International Ltd., Beechwood Trust Nos. 1 through 20, and Beechwood Re Investments LLC, Series A through I to form "Beechwood;" (2) Beechwood Bermuda Ltd. and Beechwood Bermuda International Ltd. to form "Beechwood Bermuda;" and (3) the "Platinum founders," "the principals and senior managers of Platinum and Beechwood who secretly shuttled back and forth through the revolving door of the integrated Platinum/Beechwood enterprise," and all "non-natural persons sued herein" to form "Co-Conspirators." (Third-Party Compl. ¶ 470 n. 3 & 4). BCLIC and WNIC state no reason for doing so; perhaps they lump together several of the entities as "Beechwood Bermuda" because each has the word "Bermuda" in its name.[3]

BCLIC and WNIC must also "set forth the who, what, when, where and how of the alleged fraud" to adequately plead any claim that sounds in fraud. *Lipow v. Net 1 UEPS Techs., Inc.*, 131 F. Supp. 3d 144, 157 (S.D.N.Y. 2015). BCLIC and WNIC provide none of these details with regard to their claims of fraudulent inducement and fraud, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, fraudulent conveyance, or civil RICO against PBIHL. (*See*

[3] Regardless of the reason, BCLIC and WNIC should know better. Indeed, BCLIC and WNIC seek dismissal of the Receiver's claims against them for violating the group pleading rule. (*See* ECF 170, Brief in Support at 9).

Sections IV – VI *infra*). In fact, BCLIC and WNIC do not allege any facts that tend to show that PBIHL itself engaged in any wrongful, fraudulent conduct. Therefore, dismissal is proper. *See, e.g., Rosenbeck v. Rieber*, 932 F. Supp. 626, 628 (S.D.N.Y. 1996).

III. The Doctrine of *In Pari Delicto* Bars BCLIC and WNIC's Claims as a Matter of Law.

Even if BCLIC and WNIC's pleadings are somehow adequate under Rule 9(b), the third-party claims against PBIHL must still be dismissed by operation of the *in pari delicto* doctrine. This doctrine "prevents a party from seeking to recover against others for a wrong in which the party participated or is deemed through 'imputation' to have participated." *ICP Strategic Credit Income Fund Ltd. v. DLA Piper, LLP (US)*, 730 F. App'x 78, 81 (2d Cir. 2018). New York law defines the doctrine "extremely broadly." *Picard*, 454 B.R. 25. The doctrine is "so strong," in fact, that it controls "even in difficult cases and should not be weakened by exceptions." *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010), *aff'd*, 666 F. App'x 66 (2d Cir. 2016); *see also Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 – 11 (1985) (applying the doctrine to federal law claims).

Dismissal is appropriate where, as here, application of the doctrine is apparent from the face of the pleadings. *In re Bernard Madoff Inv. Sec. LLC*, 721 F.3d 54, 65 (2d Cir. 2013). The Receiver alleges an intricate fraud perpetrated by the Platinum Insiders, BCLIC, WNIC, and others. (*See generally* First Am. Compl.). The Receiver identifies BCLIC and WNIC as two of the actors that perpetrated the fraudulent scheme by, among other things: (1) causing parties to purchase shares of a company named ALS Capital Ventures; (2) causing parties to enter into a series of transactions with Black Elk Energy Offshore; (3) misrepresenting the value of certain assets by causing parties to enter into a series of transactions after borrowing $52 million; and (4) misrepresenting the value of other assets that parties acquired after borrowing additional money.

(*Id.* ¶¶ 350 – 51, 402 – 03, 478, 506). BCLIC and WNIC should not now be allowed to pursue their claims against PBIHL given their substantial involvement in the fraudulent and wrongful conduct made the basis of the Receiver's lawsuit.[4]

IV. BCLIC and WNIC's Civil RICO and RICO Conspiracy Claims are Barred.

In the unlikely event the Court determines that wholesale dismissal of BCLIC and WNIC's third-party claims against PBIHL is not warranted, separate grounds exist for the dismissal of each and every claim that BCLIC and WNIC bring against PBIHL. Regarding BCLIC and WNIC's civil RICO and RICO conspiracy claims (*see* Third-Party Compl. ¶¶ 784 – 799), dismissal is proper because securities fraud cannot serve as a predicate act for this claim.

