UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	Civil Action No. 1:18-cv-06658 (JSR)
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY, Cross-Claim and Third-Party Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, et al., Cross-Claim and Third-Party Defendants.	Civil Action No. 1:18-cv-12018 (JSR)

OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS CROSS-CLAIMS AND THIRD-PARTY COMPLAINT OF BANKERS CONSECO LIFE INSURANCE COMPANY AND WASHINGTON NATIONAL INSURANCE COMPANY, AND BEECHWOOD RE'S MOTION TO COMPEL ARBITRATION

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PRELIMINARY STATEMENT

Washington National Insurance Company and Bankers Conseco Life Insurance Company (collectively, "CNO") submit this brief, and the accompanying Declaration of Jenna C. Polivy, dated June 12, 2019 (the "Polivy Decl."), in opposition to the motions of Cross-claim or Third-party defendants Murray Huberfeld (Dkt. 153),[1] PB Investment Holdings Ltd. ("PB Investment") (Dkt. 200), Daniel Saks (Dkt. 177), David Bodner (Dkt. 186), Beechwood Trust Nos. 7-14 (Dkt. 189), Hokyong Kim (Dkt. 191), David Ottensoser (Dkt. 193), the "Beechwood Parties" (Mark Feuer, the Feuer Family Trust, Scott Taylor, the Taylor-Lau Family Trust, Beechwood Re Ltd, Beechwood Re Holdings, Inc., B Asset Manager LP, BAM Administrative Services LLC, Beechwood Bermuda Ltd., Beechwood Bermuda International, Ltd., Dhruv Narain and Beechwood Capital Group LLC) (Dkt. 209) and Will Slota (Dkt. 231) to dismiss, in whole or in part, CNO's cross-claims and third-party claims against them. For purposes of this brief, we refer to the Answer, Cross-Claims, and Third-Party Complaint of Bankers Conseco Life Insurance Company and Washington National Insurance Company (Dkt. 75) as the "Complaint" or the "Claims" and the moving parties as "Defendants."[2]

As the Court knows from previous proceedings in these consolidated cases, everyone agrees that Platinum and Beechwood defrauded CNO. Platinum's Receiver and Liquidators admit it, and it is a central pillar of the Government's criminal case against many of the fraudsters. Bodner and Huberfeld—each a principal of both Platinum and Beechwood—also

[1] Unless otherwise noted, citations to the docket refer to the docket in the case captioned *Cyganowski v. Beechwood Re Ltd, et al.*, No. 18-cv-12018-JSR.

[2] Additional lexicon: "¶" refers to paragraphs in the Complaint. "FAC" refers to the First Amended Complaint (the operative complaint) in the action *Cyganowski v. Beechwood Re, et al.*, No. 18-cv-12018 (JSR), Dkt. No. 83. "SAC" refers to the Second Amended Complaint (the operative complaint) in the action *Trott v. Platinum Management (NY) LLC, et al.*, No. 18-cv-10936(JSR), Dkt. No. 285 (referred to herein as the "JOLs' Action").

admitted that fraud in an email dated July 30, 2015, when they acknowledged that they lied to CNO about Platinum's control of Beechwood (representing that Beechwood had no ties at all to any other companies) to induce CNO to enter into the Reinsurance Agreements with Beechwood. ¶ 871. By the time Bodner and Huberfeld admitted the fraud in their candid email, the fraud had been ongoing for two years. The fraud persisted so long—and then for another year—only because Bodner, Huberfeld and others, including the Defendants, went to extraordinary lengths to hide it, which included repeatedly lying to CNO about what Beechwood was and who was running it.

None of the Defendants have argued, nor could they, that Beechwood and Platinum did not defraud CNO. CNO was told that Beechwood was capitalized by Mark Feuer and Scott Taylor with over $100 million of their own money and that Beechwood had no connection to any hedge fund. They were also told that the reinsurance trust assets (the "Trusts" or "Trust" assets) would be invested prudently and conservatively to safeguard and grow the corpus of the Trusts, which backstopped policyholder claims. Those were all lies, and the Defendants told those lies to CNO or told others to tell those lies to CNO. While the Defendants were lying to CNO about who controlled Beechwood and why Beechwood was making so many investments in Platinum-controlled funds or entities—never once revealing that Platinum owned, controlled and funded Beechwood, while repeatedly (and falsely) denying these connections—in truth, as we all now know, the Defendants were trying to keep Platinum afloat to conceal their illicit activities.

Unable to seriously dispute the fraud, the Defendants argue that they cannot be liable for it. None of their arguments have any merit. It is not the law in New York or anywhere else that individuals may conspire to defraud an insurance company out of millions of dollars and not be held to account for such frauds and lies. Fictional entities like Platinum and Beechwood can

only act through individuals, and the Defendants are the individuals who ordered, executed and benefitted from the fraud. Each Defendant played a significant part in the fraud scheme and has been properly sued in this case.

Some Defendants make the knee-jerk argument that the Claims fail to meet Rule 9(b) pleading standards, but the exact opposite is true. The Claims are the most detailed pleadings of any in the consolidated cases. For the Court's convenience, we attach appendices as Exhibits A–Q to the Polivy Decl. (the "Appendices") in which we break down the specific allegations made against each Defendant. These allegations are more than sufficient to satisfy Rule 9(b), especially under these circumstances where the fraud was carried out in secret and the Defendants have greater knowledge about their fraud scheme than CNO has. In the event, however, this Court determines that Rule 9(b) was not satisfied for any Defendant, CNO should be given leave to replead, just as every other party asserting claims has been granted such leave.

ARGUMENT

I. CNO'S CLAIMS ARE WELL-SUPPORTED BY SPECIFIC FACTS AND DO NOT VIOLATE ANY PROHIBITION AGAINST "GROUP PLEADING"

The Defendants' main gripe seems to be that, on occasion, the Claims employ what they refer to as "group pleading" when using the terms "Co-Conspirators" or "Defendants." Their argument is actually that the Complaint is insufficiently specific as to each Defendant under Rule 9(b). In fact, however, the Complaint is replete with specific allegations identifying the acts and omissions of each Defendant, by name, that support the claims CNO brings. *See* Polivy Decl., Exs. A–Q. Each Defendant is therefore on clear notice of the claims against him, and the factual basis on which to distinguish his conduct. *See In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *34–35, 48–49 , (S.D.N.Y. Apr. 11, 2019) ("it cannot seriously be argued that

the FAC fails as a result to give BAM II fair notice of what the plaintiff's claim is and the ground upon which it rests") (internal quotations and citation omitted).

At times, CNO refers to the Co-Conspirators and Defendants jointly. But that is necessitated by the Defendants' fraudulent activity. Each Defendant was part of an intricate, albeit "really integrated" (the Co-conspirators' words) Platinum-Beechwood conspiracy. The individual Defendants were the principals and senior managers of the conspiracy.

Although all Defendants try to minimize their roles to avoid being linked together, CNO brought claims against those Defendants who were the ringleaders of the fraud. This Court has already rejected a group pleading argument from Bodner, Huberfeld, Saks, and Ottensoser, as each was alleged to have been sufficiently central to the fraud to avoid dismissal. *See In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *60–62. Kim now paints himself as an insignificant employee, but the Complaint explains with detailed allegations how Kim, a Platinum senior manager and Beechwood's *Chief Risk Officer*, [redacted] ¶ 505, [redacted] ¶ 644. Slota was Beechwood's *Chief Operating Officer*, who was instrumental in perpetrating Beechwood's [redacted] ¶¶ 493, 495, 637–40.

Here, CNO's sparing use of group pleading is perfectly appropriate. In the JOLs' Action, for example, this Court largely rejected the defendants' group pleading argument, finding that Bodner, Huberfeld, and Ottensoser were alleged to be high level corporate insiders and "they are

precisely the kind of narrowly defined group of highly ranked officers and directors that the group pleading doctrine contemplates." *In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745 at *59–60 (S.D.N.Y. Apr. 11, 2019) (internal quotations and citation omitted). The same is true here.[3] *See also In re Pfizer Inc. Sec. Litig.*, 584 F. Supp. 2d 621, 637 (S.D.N.Y. 2008); *City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) (Rakoff, J.) (citing *Pfizer*, 584 F. Supp. 2d at 638).

"[T]he adequacy of particularized allegations under Rule 9(b) is . . . case-and-context specific." *United States, ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 82 (2d Cir. 2017) (alteration in original) (quoting *Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229, 236 (2d Cir. 2015)). "The point of Rule 9(b) is to ensure that there is sufficient substance to the allegations to both afford the defendant the opportunity to prepare a response and to warrant further judicial process." *Id.* at 87 (alteration in original) (quoting *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 125 (D.C. Cir. 2015)). The Complaint certainly lays out CNO's case against each Defendant sufficiently enough to allow them to prepare a defense; it is part of the same fraud that this Court has held has been sufficiently pleaded by the JOLs and the Receiver, and which Bodner and Huberfeld have admitted was perpetrated on CNO.

Moreover, "the requirement of pleading fraud with particularity is relaxed where the particulars of the fraud claims are particularly within the knowledge of the defendants." *Sunrise Indus. Joint Venture v. Ditric Optics, Inc.*, 873 F. Supp. 765, 772 (E.D.N.Y. 1995). What's more, "the particularity requirement of Rule 9(b) is appropriately relaxed where the individual defendant is a corporate insider." *Id.* For these reasons as well, none of the Defendants, all of

[3] This stands in stark contrast to the use of group pleading by plaintiff Melanie Cyganowski (the "Receiver") in *Cyganowski v. Beechwood Re Ltd.*, No. 18-cv-12018 (JSR). She inappropriately lumps CNO with SHIP and even Beechwood.

whom were insiders to the fraud and have superior information about the fraud, should be heard to contend that the fact-rich Complaint fails under Rule 9(b).

II. THE DOCTRINE OF IN PARI DELICTO DOES NOT APPLY HERE

Several Defendants (Huberfeld, Ottensoser, Kim, and PB Investment) argue that CNO cannot recover because the Receiver also accuses CNO—albeit fancifully—of misconduct. Huberfeld Br., at 9; *see also* PB Investment Br., at 11. But, the Receiver's Complaint is not entitled to a presumption of truth on a Rule 12(b)(6) motion directed to CNO's claims. Rather, the Court must presume the truth of CNO's claims that it is the victim of the fraud and other wrongful conduct that Defendants perpetrated on CNO, and cannot use the Receiver's allegation of wrongdoing against CNO as a "fact" for any reason, let alone to dismiss CNO's Complaint. *See, e.g., Gary/Chi. Int'l Airport Auth. v. Zaleski*, 144 F. Supp. 3d 1019, 1022 (N.D. Ind. 2015) (rejecting similar argument because "any defendant who files a third-party complaint would necessarily be deemed to admit all the allegations of the original complaint—a result that would force defendants to either defend themselves from the underlying claims or seek contribution, but never both").[4]

Kim also argues that the claims against him should be dismissed because his involvement was only "limited" and "isolated" in comparison to other Platinum-Beechwood principals and senior managers. Kim Br., at 12. Aside from being untrue, that argument is also irrelevant. *In pari delicto* is meant to prevent a wrongdoer from recovering against other wrongdoers. Kim's claims that he was a less culpable fraudster than other Defendants do nothing to defeat the claims CNO has against him. And, the Complaint provides *many* details of Kim's involvement. *See*,

[4] The Receiver's claims, by contrast, are barred as a matter of law by the *in pari delicto* doctrine and *Wagoner* since the Receiver, unlike CNO, stands in the shoes of the very same Platinum fraudsters whom she admits engaged in fraud.

e.g., ¶¶ 505, 577, 579, 580, 606–08, 644. Kim cites no authority suggesting that *in pari delicto* permits CNO to sue only the most culpable persons.

III. CNO HAS ADEQUATELY PLEADED RICO CLAIMS

The Defendants (including defendant Lincoln International LLC)[5] make several arguments directed to CNO's RICO claims. *First*, they argue that these RICO claims are barred by the RICO Amendment to the Private Securities Litigation Reform Act. *Second*, they raise a hodgepodge of alleged pleading failures. None of these arguments have merit, and the RICO claims should be allowed to proceed.

A. The RICO Amendment Does Not Apply Because the Conduct at Issue Was Not Actionable Securities Fraud.

The RICO Amendment precludes a plaintiff from basing a RICO claim on predicate acts that "would have been actionable" as securities fraud. 18 U.S.C. § 1964(c). To be actionable as securities fraud, the predicate act "must coincide with the sale of securities" and be "integral to the purchase and sale of the securities in question." *Leykin v. AT&T Corp.*, 423 F. Supp. 2d 229, 241 (S.D.N.Y. 2006) (quoting *Pross v. Katz*, 784 F.2d 455, 459 (2d Cir. 1986)) (internal quotation marks omitted). The predicate act must be "material to a decision by one or more individuals (other than the fraudster) to buy or sell a 'covered security.'" *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 387 (2014). By contrast, "[c]onduct that is merely incidental or tangentially related to the sale of securities" does not trigger the RICO Amendment. *Leykin*, 423 F. Supp. 2d at 241.

[5] As virtually all of the defendants have moved to dismiss the RICO claims against it, CNO responds to Lincoln's RICO arguments here for purposes of efficiency. It has filed a separate brief contemporaneously herewith addressing Lincoln's motion to dismiss the claims and arguments that pertain particularly to Lincoln.

Most Defendants do little more than cite the standard for dismissal under the RICO Amendment and summarily conclude that it applies here. They do not identify any securities "in question," let alone why the predicate acts identified in the Complaint are "integral" to those securities' purchase and sale. For example, Kim simply asserts that "the third party defendants are being accused of securities fraud." Kim Br., at 7. But nowhere does CNO accuse the Defendants of securities fraud. Saks and PB Investment do not even address CNO's claims against them, but instead conclude that the RICO Amendment applies because of allegations in the *Receiver's* complaint. *See* Saks Br., at 8–9; PB Investment Br., at 13.

Defendants seem to argue that, because some of their conduct is actionable as securities fraud, no plaintiff can ever bring a RICO claim against them. That is incorrect and ignores this Court's recent conclusion that some—but not all—predicate acts alleged by SHIP were barred by the RICO Amendment. *See Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd*. (hereinafter "*SHIP*"), 2019 U.S. Dist. LEXIS 67952, at *30–31 (S.D.N.Y. Apr. 22, 2019).

