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 DEFENDANT PB INVESTMENT HOLDINGS, LTD.

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PB Investment Holdings, Ltd., as successor-in-interest to Beechwood Bermuda Investment Holdings, Ltd. (and incorrectly sued as Beechwood Bermuda Investment Holdings, Ltd.) ("PBIHL"), asks the Court to dismiss the First Amended Complaint [ECF 83] filed by 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 Funds LLC, Platinum Partners Credit Opportunities Fund International Ltd., Platinum Partners Credit Opportunities Fund International (A) Ltd., and Platinum Partners Credit Opportunities Fund (BL) LLC (the "Receiver"). The First Amended 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 First Amended Complaint is nothing more than an impermissible group pleading that is based on information and belief. The conclusory principal theory of the First Amended Complaint is that PBIHL was intimately aware of, and went along with, the massive fraud that Platinum insiders allegedly perpetrated. (First Am. Compl. ¶¶ 1 – 16).

The Receiver seeks to support this theory with vague and conclusory allegations as they relate to PBIHL, without directly alleging PBIHL did anything. For instance, for the sake of the First Amended Complaint, the Receiver collectively refers to PBIHL and other entities has "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants." (*Id.* ¶¶ 46 & 49). This makes for curious and confusing pleadings where one or more of these persons—PBIHL, for example—were not involved in the principal acts of the alleged conspiracy. Indeed, PBIHL is hardly mentioned at all by name in the pleadings.

The Receiver is certainly aware that she has little to support the claims against PBIHL, so she must attempt a group pleading in the hope that it will create enough of an issue for at least one

claim against PBIHL to survive. Nevertheless, dismissal of the First Amended Complaint is proper for several reasons. For one, the Receiver fails to establish that the Court has personal jurisdiction over PBIHL. The Receiver flatly alleges that PBIHL is a Bermuda entity with its principal place of business in New York. (*Id.* ¶ 38). Yet, the Receiver alleges no facts that PBIHL has availed itself of jurisdiction in this forum. To the contrary, PBIHL has never been registered as a foreign corporation under New York law and does not do business in New York. (Decl. ¶ 3).[1]

For another, the Receiver's theory 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). The Receiver asks the Court to hold PBIHL liable for aiding and abetting in the massive fraud in which the Plaintiffs participated.

Further, the Receiver's allegations fail to meet the heightened pleading standards for securities and fraud-based claims under Rule 9(b). The body of the First Amended Complaint is 116 pages, 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," the "Beechwood Entities," or the "Beechwood Defendants." Thus, PBIHL and the Court are left to wonder just how exactly PBIHL wronged the Plaintiffs, wrongfully benefitted from others' wrongdoing, or otherwise facilitated some sort of harm.

The foregoing and additional reasons set forth below should bring home that the Receiver has not asserted, nor can she assert, a factually plausible or legally cognizable claim against PBIHL. Therefore, dismissal of the Receiver's claims against PBIHL is proper.

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

STATEMENT OF FACTS

I. The Parties.

This litigation is one of several proceedings that arise out of the failure of Platinum Partners, formerly a highly regarded and successful hedge fund management company. Platinum Partners' principals are now subject to several civil and criminal proceedings, including this one.

The Receiver represents several entities that were "fraudulently marketed and operated under the name 'Platinum' by a group of now indicted, convicted and/or otherwise malfeasant individuals." (First Am. Compl. ¶ 1). Those individuals (the "Platinum Insiders") allegedly perpetrated a massive fraud on investors for their own benefit, to prop up failing investments, and to pay distributions to other investors. (*Id.* ¶¶ 1 – 16).