Section 1964(c) of the Private Securities Litigation Reform Act ("PSLRA") expressly bars any civil RICO claim predicated on the purchase or sale of securities. 18 U.S.C. § 1964(c). This bar is so broad, in fact, that "[i]f the alleged conduct could form the basis of a securities fraud claim against any party—be it against, or on behalf of, the plaintiff, defendant or a non-party—it may not be fashioned as a civil RICO claim." *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 644 (S.D.N.Y. 2017). This bar should be interpreted "not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819 (2002); *see also Boudinot v. Shrader*, No. 09 Civ. 10163, 2012 U.S. Dist. LEXIS 19172, at *5 (S.D.N.Y. Feb. 15, 2012), *aff'd in part*, 863 F.3d 162 (2d Cir. 2017). Accordingly, any alleged conduct by PBIHL to participate in or aid and abet any party's alleged securities fraud is subject to this bar. *See Zohar*, 286 F. Supp. 3d at 643.

[4] The narrow "adverse interest" exception to the *in pari delicto* doctrine does not apply in this instance. "To come within the exception, the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes." *Kirschner*, 938 N.E.2d at 952 (quoting *Ctr. v. Hampton Affiliates, Inc.*, 488 N.E.2d 828, 830 (N.Y. 1985). The Receiver affirmatively alleges that BCLIC and WNIC's participation in the fraudulent scheme benefitted them by allowing them to offload long-term care liabilities. (*See* First Am. Compl. ¶¶ 114 – 115). Any argument that the conduct of BCLIC and WNIC's agents was adverse to them is without merit and should be rejected.

BCLIC and WNIC's theory of RICO liability against PBIHL is unclear. BCLIC and WNIC vaguely allege that an "association-in-fact of Platinum, Beechwood and the individuals who participated in the management, direction and operation of Platinum and Beechwood during the relevant period" engaged in "act[s] of mail and wire fraud" "to defraud, with a specific intent to defraud WNIC, BCLIC and other institutional investors and to obtain their money and property by means of false pretenses, representations and promises," and to "perpetuate the [] ongoing Platinum fraud schemes, including [] the Platinum Ponzi-esque scheme," but there are no allegations that are specific to PBIHL. (Third-Party Compl. ¶¶ 787, 789 & 796). Even so, BCLIC and WNIC's theory against every third-party defendant piggybacks on the allegations the Receiver makes in its complaint against BCLIC and WNIC. The Receiver charges Beechwood and others with assisting the PPCO Portfolio Manager "in charging management fees" and facilitating "actual and/or constructive fraudulent conveyances" to the detriment of investors. (First Am. Compl. ¶ 262). BCLIC and WNIC plainly rely upon the Receiver's allegations when setting out their own RICO allegations against "Beechwood."

This conduct is precisely the type of conduct to which the PSLRA's bar applies. The Court has specifically recognized in other proceedings that this bar covers conduct taken to keep a Ponzi scheme going. *See, e.g., Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012) (Rakoff, J.) (dismissing civil RICO claim based on allegation that defendants "kept Madoff Securities' Ponzi Scheme alive" and conspired "to conceal the fact that their funds[] only fed into Madoff Securities" under the PSLRA's RICO amendment). Any alleged conduct by PBIHL to participate in or aid and abet the alleged Platinum fraud is subject to the PSLRA bar. *See Zohar*, 286 F. Supp. 3d at 643.

BCLIC and WNIC's RICO claims also fail because they are too narrow in number of victims, time, and purpose to constitute a continuous pattern of racketeering. To adequately plead the existence of a RICO pattern, BCLIC and WNIC must allege facts giving rise to an inference of either "close-ended" or "open-ended" continuity. *See H.J. Inc. v. Bell Tel. Co.*, 492 U.S. 229, 240 – 41 (1989). The former regards a "closed period of repeated conduct" while the latter regards "past conduct that by its nature projects into the future with a threat of repetition." *Id.* BCLIC and WNIC fail to adequately plead either form of conduct.