Moreover, the RICO Amendment does not reach predicate acts that are merely "intrinsically connected" to actionable securities fraud—a point made clear in the foundational case upon which the Defendants' cited cases are based. *Bald Eagle Area Sch. Dist. v. Keystone Fin.*, 189 F.3d 321, 330 (3d Cir. 1999) (cited by *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 278 n.11 (2d Cir. 2011)). CNO's claims are about *Reinsurance Agreements*. *Indeed, CNO never purchased, or sold, a single security to or from either Beechwood, PPCO, PPVA, or any of their affiliated companies.* The basic claim is that Platinum formed Beechwood to rob CNO of more than $600 million by falsely, through the use of the wires and mails, representing that Beechwood was owned and controlled by two legitimate businessmen (Messrs.

Feuer and Taylor) with sufficient capital to be a responsible reinsurance partner, and that Trust assets would be prudently and safely managed (and independently confirmed).

CNO was never an "investor" in Beechwood, and it did not even know about Beechwood's connections with Platinum until well into 2016, more than three years after the initial lies induced CNO to enter into the Reinsurance Agreements. CNO ceded liabilities to Beechwood and gave Beechwood $42 million in cash as a fee (referred to as a negative ceding commission) to take on those risks, plus approximately $550 million in assets—almost all cash—to satisfy statutory reserve requirements for the risks transferred. If that is a securities transaction, then every reinsurance agreement is and no cedent would ever have standing to pursue a RICO claim. At the very least, there is not even a plausible argument that the RICO Amendment bars any claim covering the $42 million negative ceding commission.

This case is thus unlike those relied upon by the Defendants, as none of those cases involved a reinsurance relationship. In the *Madoff* cases, for example, investors knew they were investing with Madoff, so the RICO Amendment applied. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 270 (2d Cir. 2011) (cited in Bodner Br., at 4). Here, CNO had no idea it was investing money with Platinum or that investing with Platinum was Beechwood's very purpose—CNO believed it was ceding funds to a Cayman-based reinsurance company as part of a reinsurance transaction—so comparing CNO to a Madoff investor is nonsensical. Moreover, CNO was never an "investor" and did not engage in any securities transaction of any kind with anyone, let alone Platinum or Beechwood. It was simply a ceding insurer defrauded by Beechwood and Platinum into handing over nearly $600 million in cash to Beechwood. That Platinum secretely formed Beechwood for the purpose of robbing CNO so it could buy and sell securities with PPCO, PPVA and their portfolio companies does not mean that CNO's claims are

actionable as securities fraud. Indeed, is there any doubt that, if CNO alleged a claim for securities fraud, the Defendants would be arguing that there is no such claim because CNO never purchased or sold a security to or from Beechwood/Platinum?

This case is similar to *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 458 (S.D.N.Y. 2009), in which the court refused to apply the RICO Amendment to plaintiffs' RICO claim. Plaintiffs alleged that the defendants fraudulently sold plaintiffs unlawful tax shelters. *Id.* at 453. In finding the RICO Amendment inapplicable, the court noted that "[w]hile the alleged fraud could not have occurred without the sale of securities[,] . . . it was the overall scheme [to sell unlawful tax shelters] that allegedly defrauded the Plaintiffs and Class Members." *Id.* at 458 n.9. The court looked beyond the sale of securities, which defendants argued was the linchpin of the scheme, and saw the fraud for what it was—a fraud involving the sale of bogus tax shelters, even if those shelters were based entirely on securities transactions creating paper losses. *Id.*

Here, although Beechwood and Plaintum secretly used the reinsurance trust funds to engage in securities fraud, like the defendants in *Kottler*, the Defendants here engaged in a *different* scheme to defraud CNO into giving its money to Beechwood in the first place. Beechwood's transaction with CNO was an outright fraud to gain control over CNO's cash. *See also OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 369 (S.D.N.Y. 2005) ("[a]lthough a scheme may have involved securities fraud," a RICO claim is not necessarily barred by the RICO Amendment).

Moreover, many of the predicate acts identified in the Complaint relate to the Defendants' abuse of *the Trusts*. That included misrepresenting the fair market value of the Trust assets to allow the Defendants to withdraw "surplus" funds fraudulently, while avoiding their obligations to "top-up" the Trust assets, as required under the Reinsurance Agreements.

¶¶ 598, 600, 660–62. As a result of this and other misconduct not actionable as securities fraud, the value of CNO's Trust assets was below the contractual threshold, and CNO was damaged in an amount exceeding $110 million when the Trust assets were recaptured. ¶¶ 668, 891. In the *SHIP* case, this Court held that similar allegations regarding misrepresentations that allowed the Defendants to improperly charge management fees might not be barred by the RICO Amendment. *See* 2019 U.S. Dist. LEXIS 67952, at *30–31.

The facts are important. Under the Reinsurance Agreements, CNO ceded liabilities to Beechwood, paid Beechwood $42 million to take those liabilities, and put approximately $550 million in trust accounts to pay policyholder claims. After that, CNO had no ability to manage the trust assets; *it was not a party or counterparty to any securities transaction*. Rather, CNO was at the mercy of Beechwood and those valuing Trust assets (like Lincoln) to ensure that the Trusts were being managed properly. What Beechwood and Platinum later did to loot the reinsurance Trusts is important to the fraud scheme—as is Linclon's central role in the fraud by purposefully misvaluing Trust assets—but as CNO was not a party to any securities transactions and was merely a secured party to the Trust assets, CNO's claims are not securities claims dressed up like RICO claims.

Finally, no Defendant has cited a case—there are none—where a court determined that fraud in a reinsurance relationship constitutes securities fraud because the reinsurer later committed securities fraud with the ceded reserves. And, before this Court issues a decision of first impression on this subject, it would be more prudent, respectfully, to permit the claim to proceed and address the issue on summary judgment.

B. The Defendants' Other Arguments Do Not Defeat the RICO Claims

Some of the Defendants raise other arguments to escape RICO liability. None have merit. Bodner, Kim, Saks, and PB Investment argue that the Complaint fails to allege facts

showing that they violated RICO. These arguments come in several flavors. Some Defendants complain that CNO failed to allege a pattern of racketeering activity. Others contend that CNO failed to show that they joined the RICO conspiracy, participated in its "operation and management," or were the proximate cause of CNO's RICO injury. But as repeatedly shown throughout this brief and in the attached Appendices, all four played key roles in the management or operation of the Platinum-Beechwood fraud. *See* Polivy Decl., Exs. H, K, N, O. This Court has already considered—and rejected—similar arguments by Bodner in the JOLs' Action. The Court held that the JOLs' allegations established that Bodner "was a corporate insider, with direct involvement in day-to-day affairs at Platinum Management." *In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *63 (internal quotation marks omitted). This, without more, was "enough to charge Bodner . . . with Platinum Management's misstatements" and sustain the JOLs' fraud and RICO claims.[6] *Id.*

The same is true here. As shown in the attached Appendices and this brief, the Complaint details the central roles that Bodner, Kim, Saks and others played in controlling the Platinum-Beechwood conspiracy and orchestrating the fraud. *See, e.g.*, Polivy Decl., Exs. H, K, O. Similarly, the Complaint details how PB Investment's predecessor was instrumental in furthering the Defendants' fraudulent scheme. *See, e.g.*, ¶¶ 517–18, 814. These Defendants cannot simply ignore these allegations to avoid RICO liability.

Kim argues that CNO fails to adequately allege the existence of an association-in-fact enterprise that engaged in a "course of fraudulent or illegal conduct separate and distinct from

[6] Saks wrongly states that more is required in a RICO case involving predicate acts of mail or wire fraud. *See* Saks Br., at 7. That is simply not true. None of the cases Saks cites for this proposition involved allegations that the defendant was central in directing a complex RICO conspiracy, as CNO has alleged Saks was here. *See* Polivy Decl., Ex. O.

the alleged predicate racketeering acts themselves." Kim Br., at 11 (quoting *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004)). There are three problems with this argument. *First*, Kim ignores that CNO has also alleged the existence of separate, non-association-in-fact RICO enterprise, Beechwood Re Ltd ("Beechwood Re"). ¶ 787. Beechwood Re, the vehicle that the Co-conspirators created to perpetrate their fraudulent schemes, is undoubtedly a proper RICO enterprise. 18 U.S.C. § 1961(4) (defining the RICO enterprise to include "any . . . corporation"). *Second*, Kim's argument relies on dicta from *Satinwood* that is at odds with other Second Circuit precedent. *See* 385 F.3d at 174; *United States v. Mazzei*, 700 F.2d 85, 88–89 (2d Cir. 1983). As a result, district courts have continued to apply *Mazzei*. *See, e.g., World Wrestling Entertainment, Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 499 (S.D.N.Y. 2006) ("[I]t is beyond dispute that neither the Second Circuit nor the Supreme Court has expressly overruled *Mazzei*. This is critical because this Court cannot ignore binding Second Circuit precedent, unless it is expressly or implicitly overruled."); *JSC Foreign Econ. Ass'n Technostroyexport v. Weiss*, 2007 U.S. Dist. LEXIS 28954, at *32–34 (S.D.N.Y. Apr. 18, 2007) (considering *Satinwood* and concluding that "*Mazzei* has not been overruled and remains good law in this circuit"). *Third*, Kim ignores the allegations in the Complaint showing that the association-in-fact RICO enterprise defrauded many others. *See, e.g.*, ¶¶ 684–88.

Saks argues that he could not have engaged in a "pattern of racketeering" over more than two years because he worked at Platinum and Beechwood for only about one and a half years.[7]

[7] Saks goes outside the Complaint to state that he worked in the Platinum-Beechwood conspiracy for only one and a half years. In the Complaint, however, Saks is alleged to have been involved with the Co-conspirators for two years, and [redacted] *See, e.g.*, ¶ 644. [redacted] the Court should not be accepting facts outside of the pleading that Saks recites to defeat a Rule 12(b)(6) motion. As discussed below, Saks' argument also fails on the merits.

Saks Br., at 8. In support of this argument, however, Saks cites only to a case dealing with the RICO statute of limitations that has no bearing here. *Id.* (*citing United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987)). In any event, the duration of Saks' involvement is irrelevant to a RICO conspiracy claim, which looks at the duration of the pattern of racketeering acts as a whole, and *not to the duration of any individual defendant's participation in the "pattern." See N.Y. Dist. Council of Carpenters Pension Fund v. Forde*, 939 F. Supp. 2d 268, 283–84 (S.D.N.Y. 2013) (holding that a defendant's misconduct of less than two years in duration would not bar RICO conspiracy claim where "pattern" lasted longer than two years). Here, the Complaint identifies the "pattern of racketeering activity" as lasting over three years, from at least July 2013 through and including September 2016. *See, e.g.*, ¶¶ 491–92, 509, 562, 574, 681–82, 791. Nor does the duration of Saks' involvement preclude CNO from adequately pleading a substantive RICO violation against Saks, as the Complaint clearly alleges communications by Saks to CNO, in which Saks concealed from CNO, among other things, the self-dealing investments and loans being made with the Trust assets. ¶ 644. *See Fresh Meadow Food Servs., LLC v. RB 175 Corp.*, 282 Fed. App'x. 94, 99 (2d Cir. 2008) (number and variety of predicate acts are one of several non-dispositive factors considered "more important" in evaluating continuity element where duration "border[s] on substantial").

PB Investment raises a hodgepodge of other arguments. *First*, it argues that CNO fails to allege whether the racketeering activity was "closed-ended" or "open-ended." PB Investment Br., at 14. That is false. *See* ¶ 791 ("Defendants began perpetrating predicate acts of racketeering in furtherance of their fraudulent schemes in 2013, at least as to CNO, and perpetrated them continuously for several years thereafter, including into late 2016."). *Second*, it contends that the RICO allegations are too narrow because only CNO is identified as a victim of

the conspiracy. PB Investment Br., at 14. This argument is meritless given that the Complaint also identifies SHIP and another insurer (ACLICO) as victims of the same conspiracy, *see, e.g.*, ¶ 682, while three other sets of plaintiffs, SHIP, the JOLs and the Receiver, are similarly bringing RICO claims against many of the same Co-conspirators. The Co-conspirators' racketeering activity clearly had broad reach and injured many victims. *Third*, PB Investment argues that CNO fails to "allege that [it] invested any racketeering proceeds in a separate enterprise." PB Investment Br., at 15. But, PB Investment is referring to the elements of Section 1962(a) claim, and CNO did not bring such a claim.

C. CNO Has Adequately Pleaded RICO Claims Against Lincoln

Lincoln makes many arguments against RICO, all of which fail. *First*, for the reasons set forth *supra* at Section III(A), the RICO Amendment does not apply. This is particularly true as to Lincoln, which is alleged to have, among other things, used the mails and wires to send the very reports containing the knowingly false and fraudulent overvaluations of trust assets that enabled Beechwood to fraudulently withdraw "surplus" funds from the Trusts. ¶ 790; *see also* ¶¶ 598, 600, 660–662.

Second, Lincoln's argument that its involvement does not satisfy the two-year benchmark "required" for closed-ended continuity fails for the same reasons Saks' argument does. The duration of Lincoln's involvement is irrelevant to the RICO conspiracy claim, because the racketeering activity of the enterprise spanned three years. And, the substantive RICO claim survives because Lincoln's 15-month involvement was marked by substantial and continuous misconduct, whereby Lincoln [redacted] enabling the Beechwood/Platinum self-dealing to continue with impunity.

Third, Lincoln knowingly and purposefully participated in the enterprise. Lincoln's own documents establish that it leapt headlong into this enterprise because it both (1) had a motive and opportunity to commit fraud [redacted][8] and (2) exhibited conscious or reckless behavior to further the racketeering activity [redacted] ¶¶ 691–783. These allegations go well beyond claims of inadequate due diligence.[9]

[8] As discussed in CNO's accompanying brief filed contemporaneously herewith—and detailed in the Complaint, ¶¶ 699–700—this motive [redacted] *See* Opp. to Lincoln Br., at Section I(B). It is specific and particularized to Lincoln itself. Lincoln's reliance on *Zucker* and *Laro* is thus wholly misplaced. *See Zucker v. Sasaki*, 963 F. Supp. 301, 308 (S.D.N.Y. 1997) (complaint made "no allegations of motive" and there was "no suggestion that [defendant] received anything other than its usual fees for its work" from an existing client); *Laro, Inc. v. Chase Manhattan Bank*, 866 F. Supp. 132, 134, 138 (S.D.N.Y. 1994) (complaint made only conclusory allegations of economically irrational motive, and nothing in extensive factual record supported inference that defendant knowingly risked and lost over $14 million of its own money because it was "motivated by an 'aggressive mode for doing business,' and a desire to continue its favorable business relationship"). Lincoln took on the engagement [redacted] Lincoln was a little fish in the portfolio valuation space [redacted] Platinum was a whale that no one [redacted] knew was engaged in fraud. Signing on the dotted line was a no brainer for Lincoln [redacted] *See* ¶¶ 698–700; *see also Sharette v. Credit Suisse Int'l*, 127 F. Supp. 3d 60, 95–96 (S.D.N.Y. Aug. 20, 2015) (finding allegations that Credit Suisse engaged in fraud to attract highly lucrative hedge fund clientele pleaded motive, and it was entirely plausible that Credit Suisse "might have seen the intensely profitable business of hedge funds . . . as the golden goose, and might therefore have thought it worth taking a risk in order to obtain some of its hatch").