The Platinum Insiders are alleged to have created Beechwood, a reinsurance company and investment advisor, in or around 2013 "to gain access to hundreds of millions of dollars in insurance assets that would then be channeled into the Platinum family of funds." (*Id.* ¶ 5). The Receiver alleges that Beechwood received millions of dollars from various defendant insurance companies that "Beechwood immediately began investing into the Platinum Funds and/or their portfolio companies through a series of debt and equity transactions." (*Id.* ¶ 169). Further, "[t]he Beechwood Defendants and the Platinum Insiders structured and implemented numerous non-arms' length non-commercial transactions through which Beechwood purchased certain PPVA fund assets," with the "sales and direct investments [] intended to generate much needed cash for the PPVA funds while maintaining the fiction of inflated valuations." (*Id.* ¶ 170).

The Receiver refers to the following defendants as "Beechwood" and the "Beechwood Entities:" Beechwood Re Ltd.; Beechwood Re Investments LLC; B Asset Manager LP; B Asset Manager II LP; Beechwood Re Holdings Ltd.; Beechwood Bermuda International Ltd.; PBIHL;

Beechwood Bermuda Ltd.; BAM Administrative Services LLC; BRe BCLIC Primary; BRe BCLIC Sub; BRe WNIC 2013 LTC Primary; and BRe WNIC 2013 LTC Sub. (*Id.* ¶ 46). The Receiver also refers to these entities and Defendants Mark Feuer and Scott Taylor as the "Beechwood Defendants." (*Id.* ¶ 49).

The Receiver incorrectly alleges that PBIHL was "a reinsurance company domiciled in Bermuda with its principal place of business in New York, New York." (*Id.* ¶ 38). The Receiver makes no further allegations supporting personal jurisdiction over PBIHL.

II. The Receiver's Conclusory Allegations against PBIHL as "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants."

The Receiver's First Amended Complaint names PBIHL as part of "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants" and then flatly asserts that "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants" aided and abetted in defrauding, conspired to defraud, and defrauded, the Plaintiffs. Specifically, the Receiver brings four counts against the "Beechwood Defendants:" (1) aiding and abetting breach of fiduciary duties; (2) aiding and abetting fraud; (3) participating in a RICO scheme that injured the Plaintiffs; and (4) violating Section 10(b) of the Securities and Exchange Act and related Rule 10b-5. (*Id.* ¶¶ 272 – 340). However, the only instance in the 116-page pleading where the Receiver appears to even remotely contemplate PBIHL regards multiple transfers of funds that allegedly occurred on March 21, 2016:

> The funds "loaned" to PPCO Master Fund under the March NPAs made a round trip back to the Noteholders, and through the Beechwood Reinsurance Trusts and/or other intermediaries, to BCLIC and WNIC, through the following note issuances and payment directions:
>
> (i) $10 Million Secured Term Note dated March 21, 2016, pursuant to which BRe BCLIC Primary "loaned" PPCO Master Fund $10 million which was then directed to BAM Administrative, as Agent for each of BRe BCLIC

> Primary, BRe WNIC 2013 LTC Primary, Beechwood Bermuda International Limited and [PBIHL], for its segregated accounts.
>
> ...
>
> (v) $42,963,949.04 Second Amended and Restated Secured Term Note dated March 21, 2016, pursuant to which SHIP "loaned" PPCO Master Fund $26,590,877.78 which was then directed to BAM Administrative, as Agent for SHIP, BRe WNIC 2013 LTC Primary, Beechwood Bermuda International Limited and [PBIHL], for its segregated accounts.

(*Id.* ¶ 246).

These allegations again fail to specify how PBIHL was specifically involved, other than perhaps being one of several intermediaries for one of several funds transfers, and how it specifically benefited. The Receiver does not detail what portion(s), if any, of these transfers actually passed through PBIHL. The Receiver's pleadings are wholly insufficient to state a claim for relief against PBIHL.

ARGUMENT

The Receiver cites no facts in her First Amended Complaint which plausibly suggest that PBIHL harmed Plaintiffs. Instead, the Receiver alleges, on information and belief (*see id.* ¶ 24) ("The Bases for Receiver's Information and Belief"), that "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants" engaged in conduct that harmed Plaintiffs. 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). The Receiver's claims against PBIHL should be dismissed.