BCLIC and WNIC purport to identify a conspiracy with the singular purpose to defraud BCLIC, WNIC, and other unknown, unnamed "institutional investors" "during the relevant period (2013 into late 2016)." (Third-Party Compl. ¶¶ 787, 789 & 796). That accusation identifies only two purported victims—BCLIC and WNIC—over a period of roughly three years. (*Id.*). These allegations fall well short of the "kind of broad-based unlawful activity that RICO was designed to address." *Feirstein v. Nanbar Realty Corp.*, 963 F. Supp. 254, 260 (S.D.N.Y. 1997) (four predicate acts over a three-year period did not satisfy the continuity factor); *Lefkowitz v. Bank of New York*, No. 01 Civ. 6252, 2009 U.S. Dist. LEXIS 120223 (S.D.N.Y. 1997), *rev'd in part on other grounds*, 528 F.3d 102 (2d Cir. 2007) (no closed-ended continuity where a small number of parties engaged in activities with a narrow purpose directed at a single or at most three victims).

Further, the allegations are plainly deficient as to PBIHL since there are no allegations that relate to PBIHL. The only allegations in the Third-Party Complaint that possibly relate to PBIHL regard the alleged transfer of $75 million of a $100 million demand note, issued by Beechwood Re Investors, LLC, that was made sometime in 2014 to "Beechwood Bermuda"—what BCLIC and WNIC call the "Demand Note Transfer." (Third-Party Compl. ¶¶ 894, 903, 909, & 915). Where the "alleged predicate acts attributed to [a particular defendant] . . . do not extend over a

sufficiently long period of time to satisfy the requirements of closed-ended continuity," a district court should "properly dismiss[]" the substantive RICO claims as well as any related claims alleging conspiracy or improper investment of RICO proceeds. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 – 82 (2d Cir. 2004) (affirming dismissal because predicate acts that span fewer than two years are always insufficient for a closed-end pattern).

Finally, the civil RICO claims fail because BCLIC and WNIC do not allege that PBIHL invested any racketeering proceeds in a separate enterprise. *See Globe Wholesale Tobacco Distribs. Inc. v. Worldwide Wholesale Trading Inc.*, No. 06 Civ. 2865, 2007 U.S. Dist. LEXIS 72656, at *5 (S.D.N.Y. Sept. 29, 2007). The allegations also do not support an inference that PBIHL entered into an agreement to facilitate the goals of the alleged enterprise. *Sanchez v. ASA Coll., Inc.*, No. 14-CV-5006, 2015 U.S. Dist. LEXIS 73222, at *12 (S.D.N.Y. June 5, 2015). Thus, dismissal of BCLIC and WNIC's civil RICO claims is proper.

V. BCLIC and WNIC's Conclusory Fraud-Based Claims are Inadequate.

BCLIC and WNIC assert three fraud-based claims against "Beechwood" and/or "Beechwood Bermuda." (*See* Third-Party Compl. ¶¶ 810, 835 – 843, & 873 – 879). While the *in pari delicto* doctrine applies to these claims, each claim should be dismissed for failure to state a claim under Rules 12(b)(6) and 9(b).

A. BCLIC and WNIC Fail to State a Claim for Fraudulent Inducement or Fraud.

A claim for fraudulent inducement regards "a knowing misrepresentation of material fact [or a material omission], which is intended to deceive another party and to induce them to act upon it, causing injury." *Sokolow, Dunaud, Mercadier & Carreras, LLP v. Lacher*, 747 N.Y.S.2d 441, 446 (1st Dep't 2002). BCLIC and WNIC's fraudulent inducement claim should be dismissed outright for several reasons.

At the outset, dismissal is proper because BCLIC and WNIC make no allegation that PBIHL made any material misrepresentation in connection with the "Demand Note Transfer." Rather, BCLIC and WNIC allege that Beechwood Re unilaterally reduced the Demand Note and then reassured BCLIC and WNIC that Beechwood Re had over $100 million in capital. (*See* Third-Party Compl. ¶ 621).

Dismissal is also proper because BCLIC and WNIC's allegations regarding the availability of "off balance sheet capital" being available for Beechwood Re also fails to establish a fraudulent inducement claim. For one, BCLIC and WNIC contend that this statement was made by Defendant "Taylor, on behalf of all Beechwood entities, including Beechwood Bermuda," in his capacity as "President of Beechwood Bermuda." (*Id.* ¶¶ 810 & 811) (emphasis added). This allegation improperly attributes the statement to all or multiple defendants in violation of the group pleading doctrine and Rule 9(b).