[9] Lincoln's cases on this point are therefore inapposite. *Cf. In re Scottish Re Grp. Sec. Litig.*, 524 F. Supp. 2d 370, 379–80, 398 (S.D.N.Y. 2007) (allegations that auditor "did not staff its audits . . . with adequately trained auditors" and "failed to exercise due professional care in the performance of its audits and preparation of its reports" insufficient to show "auditor scienter"); *O'Brien v. Price Waterhouse*, 740 F. Supp. 276, 281, 284 (S.D.N.Y. 1990) (allegations that did not indicate accountants knew of the unreasonableness of their assumptions insufficient to show scienter).

Fourth, the fact that Lincoln's reports contained "disclosures" of its information source, process and rationale does not refute the notion that it knowingly participated in a racketeering enterprise, Lincoln Br., at 15, 19; it supports it. As discussed in CNO's accompanying brief addressing Lincoln's motion to dismiss, those disclosures [redacted] and revealed nothing [redacted] That information was uniquely within Lincoln's purview, and could not have been discovered by CNO, regardless of its "sophistication" as an investor. Lincoln's cases do not hold differently.[10]

Lincoln is also wrong when it claims—relying on a case addressing violations of substantive due process under the Fifth Amendment—that the RICO claims fail because the Complaint does not allege a "meeting of the minds" between Platinum, Beechwood and Lincoln to defraud CNO. *See* Lincoln Br., at 15. A "meeting of the minds" is pertinent only to a RICO conspiracy claim, and it requires simply that Lincoln "knew about and agreed to facilitate the scheme." *Baisch v. Gallina*, 346 F.3d 366, 377 (2d Cir. 2003) (citing *Salinas v. United States*, 522 U.S. 52, 66 (1997)); *see id.* (conspiracy requirements are "less demanding" than RICO requirements). The Complaint [redacted] *See, e.g.*, ¶¶ 698–700, 741, 750, 753, 755.[11]

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[10] *See In re TVIX Secs. Litig.*, 25 F. Supp. 3d 444, 450 (S.D.N.Y. 2014) (securities claim based on the failure to discuss specific consequences of holding investment for longer than a single trading session insufficient where report included more than 25 plain English warnings concerning the risks of prolonged investments); *see also In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 119 (2d Cir. 2013) (allegations that food distributor concealed a price mark-up and thus overbilled its customers, and that customers paid the over-stated prices, may "demonstrate reliance on a defendant's common misrepresentation").

[11] *See also Mohr-Lercara v. Oxford Health Ins., Inc.*, 2019 U.S. Dist. LEXIS 52962, at *32–33 (S.D.N.Y. Mar. 27, 2019) (plaintiff plausibly pleaded knowledge and agreement to facilitate scheme by alleging defendants "acted knowingly and intentionally to profit through overcharges levied at insured patients' expense"); *City of N.Y. v. Bello*, 579 Fed. App'x 15, 17–18 (2d Cir. 2014) (summary order) (vacating summary judgment and remanding where there was evidence suggesting that defendant was knowingly involved in and knowingly facilitated illegal

Finally, Lincoln engaged in the operation and management of the enterprise, and its arguments to the contrary fall flat. Lincoln first claims the Complaint does not allege Lincoln "knew that Platinum was using Beechwood as a 'piggybank.'" Lincoln Br., at 16. But [redacted] *See* ¶ 699.

Lincoln then claims the Complaint fails to allege Lincoln "directed the diversion of [CNO's] funds." Lincoln Br., at 16. But that is not required. "One is liable under RICO [1962(c)] if he or she has 'discretionary authority in carrying out the instructions of the [conspiracy's] principals,' or 'played ***some part*** in directing the affairs' of the RICO enterprise." *Baisch v. Gallina*, 346 F.3d 366, 376–77 (2d Cir. 2003) (finding plaintiff met both by showing, among other things, issuance of false insurance certificates and concealment of another defendant's deceptive payroll practices) (internal citations and quotations omitted) (emphasis added). The requirements under § 1962(d) "are less demanding . . . . In the civil context, a plaintiff must allege that the defendant 'knew about and agreed to facilitate the scheme.'" *Id.* (citation omitted); *see also id.* (further noting that RICO liability is not limited to those with primary responsibility for the enterprise's affairs).

The Complaint clearly alleges that Lincoln had discretionary authority in carrying out the purpose of the scheme (overvaluing Beechwood's investments to defraud CNO) because it [redacted] *See, e.g.*, ¶ 743, 778. It also alleges that Lincoln played some part in directing the affairs of the enterprise—*i.e.*, it issued the "independent" valuation reports that [redacted] and overvalued Beechwood's investments of Trust assets to defraud

activity because, among other things, he knew "some" of the operations of the scheme including its "scope, plans, associates, suppliers, and customers").

CNO into thinking its assets were safer and worth more than they were and [redacted]. And, the Complaint clearly alleges that Lincoln knew about and agreed to facilitate that scheme, as at all times [redacted] on a continuous and ongoing basis. *See, e.g.*, ¶¶ 707–10, 717–19, 731–37.[12] Indeed, if not for Lincoln's erroneous valuations, CNO would not have continued the Beechwood relationship, Beechwood would have ceased to be a permanent capital source for Platinum and the enterprise would have failed. No more is required. *See Maersk, Inc. v. Neewra, Inc.*, 687 F. Supp. 2d 300, 335 (S.D.N.Y. 2009) ("operation or management" test is a "low hurdle" at the pleading stage and "RICO liability is not limited to those with primary responsibility for the enterprise's affairs.") (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993)); *see also Mohr-Lercara v. Oxford Health Ins., Inc.*, 2019 U.S. Dist. LEXIS 52962, at *32-33 (S.D.N.Y. Mar. 27, 2019) (denying motion to dismiss based on failure to adequately plead direction of enterprise affairs because the "operation or management question is essentially one of fact" that should not be decided "definitively" at such an early stage) (internal quotations and citations omitted).

[12] It is for this reason that Lincoln's cases are inapposite. *See Duravest, Inc. v. Viscardi, A.G.*, 2008 Dist. LEXIS 78584, at *1 (S.D.N.Y. Apr. 14, 2008) (Rakoff, J.) (finding that a complaint ***merely alleged*** that an outside accountant issued financial restatements that he knew were misleading or false is insufficient to plead RICO's operate-or-manage prong); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 431 (S.D.N.Y. 2007) (holding that where plaintiff's ***sole allegation*** is that defendant provided banking services that aided in the perpetration of the fraudulent scheme, does not qualify as participation in a RICO enterprise) (emphasis added).

IV. NARAIN'S, SAKS' AND KIM'S MOTIONS TO DISMISS THE BREACH OF FIDUCIARY DUTY CLAIM SHOULD BE DENIED

Under New York law, "[t]he elements of a breach of fiduciary duty claim are (1) that a fiduciary duty existed between plaintiff and defendant, (2) that defendant breached that duty, and (3) [that defendant suffered] damages as a result of the breach." *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 114 (S.D.N.Y. 2009). As to the first element, New York law on the existence of a fiduciary duty is "broad, vague and not very helpful in determining whether any particular relationship rises to the level of 'fiduciary.'" *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 502 (S.D.N.Y. 2010) (adopted by Rakoff, J. (Mar. 30, 2011)). Accordingly, "New York cases establish that a breach of fiduciary duty claim is usually a fact-specific inquiry." *Id.* at 506. One point that is clear, however, is that, where (as here) "a defendant had discretionary authority to manage [a plaintiff's] investment accounts, it owed [the plaintiff] a fiduciary duty of the highest good faith and fair dealing." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 915 N.Y.S.2d 7, 16 (1st Dep't 2010), *aff'd*, 962 N.E.2d 765 (N.Y. 2011).

CNO's pleading easily satisfies these broad elements of a breach of fiduciary duty claim. For starters, the pleading identifies numerous specific instances in which the Defendants *admitted* that Beechwood Re, BAM and BAM Administrative and their corporate officers owed fiduciary duties to CNO, based on the discretionary authority these Defendants exercised over the assets in the Trusts, of which CNO was the beneficiary and secured party. ¶ 606 (Hodgdon admitting in an email that such fiduciary duties were owed to CNO and copying Feuer, Taylor and Levy); ¶ 607 [redacted] ¶ 608 [redacted]

Thus, Narain, Saks and Kim—in addition to the cross-claim and third-party defendants who have

not moved to dismiss the breach of fiduciary claim—were fully aware of the fiduciary duties that they and Beechwood Re, BAM and BAM Administrative owed to CNO.

And, CNO makes numerous and quite specific allegations that these Defendants breached their fiduciary duties to CNO, thereby damaging CNO. *See, e.g.*, ¶ 644 (a particularly detailed paragraph, referenced at length below); ¶¶ 867–72. Defendants—led by Narain—have even admitted the damage they caused to the Trust assets of which CNO was a beneficiary, [redacted] *See, e.g.*, ¶ 643. That admission, in and of itself, should be fatal to Defendants' motions to dismiss the breach of fiduciary duty claim. And, in fact, BAM and BAM Administrative—Beechwood Re's corporate agents that had discretionary authority over the Reinsurance Trust assets—have ***not*** moved to dismiss the claim. Nor has individual defendant Rick Hodgdon.

Moreover, this Court has already articulated two alternative ways for plaintiffs to satisfy Rule 12(b)(6) in alleging that individual corporate officers breached fiduciary duties owed by their corporations in *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 524 (S.D.N.Y. 2018) ("*SHIP*"):

- "In determining whether a fiduciary duty exists, the focus is on whether one person has reposed trust or confidence in another and whether the second person accepts the trust and confidence and thereby gains a resulting superiority or influence over the first." *Id.* (citing *Indep. Asset Mgmt. LLC v. Zanger*, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008)); and

- "Furthermore, the New York Court of Appeals has stated that '[a]ny one who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby." *Id.* (citing *Wechsler v. Bowman*, 34 N.E.2d 322, 326 (N.Y. 1941)), and *Talansky v. Schulman*, 770 N.Y.S.2d 48, 53 (1st Dep't 2003) ("This includes an officer of a corporation who knowingly participates in a breach of the corporation's fiduciary duties.").

The motions of Narain, Saks and Kim should be denied under each of these two separate and independent grounds. *First*, CNO has pleaded with specificity that Narain, Saks and Kim knowingly participated in a breach of fiduciary duty as officers of Beechwood Re, BAM and BAM Administrative. As set forth above, Beechwood and its principals—including Narain, Saks and Kim—were all aware that they owed fiduciary duties to CNO under the Reinsurance Agreements. *See, e.g.*, ¶¶ 606–08 (evidencing that each of Narain, Saks and Kim had knowledge of their fiduciary duties to CNO). Many allegations demonstrate that Narain, Saks and Kim participated in a breach of these fiduciary duties.

Moreover, the Complaint alleges the following about the now infamous July 2015 Platinum-Beechwood email confessing the Co-conspirators' flagrant lies to CNO, ¶ 871 (emphasis added):

> Co-conspirators Bodner and Huberfeld similarly admitted that Feuer, Taylor and other Co-conspirators breached their fiduciary duties to [CNO]. In a July 30, 2015 email, Huberfeld and Bodner shared that they were "really concerned that if Ed Bonach [the CEO] from CNO Financial Group Finds [sic] out ***we invested beechwoods [sic] money into platinum with its illiquid investments (since it didn't exactly fit their investment objective) he won't trust us and he will take off the aprox [sic] 500 mil, he has invested in beachwood [sic] Out***. That means beechwood would either implode or not be able to function fiancialy [sic] and may have to be dissolved . . . ***We weren't exactly honest with [CNO's CEO] Ed [Bonach] about the original investment or that beechwood and platinum really are integrated***. I'm concerned." Despite his concerns that Beechwood and its principals and other Co-conspirators had breached their fiduciary duties to [CNO] by investing trust assets in [redacted] Feuer, Taylor and Beechwood continued doing so.

At an oral argument before the Court on March 7, this Court noted that this email "presupposes that the recipient knew about that we invested Beechwood's money into Platinum with its illiquid investment . . . ***I think the language could fairly be read by any reasonable fact finder as conveying to Mr. Bodner what we already knew and a concern that they now have if***

someone outside finds it out." Transcript of Oral Argument, *Trott v. Platinum Management (NY) LLC*, 18-cv-10936 (JSR) (S.D.N.Y. Mar. 7, 2019), at 10 (emphasis added). The obvious and reasonable inference from this email is that the Co-conspirators (which included Narain, Saks and Kim) had a shared understanding that they were breaching CNO's "trust"—by concealing Beechwood's self-dealing with Platinum, *i.e.*, Beechwood's investment of Trust assets "into Platinum with its illiquid investments"—and were "concerned" that their efforts to continue concealing their breaches were imperiled.

And, the Complaint sets forth a plethora of specific factual examples demonstrating how pivotal Narain, Saks and Kim were to the Co-conspirators' efforts to conceal from CNO (a) Platinum's control and ownership of Beechwood, (b) how Beechwood engaged in self-dealing with the Trust assets, (c) [redacted] and thus (d) the Co-conspirators' breach of CNO's trust. *See, e.g.*, ¶ 644; *see also* Polivy Decl., Exs. K, L, O. It details how each of Narain, Saks and Kim was charged with—and agreed to perform—the task of continuing to conceal these material facts from CNO so that CNO did not terminate the Reinsurance Agreements based on the self-dealing. This was the troika that had the day-to-day contacts with CNO in 2015 and 2016—Saks' contacts were largely in 2015, Narain's in 2016 and Kim's were in both years—but all three were charged with gaining CNO's trust and confidence so that the Platinum-Beechwood conspirators could continue the charade that Platinum and its founders neither owned nor controlled Beechwood Re, BAM and BAM Administrative. *See, e.g.*, ¶ 840. And, they succeeded for the entirety of 2015 and for three quarters of 2016, damaging CNO in the process, [redacted]

[redacted]

The following granular and specific allegations of the Complaint satisfy each of the two separate governing principles that the Court articulated, above, and show how each of Narain, Saks and Kim succeeded in the con game by developing personal relationships with CNO personnel, convincing them to repose trust and confidence in Narain's, Saks' and Kim's professed prudency and acumen, ¶ 644:

[redacted]

[redacted]

[redacted][13]

Indeed, [redacted] ¶ 505.