I. The Court Lacks Personal Jurisdiction Over PBIHL.

The Receiver has the burden to establish personal jurisdiction over any person or entity that she sues. *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010). To survive

dismissal for want of jurisdiction, the Receiver 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, the Receiver incorrectly alleges, without any factual support, that PBIHL was domiciled in Bermuda with its principal place of business in New York. (First Am. Compl. ¶ 38). The Receiver does not allege any facts to suggest that New York could be PBIHL's home for purposes of this jurisdictional analysis. To the contrary, PBIHL has never been registered as a foreign corporation under New York law. (Decl. ¶¶ 3 & 4). It has no agent for service of process in New York. (*Id.* ¶ 3). 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.*).

Similarly, PBIHL's predecessor in interest, Beechwood Bermuda Investment Holdings, Ltd. was formed in 2013. (*Id.* ¶ 4). It was, and had always been, a limited company organized under Bermuda law, with its principal place of business in Bermuda. (*Id.*). It was also a wealth management company whose investment products were not offered or available in the United States or to United States citizens. (*Id.*).

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). Her incorrect and facially insufficient allegation regarding New York as PBIHL's principal place of business notwithstanding, the Receiver only vaguely and generally alleges that PBIHL was involved in a transfer of funds, and then apparently only as a passive intermediary. (First Am. Compl. ¶¶ 246). The Receiver makes 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, because it does not.

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). The Receiver does not allege facts that meets these conditions. For one, the Receiver

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). The Receiver does 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). The Receiver's complaint concludes, without sufficient factual support, that PBIHL engaged in conduct in New York that caused financial harm to the plaintiffs 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.* This is because the defendant's conduct is of primary importance to the jurisdictional analysis, not the location of the plaintiff's injury.

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 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.").

The Receiver alleges no facts showing that PBIHL purposefully availed itself of the privileges of doing business in New York. Therefore, the claims against PBIHL should be dismissed under Rule 12(b)(2) for want of jurisdiction.

II. The First Amended Complaint Violates the Group Pleading Rule.

Even if the Receiver were able to establish personal jurisdiction over PBIHL, her 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).

The Receiver's pleadings fail this most basic rule of pleading because the allegations simply lump together PBIHL with: (1) Beechwood Re Ltd., Beechwood Re Investments LLC, B Asset Manager LP, B Asset Manager II LP, Beechwood Re Holdings Ltd., Beechwood Bermuda International Ltd., Beechwood Bermuda Ltd., BAM Administrative Services LLC, BRe BCLIC Primary, BRe BCLIC Sub, BRe WNIC 2013 LTC Primary, and BRe WNIC 2013 LTC Sub to form "Beechwood" and the "Beechwood Entities;" and (2) with Beechwood/Beechwood Entities

and Defendants Mark Feuer and Scott Taylor to form the "Beechwood Defendants." (First Am. Compl. ¶¶ 46 & 49). The Receiver states no reason for doing so.

The Receiver 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). The Receiver provides none of these details with regard to their claims of securities violations, aiding and abetting fraud, or aiding and abetting breach of fiduciary duty against PBIHL. (*See* Sections IV – VI *infra*). In fact, the Receiver does not allege any sufficient 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 the Receiver's Claims.

Even if the Receiver's pleadings are somehow adequate under Rule 9(b), her 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).

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). Indeed, just as a wrongdoer cannot profit from his misconduct, a receiver cannot pursue damages when the entity in receivership engaged in the misconduct. Courts throughout the United States agree.

For instance, the Seventh Circuit applied the *in pari delicto* doctrine to bar a receiver from asserting claims on behalf of an entity associated with a Ponzi-schemer. *See Knauer v. Jonathan Roberts Fin. Grp.*, 348 F.3d 230, 236 – 38 (7th Cir. 2003). "The basic equity is that a broker dealer, which apparently had little to do even with the Ponzi scheme, should not be liable to [the receivership entity], which was deeply complicit in the crimes . . .." *Id.* at 237.