For another, the allegations are conclusory in that they state, without any support, that Defendant Taylor was "President of Beechwood Bermuda," and that Defendant Taylor had any authority to speak, and purported to speak, on behalf of all "Beechwood" companies, even though BCLIC and WNIC's relationship was with Beechwood Re. The allegations also suffer from the same deficiencies that plague BCLIC and WNIC's allegations regarding the "Demand Note Transfer"—namely, there are no specific allegations that PBIHL benefitted from the alleged transaction or later applied those funds to, or benefitted from, specific asset purchases. Accordingly, the allegations are inadequate to plead the intent element of the fraudulent inducement claim.

Further, BCLIC and WNIC fail to allege what diligence, if any, they conducted with respect to PBIHL before relying upon the above representation. Under New York law, "sophisticated

business people have a heightened duty to use all means available to verify the information, and use their sophistication to conduct due diligence." *Solomon Capital, LLC v. Lion Biotechnologies, Inc.*, No. 651881/2016, 2018 N.Y. Misc. LEXIS 3491, at *4 (N.Y. Sup. Ct. Aug. 15, 2018). A failure to allege that it conducted due diligence in ascertaining all material facts precludes a plaintiff from establishing that it justifiably relied on the misrepresentation. *See Frati v. Saltzstein*, No. 10 Civ. 3255, 2011 U.S. Dist. LEXIS 25567, at *5 (S.D.N.Y. Mar. 14, 2011). BCLIC and WNIC fail to allege that they conducted any diligence here. Therefore, BCLIC and WNIC's fraudulent inducement and fraud claim should be dismissed in its entirety.

B. BCLIC and WNIC Fail to State a Claim for Aiding and Abetting Fraud.

A claim of aiding and abetting fraud requires specific allegations of facts supporting "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Ritchie Capital Mgmt., L.L.C. v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 338 (S.D.N.Y. 2015), *aff'd*, 821 F.3d 349 (2d Cir. 2016). BCLIC and WNIC's claim here is deficient for several reasons.

First, and as set forth in subsection V.A above, BCLIC and WNIC fail to specifically plead the "who, what, when, where, and how" of the alleged underlying fraud. Indeed, BCLIC and WNIC fail to plead any facts that tend to establish its justifiable reliance on any material misrepresentation or actionable omission, which is an essential element of any fraud claim. *See Eurycleia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976, 979 (N.Y. 2009). BCLIC and WNIC do not detail how they could have been misled by, or how they could have relied on, any alleged misstatement that was purportedly made on by or on behalf of "Beechwood Bermuda," a collective stranger to the Reinsurance Agreements.

Second, there is absolutely no allegation that PBIHL knew of the fraud. Indeed, the allegations that relate to the aiding and abetting fraud claim do not even mention PBIHL by name; rather, they lump PBIHL in with "Beechwood" and "Defendants." (*See, e.g.*, Third-Party Compl. ¶ 843) ("Because Defendants' substantial assistance with the fraud was malicious . . .").

Third, BCLIC and WNIC's allegations fail to show that PBIHL substantially assisted in achievement of the fraud. "Substantial assistance" under New York law requires allegations "that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001). BCLIC and WNIC's allegations do no such thing. The allegations focus on acts that each *human* Defendant committed which aided and abetted in the fraud, but these allegations are silent as to PBIHL. There is one passing mention of the "Demand Note Transfer" (*see* Third-Party Compl. ¶ 836) ("The conspiracy encompassed numerous tentacles, including . . . the Demand Note Transfer . . ."), yet outside of being lumped into "Beechwood Bermuda" for the sake of the "Demand Note Transfer," there is no allegation that PBIHL provided substantial assistance to any transaction that BCLIC and WNIC rely upon in support of this claim. BCLIC and WNIC's aiding and abetting fraud claim is ripe for dismissal.

C. BCLIC and WNIC Fail to State a Claim for Aiding and Abetting Breach of Fiduciary Duty.

A claim of aiding and abetting a breach of fiduciary duty requires specific allegations of: (1) a breach of fiduciary obligations to another; (2) that the aider and abettor knowingly induced or participated in the breach; and (3) damages incurred by the plaintiff as a result of the breach. *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 345 (2d Cir. 2018). "With respect to the second requirement, although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty.