The troika's arguments for dismissing the breach of fiduciary claim ring hollow in the face of CNO's specific allegations that satisfy each of the alternative ways this Court has articulated for stating such a claim sufficiently. Narain, for example, tries a misdirection ploy by arguing that "the only supposed ***representation*** in the complaint that is attributed to Narain is his purported assurance on June 23, 2016 that the Quest Livery and [ACLICO] transactions were prudent."[14] Narain Br., at 18 (emphasis added).[15] Narain utterly (and perhaps intentionally) misses the point. Like Sherlock Holmes' story, *Silver Blaze*, the telling clue is that the dog did ***not*** bark in the nighttime. So it was with Narain (and Saks and Kim). Their primary sin was their conspiratorial silence in concealing the key facts from CNO, as opposed to what they represented to CNO. Narain was the CIO for the Beechwood entities in 2016 who was in regular

[13] Kim claims that CNO is engaged in "group pleading," without identifying where in the Complaint such pleading supposedly occurs. Kim Br., at 14–15. In any event, Kim is wrong, as Paragraph 644 clearly demonstrates. *See also supra* at Section I.

[14] Narain further argues that his misrepresentations about the Quest and ACLICO transactions were immaterial because CNO was already "planning to terminate its reinsurance relationship with Beechwood in light of Huberfeld's arrest" when Narain made these June 2016 misrepresentations. Narain Br., at 19. Narain cites no allegation in the Complaint to support this argument, because there is no factual support for it. CNO has not alleged that they were "planning to terminate" the Reinsurance Agreements in June 2016. Moreover, in making this argument, Narain ignores all of his deceitful omissions of material fact in his day-to-day exchanges with CNO starting at the very beginning of 2016.

[15] Kim makes a similar argument, claiming that CNO does not "allege with specificity any individual ***acts*** in his role as a Platinum or Beechwood employee that would constitute a breach of fiduciary duty." Kim Br., at 14 (emphasis added). Kim ignores that he breached his fiduciary duties by his conspiratorial omissions of the key facts in his day-to-day interactions with CNO.

contact with CNO, convincing it to trust the prudency of his own investment decisions. He breached that trust in every exchange by what he did ***not*** say. He intentionally concealed from CNO that his and Beechwood's decisions were driven not by what was in the best interests of the Trusts, but rather, by the dictates of the Platinum founders who controlled Beechwood (and Narain). He continued concealing Beechwood's self-dealing [redacted] in cahoots with Nordlicht, Bodner, Huberfeld, Feuer, Taylor, Kim, Saks and so many others. *See, e.g.*, ¶¶ 508, 532-34, 605, 631, 633, 644.

Kim argues that "[t]his Court has rejected the argument that 'any high ranking corporate official is subject to personal liability for breach of fiduciary duty wherever the corporation breached a fiduciary duty.'" Kim Br., at 13. Saks and Narain make similar arguments. *See* Narain Br., at 18 ("CNO's Complaint rests simply on Narain's corporate position"). Again, the troika are missing the point. *First*, these were not simply "***any*** high ranking corporate official." These were the individuals who (a) were specifically charged with exercising Beechwood's discretionary authority to invest the Trust assets (Saks and Narain were both the CIOs) and [redacted], and (b) had the day-to-day contact with CNO, in which the troika succeeded in convincing CNO to repose trust and confidence in them. *See, e.g.*, ¶¶ 505, 577–80, 644, 840. *Second*, the claims against the troika make clear how each of them abused their trust in these day-to-day contacts, most specifically by their knowing (and conspiratorial) concealment of the most material facts relating to the investment decisions they were making for the Trusts: that (a) the investments represented self-dealing, pure and simple, because the Platinum founders owned Beechwood and were controlling Beechwood's investment decisions; and, (b) Beechwood's investments of Trust assets in Platinum-controlled funds and

entities [redacted] and thus damaging to CNO. *See, e.g.*, ¶¶ 599, 614, 643–44, 665, 678, 840.

The troika then attempts to graft additional pleading requirements onto the breach of fiduciary duty claims, misrepresenting New York law in the process. Narain, for example, claims that, in addition to pleading the actual elements of the claim, "CNO must allege facts giving rise to the inference that it had a fiduciary relationship with Narain personally, and make specific allegations as to the nature of the fiduciary relationship, when and how it arose, and how it was breached." Narain Br., at 18 (citing *Lunsford v. Farrell Shipping Lines, Inc.*, 1991 WL 150596, at *8 (S.D.N.Y. July 26, 1991)). As demonstrated above, CNO has satisfied all of the items Narain lists, but Narain has not been candid with the Court in its citation to *Lunsford*. *Lunsford* merely articulates the essential elements of a breach of fiduciary duty claim in an alternative way from *Meisel*, 651 F. Supp. 2d at 98. *Lunsford*, 1991 WL 150596, at *8. It does not impose pleading requirements or change the essential fact that these elements are "broad" and "fact-specific," thus generally making them not conducive to disposition on a Rule 12 motion. *In re Refco*, 826 F. Supp. 2d at 502, 506.

Kim similarly tries to graft new pleading requirements onto New York law, arguing that CNO must somehow allege more than the essential elements, such as Kim being "a founder or principal of an entity involved with the formation of the Beechwood entities," or having a "direct contractual, ownership or other relationship through which Kim could be found to have 'superiority or influence' over CNO," or having "any of his own monies invested in Platinum or Beechwood assets," or "[holding] any ownership interest in any Platinum entity or invest[ing] any of his own money in Platinum." Kim Br., at 13–14. But those allegations are not required to establish a breach of fiduciary duty, and Kim cites no legal authorities to the contrary. As

demonstrated above, this Court has already articulated two separate ways that a pleader can sufficiently allege personal liability for a breach of fiduciary duty by a corporate officer like Kim, and CNO has pleaded facts sufficient to satisfy both.

Saks follows in Narain's and Kim's footsteps by claiming the Complaint lacks allegations that simply are not required to establish a breach of fiduciary duty. Specifically, Saks claims that CNO's allegation that Saks "engag[ed] in a series of allegedly 'non-arm's-length transactions,'" is insufficient, because it has not also "allege[d] personal self-dealing . . . namely that he placed his own personal interests above those to whom he had a duty of undivided loyalty." Saks Br., at 11–13 (citing *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (1989)). Like his Co-conspirators, Saks is wrong on both the law and the facts. The case upon which Saks relies, *Birnbaum*, merely held that allegations a fiduciary had engaged in such self-dealing (as were the facts of that case) constituted a breach of fiduciary duty. *Id.* It did not hold such allegations were required to establish a breach, or that self-dealing was the only way in which a fiduciary could breach his or her duties.

Moreover, the breach of fiduciary duty claim against Saks is not limited to (or even primarily based on) his "engaging in a series of [ ] 'non-arm's-length transactions." As set forth above, it is also based on the fact that Saks, while serving as the point person for communicating with CNO and seeking (successfully) to obtain its trust, intentionally (and conspiratorially) ***concealed*** these non-arm's-length transactions from CNO, to whom he knew he owed fiduciary duties. *See, e.g.*, ¶ 644.

Saks further argues that CNO does "not allege a single fact allowing an inference that CNO placed trust and confidence in Saks personally." Saks Br., at 12. That's simply incorrect. CNO has specifically pleaded numerous examples of how Saks convinced CNO to repose trust

and confidence in him, as the CIO who was supposedly in charge of Beechwood's investment decisions. ¶ 644. And, Saks himself alludes to another fact from which such an inference may be drawn. Saks served as Beechwood's CIO starting in late 2014, but left the Platinum-Beechwood conspiracy in early 2016 (curiously, Saks was said to have left on December 31, 2015, [redacted] *see* ¶ 644). *See, e.g.*, ¶¶ 504, 579–80, 590, 644. During that time, CNO did not terminate the Reinsurance Agreements. ¶ 668. Thus, Saks succeeded in the key mission of concealing Beechwood's self-dealing and preventing CNO from terminating the Agreements sooner, giving rise to the inference that he convinced CNO to repose trust and confidence in how he exercised Beechwood's discretion to invest the Trust assets.

V. CNO SUFFICIENTLY ALLEGES FRAUDULENT INDUCEMENT AND FRAUD AGAINST SLOTA, KIM, SAKS, NARAIN AND PB INVESTMENT

As this Court has already articulated, to state a claim for fraudulent inducement, a plaintiff must "allege a misrepresentation or material omission on which [it] relied that induced [it] to enter into an agreement." *SHIP*, 345 F. Supp. 3d at 525 (internal quotation marks and citations omitted). "The elements of fraud are similar to those of fraudulent inducement."[16] *Id.* at 527.

A. CNO Pleads Misrepresentations and Material Omissions Against Narain, Kim, Slota and PB Investment With Sufficient Specificity

Plaintiffs satisfy Rule 9(b) when they "(1) specify the statements that the plaintiff[s] contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *SHIP*, 345 F. Supp. 3d at 525

[16] Kim and PB Investment argue that the fraudulent inducement and fraud claims are barred because of the *in pari delicto* doctrine and/or the *Wagoner* rule. Kim Br., at 12; PB Investment Br., at 11, 15. Those arguments fail for the reasons set forth in Section II, above.

(quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006)). "In cases where the alleged fraud consists of an omission and the plaintiff is unable to specify the time and place because no act occurred, the complaint must still allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff, and (4) what defendant obtained through the fraud." *Id.* (quoting *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000)).

Narain, Kim, Slota and PB Investment make several arguments as to why this element is not satisfied, all of which fall flat.[17] The attached Appendices identify in detail the actionable misrepresentations and omissions of Kim, Narain, Slota and PB Investment. Polivy Decl., Exs. K, L, N, P. Some examples of those actionable misrepresentations and omissions that satisfy the Rule 9(b) standard are set forth below.

1. Kim

As early as November 2013, Kim misrepresented himself to CNO as Beechwood Re's and BAM's Chief Risk Officer, when he was in fact a senior manager of Platinum. ¶ 505. Throughout the entirety of his dealings with CNO—including when he owed CNO fiduciary duties—Kim, as part of the conspiracy, intentionally concealed that Platinum controlled Beechwood (and that, in fact, they were "really integrated," as the Co-conspirators admitted) and that Beechwood's investments in Platinum-controlled funds and entities were thus blatant self-dealing. *See, e.g.*, ¶¶ 508, 580, 644, 840, 871. As a result of relying on these misrepresentations and omissions, CNO did not terminate the Reinsurance Agreements or take other actions that

[17] CNO pleads fraud against Ottensoser, too, but Ottensoser's motion to dismiss does not seek dismissal of the fraud claim. Ottensoser Br., at 1–2.

would ameliorate the damages that CNO was incurring while the Agreements remained in effect. *See, e.g.*, ¶ 804.

Also, [redacted] ¶ 644. [redacted] *See, e.g.*, ¶¶ 638–44, 871. [redacted] ¶ 644.

Through these and other omissions, Kim (and Narain, Saks, Feuer, Taylor and others) "use[d] the Reinsurance Trust Assets as a piggy bank to enrich themselves and further the Platinum Ponzi-esque scheme." ¶ 606.

Based on the foregoing allegations, CNO identified the requisite elements to satisfy the Rule 9(b) specificity standard as against Kim—the misrepresentations addressed above identify Kim as the speaker, the date of the misrepresentation, that the misrepresentations were made to CNO (and in some cases, the specific individual to whom it was made), and explain why the statements were fraudulent. *See SHIP*, 345 F. Supp. 3d at 525. And the foregoing omissions identify what information was omitted, that Kim was responsible for failing to disclose the omitted information, the context of the ommissions, how they misled CNO, and that, through these omissions, Kim was one of many to "use the Reinsurance Trust Assets as a piggy bank to enrich [himself] and further the Platinum Ponzi-esque scheme." ¶ 606.

2. Narain

At the beginning of 2016, Narain assumed the role of CIO for Beechwood and exercised Beechwood's discretionary authority over investment of the Trust assets. While Narain was having regular contact with CNO to inspire its trust and confidence in his investment prowess, he [redacted] ¶ 508. He was simultaneously admitting to his Co-conspirators [redacted] that the investments of Trust assets [redacted] and intentionally concealing that information from CNO. *See, e.g.*, ¶¶ 472, 508, 644, 840.

Throughout the entirety of his dealings with CNO—when he owed CNO fiduciary duties—Narain (like Kim), as part of the conspiracy, intentionally concealed that Platinum controlled Beechwood (and that, in fact, they were "really integrated," as the Co-conspirators admitted) and that Beechwood's investments in Platinum-controlled funds and entities were thus blatant self-dealing. *See, e.g.*, ¶¶ 505, 580, 644, 840, 871. As a result, Narain and the other Co-conspirators induced CNO not to terminate the Reinsurance Agreements or take other actions that would ameliorate the damages that CNO was incurring while the Agreements remained in effect. *See, e.g.*, ¶ 804.

Not only did Narain exercise his discretion by not divesting the [redacted] all of which was blatant self-dealing, which he concealed from CNO. *See, e.g.*, ¶¶ 644, 840. Through these and other omissions, Narain (and others) "use[d] the Reinsurance Trust Assets as a piggy bank to enrich themselves and further the Platinum Ponzi-esque scheme." ¶ 606. For the same reasons as the allegations regarding Kim, these allegations satisfy the Rule 9(b) standards for omissions. *See SHIP*, 345 F. Supp. 3d at 525.

3. Slota

Starting in 2013, when CNO was negotiating with Beechwood in connection with entering into the Reinsurance Agreements, [redacted] to convince CNO that Beechwood had a deep bench of management experience. In fact, he was a senior manager of Platinum. ¶¶ 493, 576–77. [redacted] ¶¶ 628–29. Slota was also instrumental in the Co-conspirators' fraudulent scheme [redacted] With full knowledge that [redacted] ¶¶ 637–40. Despite Slota's arguments to the contrary, these allegations are not group pleadings—they specifically identify Slota's role in the misrepresentations satisfying Rule 9(b).

4. PB Investment

[redacted] ¶ 623. These statements "were untrue when made," because PB Investment and the other Beechwood entities had no intention of keeping these promises when they made them, but instead always intended to divert the capital [redacted] and use it for Beechwood's own purposes. ¶¶ 622–27, 813.