Here, the Receiver details a massive and surreptitious fraud perpetrated by Platinum insiders. The Receiver repeatedly identifies the Platinum insiders as those who "caused" or "orchestrated" the scheme and acknowledges that the PPCO Funds were founded and controlled by Platinum insiders. (*See* First Am. Compl. ¶¶ 57 – 60 & 101 – 106). The Receiver also notes that, in 2013, "the PPCO Funds began to experience increasing redemptions" while their "cash balance decreased" and "the funding requirements . . . were not being met." (*Id.* ¶¶ 105 & 106). This "severe liquidity crisis" created a stark choice for the Platinum insiders: "wind down through liquidations and risk their fraudulent scheme being exposed or find alternative means to raise substantial capital outside of their friends and family." (*Id.* ¶ 107).

The Platinum insiders chose the latter. They "partnered and conspired with" other insiders "to form a reinsurance company . . . with the objective of entering into one or more reinsurance treaties with insurance companies, so that they could take control of reinsurance trust fund assets and use those assets to benefit Platinum" (*id.* ¶ 108), and with "[t]he ownership in and ultimate control of" the reinsurance company—Beechwood Re—being held by the Platinum insiders (*id.* ¶ 110). Beechwood Re was successful in entering reinsurance treaties and securing the associated assets. (*See id.* ¶¶ 141 – 153).

Following the above, the Receiver alleges "the Platinum insiders and Beechwood directed the Beechwood Reinsurance Trusts and the SHIP IMA accounts to purchase limited partnership

interests in the Platinum Funds." (*Id.* ¶ 177). The Receiver admits that, "without the sale of assets to Beechwood, . . . PPCO would have faced liquidity issues which would have led to an inability to satisfy any non-ordinary course redemption requests." (*Id.* ¶ 178). Considering New York's strong preference for robust application of the *in pari delicto* doctrine, the Receiver should not be allowed to pursue its claims against PBIHL.[2]

Further, the narrow "adverse interest" exception to the *in pari delicto* doctrine does not apply in this instance. *Kirschner*, 938 N.E.2d at 952. "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." *Id.* (quoting *Ctr. v. Hampton Affiliates, Inc.*, 488 N.E.2d 828, 830 (N.Y. 1985)). Where the agent's alleged misconduct "enables the business to survive—to attract investors and customers and raise funds for corporate purposes—this test is not met." *Id.* at 953.

Courts addressing facts similar to those alleged in this case routinely decline to apply the adverse interest exception. *See New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 41 N.Y.S.3d 1, 10 (1st Dep't 2016) (exception inapplicable where alleged conduct of funds' management "enabled the funds to continue to survive and to attract investors"); *Concord Capital Mgmt., LLC v. Bank of Am., N.A.*, 958 N.Y.S.2d 93, 93 (1st Dep't 2013) (exception inapplicable where alleged scheme "brought millions of dollars into plaintiffs' coffers and alleged plaintiffs to survive for a few years.").

Here, the Receiver affirmatively alleges that PPCO benefited from the Platinum insiders' wrongful conduct. The Receiver alleges that PPCO was facing a "severe liquidity crisis" that created problems when it came time to pay redemptions to investors. (First Am. Compl. ¶¶ 105 –

[2] For the same reasons, this doctrine should bar the Receiver's federal claims against PBIHL. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 – 11 (1985) (holding that the *in pari delicto doctrine* can bar a securities act claim); *see also Republic of Iraq v. ABB AG*, 920 F. Supp. 517, 546 – 47 (S.D.N.Y. 2013) (dismissing RICO claim based on *Bateman Eichler*).