And a person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator." *Id.*

The Third-Party Complaint is plainly deficient with respect to the substantial assistance element. The allegations again focus on acts that each *human* Defendant committed, but the allegations remain silent as to PBIHL. (*See generally* Third-Party Compl. ¶¶ 873 – 876). Indeed, and unlike their claim for aiding and abetting fraud, BCLIC and WNIC do not even mention the "Demand Note Transfer" in passing. (*Id.*). The pleadings do not allege that PBIHL was involved in, let alone provided substantial assistance to, any event that provides the basis of the aiding and abetting breach of fiduciary duty claim.

Bare and conclusory allegations fail to satisfy Rule 9(b)'s heightened pleading requirements. A plaintiff that raises a claim of fraud, breach of fiduciary duty, or aiding and abetting liability must plead knowing participation with particularity or risk dismissal at the pleading phase. *See Kaufman v. Cohen*, 760 N.Y.S.2d 157, 169 – 70 (1st Dep't 2003) (that one defendant with a fiduciary duty was alleged to have a beneficial interest in other entity defendants merely shows constructive knowledge, "an insufficient basis for aider and abettor liability"); *see also Global Minerals & Metals Corp. v. Holme*, 824 N.Y.S.2d 210, 216 – 17 (1st Dep't 2006) (complaint dismissed for failure to plead additional facts that would have shown key element of actual knowledge). BCLIC and WNIC's wholly vague and conclusory claims against PBIHL fail to meet these requirements. Accordingly, BCLIC and WNIC's fraud-based claims should be dismissed with prejudice.

VI. BCLIC and WNIC's Fraudulent Conveyance Claims Fail as a Matter Law.

BCLIC and WNIC plead four fraudulent conveyance claims against PBIHL. Each claim lumps in PBIHL with Beechwood Bermuda Ltd. and Beechwood Bermuda International Ltd. to

form "Beechwood Bermuda." (*See* Third-Party Compl. ¶¶ 889 – 918). Each claim also fails to identify any conduct that is specific to PBIHL that would entitle BCLIC and WNIC to relief. These general and conclusory allegations give rise to three separate grounds for dismissal.

First, BCLIC and WNIC must adequately plead each element of their fraudulent conveyance claims under the New York Debtor and Creditor Law ("NYDCL"), plead sufficient facts to provide each defendant with "fair notice" of such claims, and plead each claim in such a manner that each is plausible. *See Gowan v. Amaranth LLC (In re Dreier LLP)*, 452 B.R. 451, 462 (Bankr. S.D.N.Y. 2011). Claims of actual fraudulent conveyances must be pleaded with particularity, as well. *See In re M. Fabrikant & Sons, Inc.*, 394 B.R. 721, 733 (Bankr. S.D.N.Y. 2008). BCLIC and WNIC fail to meet this standard.

Second, there must be a transfer to the defendant for there to be a recovery of any purported fraudulent conveyance. *See Gowan*, 452 B.R. at 462. BCLIC and WNIC fail to adequately allege that PBIHL was the recipient of any transfer.

Third, BCLIC and WNIC fail must show that each is a "creditor" that is entitled to sue under New York's fraudulent conveyance statutes. *United States v. Watts*, 786 F.3d 152, 162 (2d Cir. 2015). Their allegations fail to do so. Accordingly, dismissal is proper.

A. BCLIC and WNIC Fail to Adequately Plead the Fraudulent Conveyance Claims.

Under New York law, a plaintiff must satisfy Rule 9(b) and allege that a fraudulent conveyance was made with "actual intent . . . to hinder, delay or defraud either present or future creditors." *See In re M. Fabrikant & Sons, Inc.*, 394 B.R. at 733. "The party asserting an intentional fraudulent transfer must 'specify the property that was allegedly conveyed, the timing and frequency of those allegedly fraudulent conveyances, [and] the consideration paid.'" *Id.*

(quoting *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 221 (S.D.N.Y. 2002)).

Regarding constructive fraudulent conveyance claims, the plaintiff must allege that each transfer was made "without fair consideration" and that one of the following conditions is met: (1) the transferor was insolvent or was rendered insolvent by the transaction; (2) the transferor had unreasonably small capital to justify the transfer; or (3) the transferor believed it would not be able to repay the debt. NYDCL §§ 273 – 275. These allegations must, at a minimum, give PBIHL fair notice of the particularized claims that BCLIC and WNIC make against it. *See Gowan*, 452 B.R. at 462.