PB Investment argues that there is no allegation that it made any misrepresentation, but that is incorrect. PB Investment Br., at 16. PB Investment ignores that its predecessor's principal and President, Scott Taylor, [redacted] ¶¶ 622–27; *see also Glidepath Holding B.V. v. Spherion Corp.*, 590 F. Supp. 2d 435, 453 (S.D.N.Y. 2007) (fraudulent statements made by defendant's Managing Director are attributable to the defendant). PB Investment argues that the fraud claim against it represents impermissible group pleading (PB Investment Br., at 10), but again ignores that Taylor [redacted] so it can blame only its own principal for any "grouping." ¶¶ 622–27.

PB Investment also argues that CNO provides no support for its allegation that Taylor was its predecessor's President. PB Investment Br., at 16. But Taylor's admissions that he was a principal of all Beechwood entities are legion. And, the Complaint explicitly alleges [redacted] ¶ 623. On a Rule 12(b)(6) motion, that allegation must be accepted as true. *See Larry Joseph & Peter Savitz Partners v. Mobileye, N.V.*, 225 F. Supp. 3d 210, 219 (S.D.N.Y. 2016). Rule 9(b)'s particularlity requirements govern certain aspects of fraud claims, but they do not require plaintiffs to identify *all* of the occasions on which a senior manager of corporate entities admitted to being a senior manager. CNO's allegations are sufficient.

B. CNO Sufficiently Pleads Fraud Claims Against Narain and Saks Even If They Did Not Fraudulently Induce the Reinsurance Agreements

Both Saks and Narain contend that they cannot be held liable on CNO's fraud claim because they were not employed at Beechwood Re when CNO entered into the Reinsurance Agreements with Beechwood Re. Saks Br., at 14; Beechwood Br., at 14. While that may be true

as to the part of Count Three where CNO's fraud claim alleges it was fraudulently *induced* to enter into the Reinsurance Agreements, *SHIP*, 345 F. Supp. 3d at 526, Count Three is much broader than that. In Count Three, CNO also alleges that the fraud continued after CNO entered into the Reinsurance Agreements and that Saks and Narain were perpetrators of that continuing fraud, through which they made representations and/or omissions upon which CNO relied in deciding not to terminate the Reinsurance Agreements sooner. *See, e.g.*, ¶ 804. That states a claim for fraud against Saks and Narain. *See SFR Holdings Ltd. v. Rice*, 2017 NY Slip Op 31974(U), ¶ 7 (N.Y. Sup. Ct. 2017) (dismissing claim for fraudulent inducement, while allowing plaintiffs' fraud claim to proceed).

Significantly, it is settled law that fraud liability attaches where one makes misrepresentations to cover up a fraud. In *The Jordan (Bermuda) Investment Company, Ltd. v. Hunter Green Investments, Ltd.*, 2003 WL 1751780 (S.D.N.Y. Apr. 1, 2003), for example, an investment trust engaged in fraudulent transactions, specifically, using leverage when it promised investors it would not do so. *Id.* at *3–4. In sustaining a fraud claim, the court held that the defendant acted fraudulently in lying to the investor about the nature of the investments, which was meant to cover up the fraud. *Id*. at *8. What is more, the defendant was liable for fraud because it knew that leveraged investments violated the investment guidelines and the defendant covered up those trades. *Id*. at *8–9. *See also Minnie Rose LLC v. Yu*, 169 F. Supp. 3d 504, 520–21 (S.D.N.Y. 2016). The same is true here. The Defendants who cycled into the fraud after the Reinsurance Agreements were executed knew that Platinum and Beechwood were related entities shuffling assets back and forth for no legitimate purpose, and they all lied to CNO by misrepresenting that the investments were legitimate and compliant, when in fact they were not.

C. Saks, Narain and Kim Had Special Relationships With CNO Giving Rise to a Duty of Disclosure on Their Parts

As set forth in Section IV, above, Saks, Narain and Kim owed fiduciary duties to CNO when those individuals were exercising Beechwood Re's discretionary authority over the Trust assets and regularly communicating with CNO to convince it to repose trust and confidence in their investment and risk management abilities. *See, e.g.*, ¶ 644. Thus, Saks, Narain and Kim are in error in arguing they cannot be held liable for fraud based on their intentional concealments of material facts from CNO. *See* Saks Br., at 14–15; Beechwood Br., at 17 (for Narain); Kim Br., at 16.

Moreover, Saks, Kim and Narain owed CNO a duty of disclosure not only because they owed fiduciary duties [redacted] ¶¶ 606–08), but also under the "special facts doctrine." Under the "special facts doctrine," when "one party possesses superior knowledge, not readily available to the other, and knows that the other one is acting on the basis of mistaken knowledge," a duty of disclosure arises. *SHIP*, 345 F. Supp. 3d at 526 (quoting *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 582 (2d Cir. 2005)); *Barrett v. Freifeld*, 64 A.D.3d 736, 738 (N.Y App. Div. 2009) ("Even in the absence of a fiduciary relationship, a duty to disclose may arise when one party's superior knowledge of essential facts renders nondisclosure inherently unfair."). This Court has already held that, where SHIP alleged that defendants "intended from the outset to lure institutional investors, such as insurers, into entrusting their funds to a seemingly legitimate, independent insurance company," "[t]he creation of such a deceptive scheme clearly satisfies the requirements of the special facts doctrine, and thereby imposes a duty to disclose." *SHIP*, 345 F. Supp. 3d at 526–27 (internal quotations and citation omitted).

Here, CNO alleges the exact same relationship that SHIP alleged. *See, e.g.*, ¶¶ 505, 579–80, 606–09, 614, 629, 642–44, 803–04. While Kim was present from the outset of the Beechwood Re relationship with CNO (he was represented as being Beechwood Re's Chief Risk Officer), Saks and Narain developed similar relationships with CNO after the Reinsurance Agreements were signed, assuming the position of CIO. In that position, Saks and Narain not only assumed Beechwood Re's discretionary authority over the Trust assets, but they were also the individuals who, along with Kim, had regular contact with CNO concerning those Trust assets. *See, e.g.*, ¶¶ 458, 472, 504, 508, 564, 579–80, 606-09, 614, 629, 633–34, 642–44, 803–04.

D. CNO Adequately Alleges Scienter

Kim, Saks and PB Investment argue that CNO has not adequately alleged scienter for its fraud claim. Kim Br., at 15–17; Saks Br., at 15–16 (arguing no benefit); PB Investment at 16. As this Court has previously stated, "fraudulent intent may be alleged generally" and "a plaintiff adequately pleads scienter where she 'allege[s] facts that give rise to a strong inference of fraudulent intent.'" *In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *64 (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)). Such an inference may be established by allegations showing "motive and opportunity to commit fraud" or allegations "that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Id.* (quoting *Shields*, 25 F.3d at 1128).

Here, there is a strong inference of scienter. Defendants "acted with conscious misbehavior because they made false representations despite having knowledge that their representations were false." *I.B. Trading, Inc. v. TriPoint Glob. Equities, LLC*, 280 F. Supp. 3d 524, 538 (S.D.N.Y. 2017). The fraudulent intent leaps off the page. For example, Kim stood side-by-side with Narain and Saks as the troika regularly continued justifying the [redacted]

investments to CNO, [redacted] ¶ 644. And, as this Court noted, the Bodner-Huberfeld exchange of July 2015 reeks of scienter: "***[w]e weren't exactly honest with [CNO's CEO] Ed [Bonach] about the original investment or that beechwood and platinum really are integrated***." ¶ 871; Transcript of Oral Argument, *Trott v. Platinum Management (NY) LLC*, 18-cv-10936 (JSR) (S.D.N.Y. Mar. 7, 2019), at 10. Given that Kim was regularly communicating with CNO, he was obviously included in the conspiracy to continue concealing that "Beechwood and Platinum really are integrated" and that the Co-conspirators "weren't exactly honest" about [redacted] n the Trusts. Similarly, PB Investment represented, through Taylor, [redacted] knowing full well that Beechwood did not intend to use the funds for that purpose. ¶¶ 620, 622–25, 813. To the contrary, Beechwood Re diverted funds [redacted] *Id.* These and other allegations are clearly sufficient to plead scienter.

E. CNO Adequately Alleges Justifiable Reliance on the Misrepresentations and Omissions

This Court has already held that it was justifiable for victims of the Platinum-Beechwood conspiracy to rely on promises that Beechwood was a legitimate, standalone reinsurer, when—unbeknownst to the victims—Beechwood was actually a vehicle to perpetuate the fraud of undisclosed Platinum affiliates and enrich the Co-conspirators. *SHIP*, 345 F. Supp. 3d at 527 ("The gravamen of SHIP's fraudulent inducement allegation is . . . that the defendants intended from the outset to use SHIP's assets to enrich themselves and their affiliates. By relying on defendants' representations that their business was legitimate, SHIP acted reasonably."). CNO alleges the same justifiable reliance here. *See, e.g.*, ¶¶ 536–92, 604–52. Beechwood Re and its Co-conspirators plied CNO with several categories of misrepresentations, all designed to induce

them to enter into the Reinsurance Agreements without any inkling that Beechwood Re was a Platinum-controlled entity. *Id*. Thus, the claim of three of the Defendants that justifiable reliance has not been properly pleaded is meritless. Slota Br., at 19; PB Investment Br., at 17 (conclusory argument); Beechwood Br., at 15–16 (for Narain).

Narain further argues that justifiable reliance is lacking by seeking to controvert the allegations of the Complaint. He claims that CNO had the facts, including dates, concerning representations Narain made about a transaction involving Quest Livery. Beechwood Br., at 15-16. Narain totally misses the point in two ways. *First*, Narain cannot obtain dismissal of a complaint on a Rule 12(b)(6) motion by going outside of the pleading and summarily alleging facts that controvert the facts alleged in the Complaint. *Second*, and more importantly, Narain erroneously assumes that the fraud claim against him is based on one misrepresentation. As discussed above, what was so significant was what Narain did not say. He is ignoring his fraudulent concealments. He regularly had conversations with CNO in which he intentionally concealed from them how he and his Co-conspirators were defrauding them.

PB Investment argues that, at the Rule 12(b)(6) stage, a plaintiff must "allege that it conducted due diligence in ascertaining *all material facts*" or else suffer dismissal of a fraud claim for lack of justifiable reliance. PB Investment Br., at 17 (emphasis added) (citing *Frati v. Saltzstein*, 2011 U.S. Dist. LEXIS 25567, at *5 (S.D.N.Y. Mar. 14, 2011)). That has never been a pleading standard for a fraud claim in this Circuit, and the authority PB Investment cites does not stand for such a rule. Indeed, the only arguable discussion of "due diligence" in *Frati* involved the plaintiff's claim he reasonably relied on a representation "that the promotor's sister . . . was also an investor" in deciding to invest—an argument the court rejected because, on top of being "patently unreasonable," involved information that easily "could have been verified by

the childhood friends speaking to one other." *Id.* at *12. That has no legal or factual bearing to this case.[18]

F. CNO Alleges Damages Proximately Caused by the Misrepresentations and Fraudulent Omissions

Saks makes a convoluted argument that CNO must plead "facts sufficient to show that any conduct by Saks was a proximate cause of harm to CNO." Saks Br., at 15. Effectively, he claims that a Rule 9(b) particularity standard applies to pleading proximate causation such that CNO must "at a minimum plead facts allowing an inference that the assets contained in their reinsurance trusts were greater when Saks took over responsibility for them than when CNO ultimately terminated the Reinsurance Agreements." *Id.* Saks cites no authority for the proposition that such an evidentiary showing of proximate cause is required at the pleading stage, beause there is none.

CNO pleads that it was "injured as a *proximate result* of each of [Saks' and the other defendants'] fraudulent acts and concealments . . . by not terminating the Reinsurance (and accompanying) Agreements sooner or taking other actions to ameliorate the damages that were incurring while the Agreements were continuing." ¶ 806. For example, had Saks not concealed the Co-conspirators' fraud from CNO, CNO would have terminated the Reinsurance Agreements sooner, which would have prevented Saks' successor CIO, Narain, from [redacted] the very

[18] Rather, *Frati* addresses whether reliance can be justified in the face of specific disclaimers negating the very misrepresentations upon which a plaintiff's securities fraud claims are based. *See Frati*, 2011 U.S. Dist. LEXIS 25567, at *12–13 (subject representations were made prior to investing, and were contradicted by specific disclaimers in subscription agreements). That has no bearing on CNO's claims against PB Investment, which do not involve written disclaimers at all (nor does PB Investment make any such argument). The only defendant that has raised arguments involving disclaimers is Lincoln, and CNO refutes those arguments in its separate brief filed contemporaneously herewith.

self-dealing that Saks and Narain concealed from CNO. *See, e.g.*, ¶¶ 644, 840. That is all that CNO is required to plead. *See Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (holding it sufficient for plaintiff to allege only "a causal connection between defendants' non-disclosure and the subsequent decline in . . . value"). Narain goes back to his blind spot, assuming that the fraud claim against him is based on only one misrepresentation involving the Quest Livery transaction, and argues a lack of proximate causation by again trying to controvert the allegations of the Complaint concerning that deal. Beechwood Br., at 16. This argument fails for the same reasons discussed above, particularly his erroneous assumption that the fraud claim does not include his fraudulent concealments that allowed him to [redacted] *See, e.g.*, ¶¶ 644, 840.

Narain also argues that CNO did not allege that it incurred any out-of-pocket damages as a result of the fraud. Beechwood Br., at 16 (on behalf of Narain). In fraud cases, "[t]he true measure of damage is the indemnity for the actual pecuniary loss sustained as the direct result of the wrong." *Reno v. Bull*, 124 N.E. 144, 146 (N.Y. 1919). CNO's allegation that it sustained damages "by not terminating the Reinsurance (and accompanying) Agreements sooner or taking other actions to amerliorate the damages that were incurring while the Agreements were continuing" is sufficient to satisfy the element of out-of-pocket damages at the pleading stage. ¶ 806.

VI. CNO STATES CLAIMS FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AND FRAUD

Defendants Huberfeld, Kim, Saks, Bodner, Slota, PB Investment, and the Beechwood Trusts (all integral members of the conspiracy alleged in the Complaint) move to dismiss the aiding and abetting claims, arguing that insufficient facts are pleaded to show their involvement

(Ottensoser does not move against these claims). The Appendices demonstrate the falsity of this argument. *See* Polivy Decl., Exs. G, H, J, K, N, O, P. And, the Beechwood Trusts, along with PB Investment's predecessor-in-interest, were merely alter egos of (and asset protection devices for) the kingpins of the conspiracy, such as Nordlicht, Huberfeld, Bodner, Feuer and Taylor. *See, e.g.*, ¶¶ 484, 488, 518–21, 653–56. The Complaint provides ample factual support to sustain claims for aiding and abetting breach of fiduciary duty and fraud (both as summarized below and in the Appendices), so Defendants' motions to dismiss should be denied.