107). The Receiver admits the PPCO Funds' principals were also principals of Beechwood and crafted the plan to gain access to reinsurance trust assets to ease PPCO Funds' liquidity issues. (*Id.* ¶¶ 108 & 11). The Receiver also admits that PPCO/the PPCO Funds relied on asset sales to Beechwood, financed by reinsurance trust assets that were secured as part of the scheme, to survive. (*Id.* ¶ 178). Thus, the allegations show that the conduct of Platinum insiders sustained the funds, and any argument that this conduct was adverse to PPCO is without merit and should be rejected.

IV. The Receiver's Civil RICO Claims are Barred as a Matter of Law.

In the unlikely event the Court determines that wholesale dismissal of the Receiver's claims against PBIHL is improper, separate grounds exist for the dismissal of each and every claim that the Receiver brings against PBIHL. Regarding the Receiver's civil RICO claims (*see* First Am. Compl. ¶¶ 272 – 308), dismissal is proper because securities fraud cannot serve as 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.

The Receiver's theory of RICO liability against PBIHL fails. The Receiver generally alleges that the defendants comprising "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants" "utilized Beechwood to assist the PPCO Portfolio Manager in charging management and incentive fees based on over-valued assets and charge substantial management fees on account of the Beechwood investments inuring to the benefit" of PBIHL and others, assisted Platinum Insiders "in perpetuating a fraud on the investors and creditors of the Platinum Funds," and "committed mail and wire fraud[,]" but there are no allegations that are specific to PBIHL. (First Am. Compl. ¶¶ 260 – 262 & 264).

Even if there were allegations specific to PBIHL, this conduct is precisely the type 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.

The Receiver'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, the Receiver 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.* The Receiver fails to adequately plead either form of conduct.

The Receiver purports to identify a conspiracy with the singular purpose to defraud certain "Platinum Fund investors" over a three-year period. (First Am. Compl. ¶¶ 259 – 271). That accusation identifies a handful of victims 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 since there are no specific allegations regarding PBIHL. The only allegations in the First Amended Complaint that do relate to PBIHL regard the alleged transfers of funds that occurred on or about March 21, 2016. (First Am. Compl. ¶¶ 246). 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). Here there are no acts that the Receiver attributes to PBIHL.

Finally, the civil RICO claims fail because the Receiver does 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 the Receiver's civil RICO claims is proper.

V. The Receiver Fails to State a Claim for Violation of Section 10(b) and Rule 10b-5.

To succeed on a Section 10(b) claim, a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 – 42 (2005)); *see also Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 157 (2008) (Rule 10b-5 only prohibits conduct that is already prohibited by Section 10(b), and the Supreme Court reads a right to a private cause of action implied in the statute and its implementing regulation). However, to satisfy the heightened pleading standards of the PSLRA, the plaintiff must: "(1) 'specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading,'; and (2) 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007) (quoting 15 U.S.C. §§ 78u-4(b)(1), 78u-4(b)(2)).

A strong inference of fraudulent intent "may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *IKB Int'l S.A. v. Bank of Am. Corp.*, 584 F. App'x 26, 27 (2d Cir. 2014) (citing *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006)). "Where motive is not apparent, it is still possible to plead

scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater." *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001). "Recklessness is defined as at the least, an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009).

A plaintiff adequately alleges scienter only if "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 324. The Court must "consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff." *Id.*

The Receiver brings claims under subsections (a), (b), and (c) of Rule 10b-5. While subsection (b) prohibits "the making of a material fact and the omission to state a material fact," subsections (a) and (c) allow suit against defendants who, with scienter, employ a "device, scheme or artifice to defraud," or engage in an "act, practice, or course of business which operates or would operate a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5. "To state a claim based on conduct violating Rule 10b-5(a) and (c), plaintiff must allege (1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance." *In re Alstom SA*, 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005). A plaintiff bringing a claim pursuant to those subsections must "plead with particularity the manipulative scheme itself[.]" *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 297 (S.D.N.Y. 2003).