BCLIC and WNIC's pleadings allege that each transaction was both constructively and actually fraudulent. These allegations fail to approach the heightened pleading standards of Rule 9(b). Absent from these allegations is any particularized allegation of fraud on PBIHL's part. Indeed, as already shown, BCLIC and WNIC plead these third-party claims against "Beechwood Bermuda" without any differentiation between the companies that comprise this self-serving term.

Further, the allegations do not provide "fair notice" to PBIHL. BCLIC and WNIC seek to recover a money judgment for the 2014 transfer(s) of $75 million from the $100 million demand note issued by Beechwood Re Investors, LLC—what BCLIC and WNIC call the "Demand Note Transfer." (Third-Party Compl. ¶¶ 894, 903, 909, & 915). The pleadings, however, contain no allegation that details how PBIHL was involved in the transfer(s). BCLIC and WNIC contend that the companies comprising "Beechwood Bermuda" were transferees of these funds. (*Id.* ¶¶ 517 & 618). Yet, BCLIC and WNIC do not detail what portion of the $75 million, if any, was transferred

to PBIHL, when in 2014 the transfer(s) occurred, whether or how PBIHL was involved in facilitating the transfer(s), etc. BCLIC and WNIC are required to allege these details to comply with Rule 9(b) and New York law. *See In re M. Fabrikant & Sons, Inc.*, 394 B.R. at 733. They do not do so.

B. BCLIC and WNIC Fail to Adequately Allege Recipient Status for PBIHL.

In addition to the above reason for dismissal, BCLIC and WNIC's allegations necessarily fail because they fail to credibly allege that PBIHL actually received an avoidable transfer. BCLIC and WNIC contend the "Demand Note Transfer" is avoidable, but they merely speculate that PBIHL was somehow involved. Indeed, BCLIC and WNIC's allegations are notable for their absence of any supporting details as to how or whether PBIHL was actually involved in the transfer(s). This is critical. Absent any further detail, BCLIC and WNIC's fraudulent conveyance claims are, at best, claims for aiding and abetting a fraudulent conveyance. Aiding and abetting a fraudulent conveyance is not an actionable claim. *BBCN Bank v. 12th Ave. Rest. Grp.*, 150 A.D.3d 623, 623 – 24 (N.Y. App. Div. 1st Dep't 2017); *see also Shefner v. Beraudiere*, 127 A.D.3d 442, 442 (N.Y. App. Div. 1st Dep't 2015) ("Providing assistance to an alleged transferee does not state a claim in fraudulent conveyance[.]"). Further, the law only allows "nullification of the transfer by returning the property at issue back to the transferor." *Paradigm BioDevices Inc. v. Viscogliosi Bros., LLC*, 842 F. Supp. 2d 661, 667 (S.D.N.Y. 2012). There is no "independent remedy of money damages against third parties." *Id.* Accordingly, BCLIC and WNIC's conclusory recitation of the elements of their fraudulent conveyance claims is insufficient to plead any actionable claim against PBIHL that survives Rule 12(b) dismissal. *See Guangzhou Love Live Culture Dev. Ltd. v. Belinda Int'l Ltd.*, No. 16-CV-0862, 2017 U.S. Dist. LEXIS 221774, at **16

– 18 (E.D.N.Y. Dec. 28, 2017) (dismissal of a fraudulent conveyance claim was proper where it consisted "of little more than a formulaic recitation of the elements").

C. BCLIC and WNIC Are Not "Creditors" Entitled to Sue PBIHL.

"[I]t is well settled under New York law that the challenger must be a creditor" of the alleged transferor of the fraudulent conveyance. *Watts*, 786 F.3d at 162. Here, BCLIC and WNIC fail to adequately allege their standing as purported creditors to seek relief. Therefore, dismissal of BCLIC and WNIC's fraudulent conveyance claims are proper.

VII. BCLIC and WNIC's Contribution and Indemnity Claim Fails as a Matter of Law.

BCLIC and WNIC generally allege that they are entitled to indemnity and contribution from PBIHL should they "be found to have any liability to the [] Receiver," as "such liability will be the result of the fraudulent and other wrongful conduct of each of the Cross-Claim and Third-party Defendants[.]" (Third-Party Compl. ¶¶ 921 & 922).