For aiding and abetting breach of fiduciary duty, a plaintiff needs to show: "(1) breach of fiduciary obligations to another of which the aider and abettor had actual knowledge; (2) the defendant knowingly induced or participated in the breach; and (3) plaintiff suffered actual damages as a result of the breach." *Anwar v. Fairfield Greenwich, Ltd*., 728 F. Supp. 2d 372, 442 (S.D.N.Y. 2010). To state a claim for aiding and abetting fraud, a plaintiff must show: "(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." *Id.* None of the Defendants contest that a fraud was afoot and, as shown in Sections IV and V, above, CNO has adequately alleged a breach of fiduciary duty and fraud. Thus, the only additional elements at issue are: (1) actual knowledge and (2) substantial assistance and inducing/participating in the breach.[19]

A. Defendants Had Actual Knowledge of the Breach and Fraud

"[A] plaintiff alleging an aiding-and-abetting fraud claim may plead actual knowledge generally, particularly at the prediscovery stage, so long as fraudulent intent may be inferred

[19] The Court has already ruled in the *Trott* case that many of the Defendants must defend similar aiding and abetting claims. *See In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *66–69.

from the surrounding circumstances." *Landesbank Baden-Wurttenmberg v. RBS Holdings USA, Inc.*, 14 F. Supp. 3d 488, 514 (S.D.N.Y. 2014) (quoting *DDJ Mgmt., LLC v. Rhone Grp.*, LLC, 911 N.Y.S.2d 7 (1st Dept. 2010)). The *Anwar* case upon which Kim relies in discussing this requisite fraudulent intent is instructive. Kim Br., at 17. In *Anwar*, the plaintiffs invested large sums of money in the Madoff Ponzi scheme feeder funds. *Anwar*, 728 F. Supp. 2d at 387. Plaintiffs sued several of the feeder funds' entities, executives, and professional service providers who audited, administered, or were otherwise involved with the funds. *Id.* The Plaintiffs also brought aiding and abetting claims against Citco, which was alleged to have served a variety of key roles for the funds, including preparing monthly reports, operating as the funds' public liaison, and monitoring any sub-custodians of the funds. *Id.* at 392–94.

The court denied the Citco defendants' motion to dismiss the aiding and abetting claims, finding that the plaintiffs pleaded sufficient facts as to Citco's actual knowledge of the fraud. *Id.* at 443. For example, the plaintiffs alleged that: (1) by virtue of the defendants' long-standing involvement in the funds and their experience in their management, the defendants knew or were willfully blind to the deficient due diligence and risk controls; (2) the Citco defendants knew that the fund defendants represented to plaintiffs that they used thorough due diligence and verification of the fund managers, representations that the Citco defendants either knew were false or were willfully blind to their falsity; and (3) the Citco defendants knew that the fund defendants were misrepresenting the due diligence performed and failing to disclose clear deficiencies. *Id.* The Court denied the Citco defendants' motion under Rule 9(b), finding that these allegations adequately alleged a strong inference of conscious avoidance by the Citco defendants, because they alleged "that the Citco Defendants were aware of the roles consolidated in Madoff, the lack of transparency into his operations, his family members' involvement in key

positions at his firm, his lack of segregation of important functions, his use of an unknown auditing firm, his use of paper trading records, and his implausibly consistent investment returns." *Id.* "Given the Citco Defendants' familiarity with the Funds, as well as their general experience in providing financial services to funds, and their knowledge of these red flags, the Court finds that Plaintiffs allege a strong inference that the Citco Defendants consciously avoided confirming facts that, if known, would demonstrate the fraudulent nature of the endeavor they substantially furthered." *Id.*

The same is true here. As detailed in the Complaint, a central pillar of the fraudulent scheme (and an indispensable element for the fraud to continue) was a conspiracy to conceal Platinum's ownership, control and funding of Beechwood. Each of the Defendants necessarily knew of this deception and agreed to perpetuate it. [redacted] *See, e.g.*, ¶¶ 568, 605, 871.

Accordingly, this Court has already rejected the same exact arguments against actual knowledge that Huberfeld and Bodner make here. *In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *63–66. By the same token, this Court has already concluded that it could reasonably infer Saks' knowing participation in the fraud. *In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *71–72. For his part, Kim barely even argues that the Complaint is deficient as to his lack of knowledge, offering only two conclusory statements to that effect. Kim Br., at 17. But, Kim was both a Platinum senior manager and Beechwood's Chief Risk Officer. ¶ 505. For him to claim ignorance of the facts is fanciful.

Slota fares no better. He argues that the Complaint does not allege his awareness of the fraud, Slota Br., at 20, but this is akin to the characters of Max Bialystock or Leo Bloom of *The*

Producers professing that they were not aware of the fraud they were perpetrating on their investors. Slota was integrally involved in, aware of and instrumental in perpetrating the most audacious aspect of the fraud, [redacted] ¶¶ 493, 495, 637–40. Moreover, Slota was a senior manager of Platinum who, [redacted] ¶ 493. For him to claim ignorance of the facts is equally fanciful.

B. Each of the Defendants Participated and Substantially Assisted in the Fraud/Breach

Substantial assistance exists where a defendant "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed." *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, 1999 U.S. Dist. LEXIS 11599, at *26 (S.D.N.Y. July 30, 1999) (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992)). The defendant need not have been an active participant "when the fraud was hatched," as the "critical test for substantial assistance is whether the third party's conduct made a substantial contribution to the perpetration of the fraud." *In re Refco Sec. Litig.*, 2011 U.S. Dist. LEXIS 44724, at *19–20 (S.D.N.Y. Apr. 10, 2011) (internal quotations omitted).

"Substantial assistance can take many forms." *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 511 (S.D.N.Y. 2001). For example: (1) helping to conceal the lack of objectivity in evaluations, *id.*; (2) "[e]xecuting transactions, even ordinary course transactions . . . where there is an extraordinary economic motivation to aid in the fraud," *id.*[20]; or (3)

[20] *See also Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983) (broker's processing of transactions with knowledge of fraudulent nature to generate commissions); *IIT v. Cornfeld*, 619

"engineering a major transaction to allow the fraudsters to cash out," *In re Refco*, 2011 U.S. Dist. LEXIS 44724 at *20–22.

In addition to considering a wide range of activities, courts do not limit themselves to a singular act or omission, instead considering the totality of the circumstances. *See Primavera Familienstiftung*, 130 F. Supp. 2d at 511. And where, as here, the defendants were active participants in a "symbiotic fraudulent scheme"—that is, where the co-conspirators were in a common and mutually beneficial relationship—courts reject defendants' attempts to cast their activities are "ordinary-course transactions." *ABF Capital Mgmt. v. Askin Capital Mgmt., L.P.*, 957 F. Supp. 1308, 1330 (S.D.N.Y. 1997) (alleging that co-conspirators were "in bed" together).

Against this backdrop, Defendants' suggestion that they—the insiders, senior managers and critical players in the fraudulent scheme—did not "substantially assist" in the scheme's operation is laughable. CNO sued them precisely because they were the key operatives and Co-conspirators. Specific allegations of the Complaint confirm as much as to each of the Defendants:

- [redacted] ¶¶ 493, 495, 637–40;
- [redacted] *See, e.g.*, ¶¶ 532–34, 568, 605;
- Kim and Ottensoser worked on consummating numerous of the non-arm's-length transactions in which Beechwood Re, BAM and BAM Administrative invested CNO's Trust assets. ¶¶ 642, 644, 646, 838;

F.2d 909, 921–22, 926–27 (2d Cir. 1980) (performing challenged transaction knowing it violated client's policy, with heightened economic motive to do so).

- After CNO entered into the Reinsurance (and accompanying) Agreements, the troika of Saks, Kim and Narain each played pivotal roles in aiding and abetting the continuing fraud. Saks and Narain served as the CIO's for Beechwood—Saks in 2014–15 and Narain in 2016—and both, along with Kim, repeatedly continued the charade [redacted] ¶ 644;
- [redacted] ¶ 840.

The activities identified in the Complaint in which each Defendant engaged span hundreds of paragraphs and go far beyond those listed above as substantial assistance. Defendants, however, cherry-pick one or two paragraphs and, based on those paragraphs alone, summarily conclude that the allegations against them are insufficient to state a claim. For example, Kim claims that the only conduct chargeable to him was his receipt of e-mails, Kim Br., at 18, utterly ignoring Paragraph 644, which details his specific acts and omissions on particular dates with quoted conversations. This is why CNO is attaching the Appendices for the Court to see the entire panoply of acts and omissions pleaded against each Defendant. Defendants "cannot secure dismissal by cherry-picking only those allegations susceptible to rebuttal and disregarding the remainder." *In re Philip Servs. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 476 (S.D.N.Y. 2004).

Slota simply controverts the allegations of the Complaint, arguing that his conduct was of the routine business variety, which cannot qualify as substantial assistance. Slota Br., at 20. But he ignores [redacted]

[redacted] ¶¶ 493, 495, 637–40 [redacted] ¶¶ 494, 704. Where, as here, these general business activities are part of a symbiotic fraudulent relationship, a defendant cannot defeat aiding and abetting liability on a motion to dismiss. *See ABF Capital Mgmt.*, 957 F. Supp. at 1330.

Huberfeld's and Bodner's attempts to avoid their involvement in the scheme are comical. For example, Huberfeld is simply wrong that the Complaint alleges only "innocuous acts" against him, Huberfeld Br., at 7, as is Bodner in stating that "not a single oral or written statement, or any fraudulent act, is attributed to Bodner's direction or supervision," Bodner Br., at 9. They confessed to the fraud and conspiracy they engineered. ¶ 472. If that were not enough, this Court has already found that both Bodner and Huberfeld were sufficiently senior to be charged with Platinum's misstatements. *See In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *63–64, 66 (denying motion to dismiss aiding and abetting fraud claim against Bodner, Huberfeld, Ottensoser, Saks, and others).

Bodner's alter egos, Beechwood Trusts 7-14, argue that "there is not a single fact alleged in the TPC to support" that these asset protection vehicles were used by Bodner to perpetrate the fraud. Bodner Br., at 2. PB Investment similarly contends that the "allegations are silent as to PBIHL." PB Investment Br., at 18. But, each of these entities is specifically alleged to have been a vehicle used to perpetrate the fraud. *See* Complaint ¶¶ 517–518, 814.

In sum, CNO has pleaded specific facts of the fraudulent scheme in exacting detail, well exceeding what Rule 9(b) requires. Because each of the Defendants had actual knowledge of the fraud and breaches of fiduciary duty and provided substantial assistance, the motions to dismiss should be denied.

VII. BEECHWOOD RE'S MOTION TO DISMISS THE BREACH OF CONTRACT CLAIM OR TO COMPEL ARBITRATION SHOULD BE STRICKEN AND DENIED

For a breach of contract claim, a plaintiff must allege that the defendant "breached a binding agreement between the parties, which damaged [the plaintiff]." *Stonehill Capital Mgmt. LLC v. Bank of the West*, 68 N.E.3d 683, 688 (N.Y. 2016). The Complaint identifies at least nine ways in which Beechwood Re breached the Reinsurance Agreements and their accompanying Agreements. ¶¶ 593–603, 657–76, 861–65.

Although the Beechwood Parties' Notice of Motion states that Beechwood Re is moving to dismiss CNO's breach of contract claim under Rule 12(b)(6), Beechwood Re makes absolutely no argument supporting this branch of the Notice of Motion. Beechwood Re's motion should be denied.

Beechwood Re also moves to compel CNO to arbitrate its breach of contract claims versus Beechwood Re. Beechwood Br., at 19–21. Beechwood Re's motion to compel should be stricken because Beechwood Re has made this motion without first posting security in an amount that this Court must determine. CNO has already made a separate motion to strike Beechwood Re's motions to compel arbitration and to dismiss CNO's claims, and for this Court to set an appropriate amount of security that Beechwood Re must post under New York and Indiana's Security Statutes before Beechwood Re is permitted to file a responsive pleading to CNO's claims. *See Cyganowski v. Beechwood Re Ltd.*, No. 18-cv-12018 (JSR), Dkt. No. 435. CNO

refers the Court to that motion for a full discussion of the grounds for striking Beechwood Re's motions to dismiss and compel arbitration.

Finally, if the Court addresses the merits of Beechwood Re's motion to compel arbitration, then the motion should be granted in part, and denied in part. While Beechwood Re may be entitled to compel arbitration of CNO's claims concerning Beechwood Re's breach of contract prior to terminating the Reinsurance Agreements, Beechwood Re provides no reason why it should be able to compel arbitration of the contribution claims which have arisen solely by virtue of Platinum's receivership. Those contribution claims are not before the Panel and should not be. For example, the Receiver claims that CNO must return *to the Receivership Entities* assets CNO recaptured when it terminated the Reinsurance Agreements. If the Receiver is permitted to pursue these specious claims against CNO in this action, CNO should be permitted to efficiently pursue contribution against Beechwood Re in the same case.

VIII. CNO'S FRAUDULENT CONVEYANCE CLAIMS ARE ADEQUATELY PLEADED

Only Defendant PB Investment moves for dismissal of CNO's fraudulent conveyance claims, and it makes two arguments for dismissal. *First*, it argues that the claims are not adequately pleaded (and, as a corollary, that PB Investment is not alleged to be a recipient of any transfer). PB Investment Br., at 15–22. But the Complaint is replete with specific allegations regarding the fraudulent Demand Note Transfer that Beechwood Re [redacted] including (a) when the Transfer was made, (b) how much was transferred, (c) the fraudulent scheme involving the Transfer, and (d) the fact that no consideration was provided for the Transfer. *See, e.g.*, ¶¶ 611, 616, 619, 625; Subpoint A, below.

Second, PB Investment argues that CNO has not adequately alleged that it is a creditor of Beechwood Re, the transferor of the fraudulent conveyances [redacted] PB Investment

Br., at 23. The Complaint's allegations also gut this argument, as it contains detailed allegations regarding CNO's status as creditors of Beechwood Re entitled to assert fraudulent conveyance claims for the avoidance of the Demand Note Transfer. *See* Subpoint B, below. PB Investment's motion to dismiss the fraudulent conveyance claims should thus be denied.

A. The Fraudulent Conveyance Claims Are Adequately Pleaded

For actual fraudulent conveyance claims, a plaintiff must plead details as to how the *transferor*—Beechwood Re here—committed the fraud. *Zanani v. Meisels*, 78 A.D 3d 823, 825 (2d Dep't 2010) (noting that section 276 of New York Debtor Creditor Law requires proof that the ***transferor*** actually intended to "hinder, delay, or defraud" any present or future creditors). For constructive fraudulent conveyance claims, however, no fraudulent conduct is required, so no similar pleading requirement exists. *Englander Capital Corp. v. Zises*, 2013 N.Y. Misc. LEXIS 5282, *8 (1st Dep't 2013) (emphasizing that constructive fraudulent conveyance claims do not require a showing of the transferor's motive or intent to defraud).