It is readily apparent from the Receiver's pleading that she fails to plead an actionable claim for securities law violations against PBIHL. For one, the Receiver makes no allegation (1) that PBIHL or anyone acting on its behalf made a material misrepresentation or omission, (2) that

PBIHL had the requisite mental state to commit a violation, (3) any connection between the misrepresentation or omission and the purchase or sale of a security, or (4) reliance upon the misrepresentation or omission. The Receiver's pleading also fails to meet the heightened pleading requirements that are necessary to plead an actionable claim here. The only allegations that directly relate to PBIHL are that it was involved in some capacity in one or more transfers of funds in March 2016. (*See* First Am. Compl. ¶ 246). There are no allegations in the First Amended Complaint regarding PBIHL beyond that. Suffice it to say, any factual allegations that tend to show the existence of scienter and/or intent to defraud by PBIHL are absent. The Receiver's Section 10(b) and Rule 10b-5 claim should be dismissed as a result.

VI. The Receiver's Conclusory Fraud-Based Claims are Inadequate.

The Receiver asserts two fraud-based claims against the "Beechwood Defendants." The Receiver alleges aiding and abetting breaches of fiduciary duty based on—well, it is unclear because PBIHL is named here but there is no allegation specific to it. (*See id.* ¶¶ 322 – 333). The Receiver also alleges aiding and abetting common law fraud based on—again it is unclear from the pleadings. (*See id.* ¶¶ 334 – 340). 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. The Receiver Fails 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 First Amended Complaint is plainly deficient with respect to the substantial assistance element. The allegations focus on acts that "Nordlicht and the PPCO Portfolio Manager" committed, but when it comes to defendants like PBIHL, the Receiver makes general, vague and conclusory allegations that those defendants acted "through their common agents and officers." (*See* First Am. Compl. ¶¶ 323 & 328). Even so, the Receiver does not mention the March 2016 transfers as a basis for this claim. In other words, 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.

B. The Receiver Fails 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). The Receiver's claim here is deficient for several reasons.

First, the Receiver fails to specifically plead the "who, what, when, where, and how" of the alleged underlying fraud. Indeed, the Receiver fails to plead any facts that tend to establish the plaintiffs' justifiable reliance on any material misrepresentation or actionable omission by Defendants, 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). The Receiver does not detail how the plaintiffs 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 any Defendant, which apparently had no contact whatsoever with Plaintiffs.

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 together PBIHL with the "Beechwood Defendants." (*See, e.g.*, First Am. Compl. ¶ 336) ("The Beechwood Defendants, the SHIP Defendants and each of the CNO Defendants (through their common agents and officers . . ..").

Third, the Receiver'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). The Receiver's allegations do no such thing. The allegations are, in fact, silent as to PBIHL outside of the passing references to it regarding the March 2016 transfers. These allegations are insufficient to show that PBIHL provided substantial assistance to any transaction that the Receiver relies upon in support of this claim. The Receiver's aiding and abetting fraud claim is ripe for dismissal.

The Receiver's aiding and abetting claims appear to be an attempt to create liability by association. However, the case law requires more than pleading mere association before a claim is actionable—the party must be proximately involved with the transaction(s) at issue. The only allegations regarding PBIHL in the entire First Amended Complaint regard it being a part of "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants," and being involved, in some sort of capacity, with one or more transfers that occurred in March 2016. Whether PBIHL actually received any funds from one or more of these transfers appears to be unimportant to the

Receiver; however, it is required to state a claim. Accordingly, the Receiver's aiding and abetting claims should be dismissed with prejudice.

CONCLUSION

As the above makes clear, dismissal is proper for each claim the Receiver brings against PBIHL: (1) aiding and abetting breach of fiduciary duties; (2) aiding and abetting fraud; (3) participating in a RICO scheme that injured the Plaintiffs; and (4) violating Section 10(b) of the Securities and Exchange Act and related Rule 10b-5. 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, the Receiver's claims against PBIHL should be dismissed with prejudice.

Dated: May 15, 2019

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CERTIFICATE OF SERVICE

It is hereby certified that on this 15th day of May 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this proceeding.

CHARLES A. GRUEN