These pleadings fail as a matter of law. This is because BCLIC and WNIC do not allege the elements of contribution or indemnity. It is unclear whether their theory of contribution and indemnity is based on New York law or federal law, but, in either case, the allegations are deficient. For one, contribution for violations of federal securities law is allowed only among "joint tortfeasors." *Stratton Group, Ltd. v. Sprayregen*, 466 F. Supp. 1180, 1185 (S.D.N.Y. 1979) ("The essence of contribution, therefore, is the presence of joint tortfeasors"). BCLIC and WNIC steadfastly insist that they have not violated and federal law, including federal securities laws, so nothing in the Third-Party Complaint can be read as an allegation or concession of fraudulent conduct on BCLIC or WNIC's part. BCLIC and WNIC also fail to allege that the injuries suffered

by the Plaintiffs in the underlying action were caused by PBIHL's violation of securities laws. *See, e.g., Monisoff v. American Eagle Investments, Inc.*, 955 F. Supp. 40, 41-42 (S.D.N.Y. 1997).

For another, any contribution claim under New York law is lacking, because New York law only permits a claim for contribution for a "personal injury, injury to property or wrongful death." CPLR 1401. The Receiver's pleadings fail to state a claim for relief against PBIHL, as set forth in PBIHL's Motion to Dismiss First Amended Complaint and Brief in Support, which is incorporated by reference herein.

Finally, indemnity is not available where, as here, BCLIC and WNIC have not jointly settled federal law claims with other tortfeasors, *see, e.g., Globus v. Law Research Service, Inc.*, 287 F. Supp. 188, 199 (S.D.N.Y. 1968), *aff'd in pertinent part*, 418 F.2d 1276, 1288-89 (2d Cir. 1969), nor where indemnity may not be implied from the relationship between the parties or from the law. *See Peoples' Democratic Republic of Yemen v. Goodpasture, Inc.*, 782 F.2d 346, 351 (2d Cir. 1986). Accordingly, the contribution and indemnity claim should be dismissed.

VIII. BCLIC and WNIC's Unjust Enrichment/Constructive Trust Claim Fails as a Matter of Law.

The final claim that BCLIC and WNIC bring against PBIHL is a claim for unjust enrichment. According to BCLIC and WNIC:

> All of the Cross-claim and Third-party Defendants in this action were unjustly enriched, at WNIC and BCLIC's expense. Beechwood Re avoided its obligations to top-up the trusts by using bogus valuation reports to claim that the trusts were adequately capitalized with investments having a fair market value which they in fact did not have; the investments were the product of self-dealing. The Defendants used trust assets to keep the Platinum-Beechwood fraud scheme afloat, and to enrich themselves in the process in the form of compensation, bonuses, dividends and/or other payouts.

(Third-Party Compl. ¶ 924).

This pleading of a general, non-specific benefit is insufficient to support an unjust enrichment claim. *Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 533 (S.D.N.Y. 2018); *see also Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352 – 53 (S.D.N.Y. 2018). As the Court explained in a related proceeding, "[r]elief for unjust enrichment is 'available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff.'" *Senior Health Ins. Co.*, 345 F. Supp. 3d at 532 (quoting *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012)). While BCLIC and WNIC do allege that "Defendants used trust assets to keep the Platinum-Beechwood fraud scheme afloat, and to enrich themselves," there is no allegation anywhere in the Third-Party Complaint that PBIHL actually "used trust assets" or how PBIHL was "enriched." To the contrary, BCLIC and WNIC allege that PBIHL was a transferee of some unidentified portion of "capital" from a demand note. (Third-Party Compl. ¶¶ 545 & 618). Therefore, the Court should dismiss BCLIC and WNIC's unjust enrichment claim.

CONCLUSION

As the above makes clear, dismissal is proper for each claim that BCLIC and WNIC bring against PBIHL: (1) aiding and abetting breach of fiduciary duties; (2) aiding and abetting fraud; (3) fraudulent inducement and fraud; (4) participating in a RICO scheme; and (5) fraudulent conveyance; (6) contribution and indemnity; and (7) unjust enrichment/constructive trust. The reasons for dismissal include lack of personal jurisdiction over PBIHL, impermissible group pleading, operation of the *in pari delicto* doctrine, the PSLRA's bar, and failure to plead with sufficient specificity under Rules 9(b) and 12(b)(6).

For these reasons, Bankers Conseco Life Insurance Company and Washington National Insurance Company's third-party claims against PBIHL should be dismissed with prejudice.

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