Accordingly, PB Investment's argument that the Complaint fails to include "any particularized allegation of fraud on PB [Investment's] part" is entirely beside the point. *See* PB Investment Br., at 21. CNO was not required to "particularize[] allegation[s] of fraud" by PB Investment. Fraudulent conduct by [redacted] is not an element of CNO's claims for either actual or constructive fraudulent conveyance (Counts 14 through 17).

Moreover, the Complaint details Beechwood Re's fraudulent conduct and intent in the Demand Note Transfer, including (a) when the Transfer was made, (b) how much was transferred, (c) the fraudulent scheme involving the Transfer, and (d) the fact that no

consideration was provided for the Transfer.[21] *See, e.g.*, ¶¶ 616–27. Neither PB Investment nor any other Defendant disputes that CNO has adequately pleaded the transferor's fraud.

PB Investment next argues that the Complaint fails to provide it "fair notice" of the fraudulent conveyance claims because it is included in the definition of "Beechwood Bermuda." PB Investment Br., at 21. The sole authority PB Investment relies on for this proposition, *In re M. Fabrikant & Sons, Inc.*, 394 B.R. 721 (Bankr. S.D.N.Y. 2008), is inapposite. There, the bankruptcy court dismissed actual fraudulent conveyance claims for failing to meet Rule 9(b) pleading standards because the complaint did not "identify any specific transfer, transferor, transferee, or date of transfer." *Id.* at 734. Here, among other things, CNO alleges the following: the "Demand Note Transfer occurred on or about May 16, 2014," ¶ 619; the Transfer was in the amount of $75 million, *id.*; [redacted] ¶ 618; the Transfer was designed for the purpose of, and succeeded in, rendering Beechwood Re insolvent and placing Beechwood Re's "capital" beyond the reach of CNO, ¶ 620; and, there was no consideration for Beechwood Re's Transfer of the $75 million, *id*. The Complaint thus contains detailed allegations providing PB Investment with more than fair notice of the fraudulent conveyance claims asserted against it.

B. CNO Pleads Creditor Standing

PB Investment summarily argues that the Complaint does not "adequately allege [CNO's] standing as purported creditors" to assert the fraudulent conveyance claims. PB Investment Br., at 22. But the Complaint explicitly details CNO's standing as creditor of Beechwood Re to [redacted] For example, CNO specifically alleges that it is Beechwood Re's creditor under the terms of the Reinsurance

[21] In addition, the Complaint describes numerous "badges of fraud" supporting a claim for actual fraudulent conveyance. *See, e.g.*, ¶¶ 898–99.

(and accompanying) Agreements and tort claimants due to the following, among other things: Beechwood Re's failure to perform its obligations under the Reinsurance Agreements, ¶ 890; Beechwood Re's fraudulent, reckless and grossly negligent acts in overvaluing Trust assets to create the false impression that the Trusts had surplus funds, *id*.; Beechwood Re's failure to pay contractually obligated amounts to CNO upon its recapture of the assets, ¶ 891; and the damages CNO suffered as a result of Beechwood Re's other breaches of the Reinsurance Agreements and fraudulent and other wrongful conduct, ¶ 892. In fact, ***the entire Complaint*** details how and why CNO is Beechwood Re's creditor.

IX. THE MOTIONS TO DISMISS THE CONTRIBUTION AND INDEMNITY CLAIMS SHOULD BE DENIED

A. The Motions to Dismiss CNO's Contribution Claims Should Be Denied Because Movants Admit That CNO May Bring Such Claims

Each of the Defendants admits—whether explicitly or implicitly—that CNO may bring contribution claims here. Let us count the ways.

First, several Defendants—Bodner, Slota, Saks and PB Investment—explicitly admit that, under New York law, CNO may bring claims for contribution where intentional torts—such as claims for fraud or breach of fiduciary duty—are involved. Slota Br., at 23–24; Bodner Br., at 14 (citing *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 319, 324 (S.D.N.Y. 2010)); Saks Br., at 21; and PB Investment Br., at 24 (citing CPLR § 1401).[22] Each of these Defendants then claim that CNO must particularize how any act of such Defendant "caused the injury for which

[22] PB Investment argues that CPLR § 1401 "only permits a claim for contribution for a 'personal injury, ***injury to property*** or wrongful death.'" PB Investment Br., at 24 (citing CPLR § 1401) (emphasis added). This argument finds no traction here, since (a) CNO sue Defendants for "injury to property," *see, e.g.*, ¶¶ 793, 799, (b) Defendants, including PB Investment, have admitted that CNO can seek contribution for intentional torts such as fraud and breach of fiduciary, *see supra*, and (c) the language of CPLR § 1401 that PB Investment quotes is not limiting language in any event.

the Receiver seeks to recover." *See, e.g.*, Slota Br., at 23–24 (citing *Amusement Indus.*, 693 F. Supp. 2d at 324).

How each Defendant "caused the injury for which the Receiver seeks to recover," however, is readily apparent within the four corners of the Receiver's FAC and CNO's Complaint. For example, the Receiver alleges that CNO aided and abetted the Platinum-Beechwood fraud and breaches of fiduciary duty by turning a blind eye and "cho[osing] to ignore the close ties binding the Platinum Funds and Beechwood entities." *See, e.g.*, FAC ¶ 8.[23] CNO has denied liability to the Receiver based on that allegation, but, if CNO were found liable based on it,[24] CNO is entitled to seek contribution from each and every Defendant it sued because each was an integral actor in the Platinum-Beechwood conspiracy by, among other things, (a) lying to CNO and misrepresenting Platinum's control and ownership of Beechwood, *i.e.*, "the close ties binding the Platinum Funds and Beechwood entities," and (b) breaching fiduciary duties that Beechwood Re, among others, owed to CNO, by their steadfast concealment

[23] The Receiver makes similar allegations with respect to the fraudulent conveyance claims against CNO, in which she seeks the return of nearly $70 million of CNO's property. *See* FAC ¶ 222 (alleging CNO "actively aided and abetted the Platinum/Beechwood fraud and their respective breaches of fiduciary duty" by "substantially and substantively work[ing] with Beechwood and PPCO Master Fund in consummating fraudulent conveyances."). If CNO is somehow found liable as a "transferee," it will be because the Defendants—the "transferors" and those working in concert with them—made it so.

[24] Saks joins in Bodner's arguments for dismissing CNO's contribution claims and thus his motion fails for the same reasons that Bodner's fails. Saks Br., at 21. In addition, Saks refuses to accept the alternative predicate for a contribution claim. He argues that CNO cannot seek contribution from Saks because they are complaining that Saks, among others, defrauded it "for the *benefit* of PPCO." Saks Br., at 21 (emphasis in original). While Saks is correct that he, among others, defrauded CNO for the benefit of the Platinum-Beechwood Co-conspirators (including Saks), CNO's contribution claim, pleaded in the alternative, is that, if by some miscarriage of justice it were found that CNO aided and abetted the intentional torts that the Receiver is alleging, then Saks and his Co-conspirators certainly contributed to those same torts. ¶¶ 919–22.

from CNO of the purported "close ties binding the Platinum Funds and Beechwood entities." FAC ¶ 8.

The Platinum-Beechwood conspiracy certainly included each Beechwood entity that CNO sued. In fact, all plaintiffs in these consolidated actions, including Platinum—both the JOLs and the Receiver—admit that the Beechwood entities, their successors-in-interest (*e.g.*, PB Investment) and numerous individuals connected with those entities, including Platinum founders Nordlicht, Huberfeld and Bodner, and Levy, Feuer and Taylor (and each of these individuals' trusts and other asset-protection vehicles), were Platinum alter egos. *See, e.g.*, FAC ¶¶ 168–73; SAC ¶¶ 344–99, 986–1000; *see generally* CNO's Complaint.[25] Defendants Bodner and Huberfeld effectively admitted as much. SAC Ex. 33 ("We weren't exactly honest with [CNO] . . . that beechwood and platinum really are integrated").

Second, Huberfeld and Ottensoser are unable to find a single case to support their conclusory argument against contribution. Instead, they cite *Charamac Props. v. Pike*, 1993 U.S. Dist. LEXIS 14593, at *24 (S.D.N.Y. Oct. 19, 1993)—which they admit "collect[s] cases barring ***indemnity*** for claims of RICO violations, fraud, and breach of fiduciary duty," Huberfeld Br., at 8 (emphasis added); *see also* Ottensoser Br., at 2. *Charamac Properties* did not directly address contribution claims; only indemnity claims.[26]

Third, the Beechwood Parties and PB Investment go further and explicitly admit that CNO may bring contribution claims against "joint tortfeasors" on the Receiver's federal

[25] To this list, CNO would add Slota, Saks, Ottensoser, Kim and Narain.

[26] Similarly, the Beechwood Parties not only cite zero authorities for the proposition that CNO is barred from bringing contribution claims where intentional torts are involved, but also simply ignore the issue, thus implicitly conceding that CNO may bring such claims. *See generally* Beechwood Br., at 10-12.

securities law claims.[27] Beechwood Br., at 11; PB Investment Br., at 23–24. They then argue that CNO (a) has "steadfastly" insisted that they did not violate the securities laws, PB Investment Br., at 23, and (b) do not allege that Defendants "defrauded PPCO," Beechwood Br., at 11. They are correct that CNO steadfastly denies liability to the Receiver under the federal securities law, but CNO is permitted to plead in the alternative that, if by some miscarriage of justice, it were found that CNO violated those laws as the Receiver is alleging, then Beechwood and its Co-conspirators were certainly joint tortfeasors. ¶¶ 919–22; *see also* FAC ¶¶ 309–16 (alleging CNO and Beechwood defendants violated federal securities law through a common "plan, scheme and conspiracy to defraud PPCO funds," causing PPCO damages in an amount not less than $69.1 million). This form of alternative pleading is entirely appropriate. *Epstein v. Haas Sec. Corp.*, 731 F. Supp. 1166, 1187 (S.D.N.Y. 1990) (holding that party seeking contribution "need not concede . . . liability" to properly assert such a claim. "It is enough [to] assert that if they are adjudged liable to plaintiffs, then they and third-party defendants are joint tortfeasors").

Two Defendants—Huberfeld and Slota—misstate the law and contradict their co-Defendants by arguing that CNO is barred from seeking contribution under the federal securities laws. Slota Br., at 23; Huberfeld Br., at 8, (citing *Charamac Props.*, 1993 U.S. Dist. LEXIS 14593, at *24). As discussed above, Huberfeld is wrong, as *Charamac Properties* does not address contribution. Neither does the case Slota relies on, *In re Residential Capital, LLC*, 524 B.R. 563, 594–96 (Bankr. S.D.N.Y. 2015). Both cases adjudicated indemnification claims only.

[27] Bodner ignores contribution entirely, moving to dismiss only CNO's claim for ***indemnification*** on the Receiver's federal securities law claim. Bodner Br., at 13–15. Saks and Ottensoser follow Bodner's position and thus, like Bodner, implicitly admit that CNO may seek contribution on the securities law claims. Saks Br., at 21; Ottensoser Br., at 2; *see also* Kim Br. (not addressing these claims).

Moreover, the Court in *In re Residential Capital, LLC* denied the motion to dismiss the *indemnity* claim, holding that "[s]ome courts in this circuit have refused to bar indemnification claims for securities law violations as a matter of law," *id.* at 594, making Slota's argument that such claims are barred under federal securities laws doubly erroneous.

B. The Motions to Dismiss CNO's Indemnity Claims Should Be Denied

A third-party complaint need not be based on the same claim or ground as the plaintiff's claim against the third-party plaintiff. The essential test is whether the third-party defendant may be liable to the third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to the plaintiff. *See Holloway v. Brooklyn Union Gas Co.*, 50 A.D.2d 603, 604 (2d Dep't 1975).

Defendants' motions to dismiss CNO's indemnity claims are based on erroneous assumptions. They contend that, for CNO to have indemnity claims against them, the Defendants must be alleged to be "joint tortfeasors against PPCO, or an active tortfeasor against PPCO in a situation where CNO is charged with harm to PPCO but was blameless or passively negligent." *See, e.g.*, Saks Br., at 21 (citing no authorities). But, that position is incorrect. *See Holloway*, 50 A.D.2d at 604. Accordingly, each Defendant misconstrues the basis for CNO's indemnity claims.

CNO states indemnity claims against Beechwood Re based on the Reinsurance Agreements that are already before this Court. *Cyganowski v. Beechwood Re, Ltd.*, No. 18-cv-12018 (JSR), Dkt. Nos. 170-1 through 170-9. Section 8.2 of each of those Agreements entitle CNO to indemnification from Beechwood Re for its wrongful conduct, including for its breaches of the Agreements and false representations. *Id.*

Moreover, CNO (along with the JOLs and the Receiver) allege that Beechwood Re, along with the other Beechwood entities and Platinum-Beechwood senior managers, are alter egos of

Platinum. *See, e.g.*, ¶¶ 470, 518-21, 592; SAC ¶¶ 344–99, 986–1000 (the JOLs' alter ego allegations); *Cyganowski v. Beechwood Re, Ltd.*, No. 18-cv-12018 (JSR), Dkt. No. 1, ¶¶ 158 (on page 40), 163–75 (the Receiver's alter ego allegations). All agree that the Platinum-Beechwood alter egos fraudulently induced CNO to enter into the Reinsurance Agreements. *See, e.g.*, SAC Ex. 33.

CNO brings claims against many of the Co-conspirators arising out of this conduct, including Beechwood Re's breaches of the Reinsurance Agreements and the Co-conspirators' breaches of fiduciary duties arising under those Agreements, as well as misrepresentations that Beechwood Re and other Co-conspirators made in connection with those Agreements. *See generally* the Complaint.

The Receiver, meanwhile, alleges that the very same acts and omissions by Beechwood Re and its Co-conspirators will make CNO liable to the Receiver, because (she alleges) certain investments of Trust assets damaged PPCO, thus making CNO liable to the Receiver (for aiding and abetting a fraud and a breach of fiduciary duties, for example). *See generally* the FAC. In a just world, CNO will prevail on its claims and obtain damages, and the Receiver's claims against CNO will be dismissed. Should there be a miscarriage of justice, however, such that CNO is found to be liable to the Receiver based on the Receiver's frivolous allegations, then CNO is entitled to seek indemnity against Beechwood Re and its alter egos, in accordance with Section 8.2 of the Reinsurance Agreements. Beechwood Re's alter egos include each of the Defendants here.

Defendants have all ignored the central fact that Platinum—in the persons of the Receiver and the JOLs, who stand in Platinum's shoes—has *admitted* that Platinum had alter egos, including Beechwood Re and the other Beechwood entities. What is not yet clear—and may not

be clear until after trial—is how many of the individual defendants —including Nordlicht, Huberfeld, Bodner, Levy, Feuer, Taylor and their many trusts and other vehicles—will be found to be alter egos with the "integrated" Platinum-Beechwood enterprise. Should CNO be found to be liable to the Receiver based on the Receiver's frivolous allegations, then, in accordance with Section 8.2 of the Reinsurance Agreements, CNO should be entitled to seek indemnity against all of those persons who are found to be Beechwood Re's alter ego.

X. THE MOTIONS TO DISMISS CNO'S UNJUST ENRICHMENT CLAIMS SHOULD BE DENIED

Under New York law, the elements of a claim for unjust enrichment are (1) that a party was enriched, (2) at plaintiff's expense, and (3) it is against equity and good conscience to permit the enriched party to retain what is sought to be recovered. *Childers v. N.Y. & Presbyterian Hosp.*, 36 F. Supp. 3d 292, 305 (S.D.N.Y. 2014).

[redacted] In May 2014, the Co-conspirators transferred $75 million of Beechwood Re's "capital," that is, $75 million of the $100 million capacity available to Beechwood Re under the Demand Note, [redacted] ¶¶ 618–19. Beechwood Re had been holding the $100 million Demand Note for the benefit of CNO, to support Beechwood Re's liabilities to CNO under the Reinsurance Agreements. The Co-conspirators transfer of $75 million of the Demand Note's $100 million capacity [redacted] at the expense of CNO. [redacted] no consideration to Beechwood Re (or any of the Co-conspirators) for the Demand Note Transfer. [redacted] ¶¶ 617–27. [redacted] ¶ 517.

That the Demand Note Transfer was made at the expense of CNO is underscored by Beechwood Re's being placed into Controllership, followed by liquidation. *See* ¶ 626.

[redacted] ¶ 676.

Had the Co-conspirators not transferred $75 million of Beechwood Re's Demand Note for no consideration, Beechwood Re might well have assets today to repay the amounts CNO is seeking.

Defendants other than Beechwood Bermuda (including PB Investment) have also obtained a windfall and been unjustly enriched at the expense of CNO. For example, Beechwood Re avoided its obligations under the Reinsurance Agreements to top-up the Trust assets 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. Many of the investments were the product of self-dealing. Instead, Beechwood Re (using Lincoln's fraudulent valuation reports) certified that the Trusts had surplus assets and then skimmed off the so-called "surplus" and distributed it to the Co-conspirators. ¶¶ 662, 924. The millions that the Co-conspirators raked in from these distributions of so-called "surpluses" from the Trusts were obtained at CNO's expense. Those assets were no longer available to CNO when it recaptured the Trust assets in late September 2016.

Many of these funds that were distributed to the Co-conspirators went to the asset protection vehicles that the Co-conspirators established to secrete assets. That includes funds that were distributed to the trusts (and Investment Series) that Nordlicht, Bodner, Huberfeld,

Feuer, Taylor and Levy established for that purpose. Thus, those trusts and Investment Series were also unjustly enriched, just like their alter egos—*i.e.*, Nordlicht, Bodner, Huberfeld, Levy, Feuer and Taylor. ¶¶ 483–88, 518–21, 653–56, 925–26.

Huberfeld argues that the unjust enrichment claim against him fails because it is "too attenuated" in that he did not "have any relationship with [CNO]." Huberfeld Br., at 8–9. Although Huberfeld is correct that CNO was utterly unaware that it had any relationship with Huberfeld—because he, like the other Co-conspirators, were assiduous in concealing Huberfeld's role—he in fact secretly owned, controlled and bankrolled Beechwood Re through his Beechwood Trusts. *See, e.g.*, ¶¶ 518, 654–55, 925. His secret ownership, control and funding of Beechwood Re utterly undercuts his plea that an unjust enrichment claim against him is "too attenuated."

PB Investment contends that CNO must allege that the unjust enrichment of PB Investment came from its "use[ ] [of] trust assets," as opposed to its being "a transferee of some unidentified portion of 'capital' from a demand note." PB Investment Br., at 25. PB Investment cites no authority to support this proposition. Moreover, as noted above, CNO has alleged that PB Investment was unjustly enriched because [redacted] ¶¶ 617–27. PB Investment was unjustly enriched when [redacted] ¶ 517.

The Beechwood Parties that CNO sues on its unjust enrichment claim—that is, Beechwood Capital Group, Beechwood Holdings, BAM, BAM Administrative, the two remaining Beechwood Bermuda entities (BBL and BBIL), the Feuer Family Trust, the Taylor-

Lau Family Trust and Narain—argue that the unjust enrichment claim "is expressly tied to" and duplicates CNO's breach of contract claim against Beechwood Re. Beechwood Br., at 13. The Beechwood Parties ignore, however, CNO's allegation that, upon skimming millions of assets from the Trusts under the pretense that the Trusts had surpluses, Beechwood Re distributed these so-called "surplus funds" to the Co-conspirators, including each of the Beechwood Parties that CNO sues.[28] ¶¶ 662, 924. That means that each of these Beechwood Parties was unjustly enriched. And, it's no answer to tell CNO that its sole remedy is for breach of contract against Beechwood Re, particularly given that [redacted] ¶ 676. CNO has a remedy against those parties to whom Beechwood Re distributed the fruits of its breaches of contract and other wrongful conduct, but who claim to have received those fruits innocently: unjust enrichment.[29]

Kim raises two arguments in seeking to dismiss the unjust enrichment claim, neither of which is on point. He argues that the "doctrine of unclean hands requires that [CNO's] claim against Kim for unjust enrichment be dismissed." Kim Br., at 19. This argument fails for the same reason that Defendants' arguments about the *in pari delicto* doctrine fail. On a Rule 12(b)(6) motion, the Court is not to credit the Receiver's frivolous allegations against CNO.

[28] The Beechwood Parties also contend that it is "entirely conclusory" for CNO to allege that Beechwood Re distributed the fruits of its wrongful conduct to the Beechwood Parties, unless CNO provides greater specificity as to the "compensation, bonuses, dividends and/or other payouts" that each Beechwood Party received. Beechwood Br., at 13–14. But, that data is uniquely within Defendants' possession, particularly the Beechwood Parties.

[29] The very same responses apply to Slota, Ottensoser, Bodner and Saks, as each argues the same two points as the Beechwood Parties, namely, (a) that the unjust enrichment claims are tied to and duplicate the breach of contract claim against Beechwood Re, and (b) CNO has not pleaded with specificity the benefits with which they were enriched unjustly. *See* Slota Br., at 24; Ottensoser Br., at 2; Bodner Br., at 12–13; and Saks Br., at 19–20.

Kim also argues that the claim should be dismissed because "Kim had [no] motive to benefit himself at [CNO's] expense or that he stood to benefit from [CNO's] relationship with Beechwood . . . [or] had any pecuniary interest whatsoever in advancing any fraudulent schemes." Kim Br., at 19. But Kim's "motive to benefit himself" or his "pecuniary interests" are not elements of an unjust enrichment claim.

XI. THIS COURT HAS SPECIFIC JURISDICTION OVER PB INVESTMENT AS IT WAS AN ALTER EGO OF EACH OF THE BEECHWOOD ENTITIES AND PLATINUM, NONE OF WHOM CONTEST PERSONAL JURISDICTION

By way of background, PB Investment is the successor in interest to BBIH. Compl. ¶¶ 470 n.3, 517. On June 28, 2017, BBIH changed its name to PB Investment. As BBIH's successor in interest, PB Investment's challenge to personal jurisdiction (PB Investment Br., at 6–9) fails because BBIH was an alter ego of the other Beechwood entities and Platinum, none of which challenge personal jurisdiction in this action.

"Under New York law, if a court has personal jurisdiction over a defendant, it may also exercise personal jurisdiction over an alter ego defendant." *Micro Fines Recycling Owego, LLC v. Ferrex Eng'g, Ltd.*, 2019 U.S. Dist. LEXIS 67981, at *11 (N.D.N.Y. Apr. 22, 2019) (quoting *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 138 (2d Cir. 2010)); *Int'l Equity Invs. v. Opportunity Equity Partners, Ltd.*, 475 F. Supp. 2d 456, 459 (S.D.N.Y. 2007). The alter ego standard for jurisdictional purposes is relaxed as compared to the standard for alter ego liability—personal jurisdiction over an alter ego defendant will be exercised where the "allegedly controlled entity 'was a shell' for the allegedly controlling party; it is not necessary to show also 'that the shell was used to commit a fraud.'" *Int'l Equity*, 475 F. Supp. 2d at 459 (quoting *Marine Midland Bank N.A.*, 664 F.2d at 904); *see also SHLD, LLC v. Hall*, 2016 U.S. Dist. LEXIS 19368, at *15 (S.D.N.Y. Feb. 17, 2016); *In re Commodity Exch., Inc.*, 213 F. Supp. 3d

631, 681 (S.D.N.Y. 2016).[30] "It is also well established that the exercise of personal jurisdiction over an alter ego corporation does not offend due process." *Micro Fines*, 2019 U.S. Dist. LEXIS 67981, at *12 (quoting *S. New England Tel. Co.*, 624 F.3d at 138).

"[T]he factors to be considered in [a jurisdictional] alter-ego analysis include whether there was a failure to observe corporate formalities, evidence of undercapitalization, intermingling of personal and corporate funds, shared office space and phone numbers, any overlap in ownership and directors and whether the corporation was used to perpetrate a wrongful act against the plaintiffs." *Cardell Fin.Corp. v. Suchodolski Assocs.*, 2012 U.S. Dist. LEXIS 188295, at *94–95 (S.D.N.Y. July 17, 2012); *see also Micro Fines*, 2019 U.S. Dist. LEXIS 67981, at *13–14; *In re Commodity Exch., Inc.*, 213 F. Supp. 3d at 681. Considering all of these factors, Platinum (and the other Beechwood entities) dominated BBIH.

The Complaint alleges all of the following: [redacted] and "Platinum and Beechwood were integrated, with their senior managers shuttling back and forth between Platinum and Beechwood."[31] ¶ 586. Scott Taylor and Moshe Feuer were "founder[s] and [President and CEO, respectively,] of Beechwood Re as well as the principal[s] of most Beechwood entities," and [redacted] ¶¶ 483, 485, 623. Further, Taylor [redacted]

[30] Even though the Complaint need not allege that the shell was used to commit a fraud for jurisdictional purposes, the Complaint is rife with allegations that Platinum and Beechwood used BBIH (as one of the Beechwood Bermuda entities) to commit fraud against CNO. ¶¶ 521, 586, 616–27.

[31] "The cast of individuals who shuttled back and forth between Platinum and Beechwood included Nordlicht, Levy, Slota, Hodgdon, Ottensoser, Poteat, Leff, Small, Manela, Saks and Kim." ¶ 629; *see also* ¶¶ 480, 489, 491, 493, 496, 498, 500, 502, 504–06 (identifying senior managers working for both Platinum and Beechwood).

[redacted] ¶ 623; *see also* ¶ 624. As a resident of New York, Taylor wrote this email not in Bermuda, but from New York.[32] Further to the Taylor email, Platinum and the other Beechwood entities also intermingled funds with BBIH: [redacted] (¶ 586), [redacted] ¶ 618. This transfer left "Beechwood Re a mere shell company, [and] grossly undercapitalized." ¶ 626.

Based on the foregoing, BBIH was an alter ego of Platinum and the other Beechwood entities, each of whom this Court has jurisdiction over (and which none of them challenged in their motions to dismiss).[33] *See d'Amico Dry d.a.c. v. Primera Mar. (Hellas) Ltd.*, 348 F. Supp. 3d 365, 389–90 (S.D.N.Y. 2018) (finding personal jurisdiction of nonappearing defendants where alter egos waived objections to personal jurisdiction). Notably, PB Investment did not challenge this Court's personal jurisdiction over it in its motion to dismiss the JOLs' SAC, so to the extent the claims against it are not dismissed on other grounds, PB Investment has waived the personal jurisdiction defense requiring it to participate in the litigation (including discovery, etc.) going forward at least as against the JOLs. Therefore, this Court can exercise personal jurisdiction over PB Investment in this action.

[32] In the event the Court grants leave to amend instead of denying the motion to dismiss outright, CNO will amend to include these allegations, among others.

[33] This Court has personal jurisdiction over the various Beachwood entities under the doctrines of general jurisdiction or specific jurisdiction, or pursuant to New York's long arm statute, CPLR § 302.

To the extent the Court requires additional facts to conduct its analysis, CNO respectfully requests that the Court permit CNO to conduct jurisdictional discovery of PB Investments as successor in interest to BBIH. "Jurisdictional discovery is warranted where, even if plaintiff has 'not made a *prima facie* showing, [they have] made a sufficient start toward establishing personal jurisdiction.'" *City of Almaty v. Ablyazov*, 278 F. Supp. 3d 776, 809 (S.D.N.Y. 2017) (citations omitted). "The Court is afforded with 'broad discretion' when determining whether to grant jurisdictional discovery." *MWH Int'l, Inc. v. Inversora Murten S.A.*, 2012 U.S. Dist. LEXIS 109210, at *15 (S.D.N.Y. Aug. 3, 2012). And because merits discovery is already underway, jurisdictional discovery can proceed simultaneously without delaying the case.

XII. CNO SHOULD BE GRANTED LEAVE TO REPLEAD SHOULD THE COURT FIND ANY OF THEIR CLAIMS TO BE DEFICIENT

If the Court finds that any of CNO's claims are legally insufficient, either under Rule 9(b) for not being pleaded with enough specificity or under Rule 12(b)(6) due to the absence of a necessary allegation, CNO should be granted leave to replead. *In re Ford Fusion & C-Max Fuel Econ. Litig.*, 2015 U.S. Dist. LEXIS 155383, at *112 (S.D.N.Y. Nov. 12, 2015) ("[T]he 'usual practice' is to grant leave to amend a Complaint dismissed pursuant to Rule 9(b)"); *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991) ("As a matter of procedure, when a complaint is dismissed pursuant to Rule 12(b)(6) and the plaintiff requests permission to file an amended complaint, that request should ordinarily be granted").

CONCLUSION

For the foregoing reasons, CNO respectfully requests that this Court deny the third-party defendants' motions to dismiss.

Dated: June 12, 2019

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By: /s/ *Adam J. Kaiser*

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