UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	:	Civil Action No. 1:18-cv-06658
MELANIE L. CYGANOWSKI, AS RECEIVER FOR PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC, Plaintiffs, v. BEECHWOOD RE LTD., et al., Defendants.	:	Civil Action No. 1:18-cv-12018

OMNIBUS MEMORANDUM OF LAW
IN OPPOSITION TO THE MOTIONS TO DISMISS THE
RECEIVER'S FIRST AMENDED COMPLAINT

OTTERBOURG P.C.
230 Park Avenue
New York, New York 10169
(212) 661-9100

Counsel for Melanie L. Cyganowski, as Receiver

Of Counsel:

Adam C. Silverstein
William M. Moran
Erik B. Weinick
Andrew S. Halpern

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules

Melanie L. Cyganowski, the Receiver (the "**Receiver**") for the above-captioned plaintiffs, files this memorandum of law in opposition to the motions to dismiss her First Amended Complaint (the "**Complaint**")[1] (Dkt. No. 207) filed by the Moving Defendants.[2]

I. PRELIMINARY STATEMENT

The PPCO Funds' path to receivership was paved with both the self-serving acts of their insiders and those of certain opportunists, namely the CNO and SHIP Defendants. The latters' actions were at least as detrimental to the PPCO Funds and their investors and creditors as the Platinum insiders' conduct because, *inter alia*, their unlawfully obtained liens on the PPCO Funds' assets now preclude the Receiver from making a distribution to the innocent investors and creditors of her estate. Thus, the Receiver asserts claims against both groups, sounding in, *inter alia*, securities fraud and RICO (pled in the alternative), aiding and abetting breach of fiduciary duty, aiding and abetting fraud and fraudulent conveyance.

---

[1] All capitalized terms not defined herein are defined in the Complaint.

[2] The motions to dismiss (collectively, the "**Motions**") and memoranda of law in support of each Motion filed by "**Moving Defendants**" are:

- Fuzion Analytics Inc. and Senior Health Insurance Company (Docket No. 156) (the "**SHIP MTD**" and the memorandum of law in support, the "**SHIP MOL**");
- Bankers Conseco Life Insurance Company and Washington National Insurance Company (Docket No. 168) (the "**BCLIC/WNIC MTD**" and the memorandum of law in support, the "**BCLIC/WNIC MOL**");
- 40|86 Financial Advisors, Inc. and CNO Financial Group, Inc. (Docket No. 173) (the "**CNO MTD**" and the memorandum of law in support, the "**CNO MOL**");
- B Asset Manager II LP, B Asset Manager LP, BAM Administrative Services LLC, Beechwood Bermuda International, Ltd., Beechwood Bermuda Ltd., Beechwood Re Holdings, Inc., Beechwood Re Investments, LLC, Beechwood Re Ltd., Moshe M. Feuer, and Scott A. Taylor (Docket No. 183) (the "**Beechwood MTD**" and the memorandum of law in support, the "**Beechwood MOL**"; and
- PB Investment Holdings, Ltd. ("**PBIH**"), as successor in interest to Beechwood Bermuda Investment Holdings, Ltd. (Docket No. 205) (the "**PBIH MTD**" and the memorandum of law in support, the "**PBIH MOL**").

The Complaint details the insiders' creation of Beechwood, a family of investment advisors, reinsurers and trusts, which was intended to, and did, attract hundreds of millions of dollars in insurance assets that were otherwise ineligible to be invested directly into Platinum. The assets were then funneled into the Platinum family of funds through Beechwood, while simultaneously earning the insiders of both Platinum and Beechwood millions of dollars in fees. Controlled by Nordlicht, through PPCO Portfolio Manager, the PPCO Funds were mere zombies, caused to enter into countless transactions with Beechwood solely to benefit Nordlicht and his cohorts, who had abandoned their fiduciary duties to the PPCO Funds. Similarly, the Beechwood entities were collectively orchestrated by that very same group, with the addition of Taylor and Feuer. The Platinum insiders were thus able to direct the actions of both the PPCO Funds and the various Beechwood entities through a series of complex transactions that simply amounted to theft from the PPCO Funds. This and other malfeasance led to the appointment of the Receiver.

The insurers named in the Complaint – (i) CNO, through its subsidiaries, BCLIC and WNIC, advised by 40|86 Advisors and (ii) SHIP, advised by Fuzion – both became investors in Beechwood under desperate circumstances. The Complaint details how CNO's investment with Beechwood was motivated by its need to offload problematic legacy long-term care policies housed at BCLIC and WNIC, (collectively, "**BCLIC/WNIC**"), and thereby cap the risk associated with them. CNO had long looked to offload this portfolio but had been unsuccessful. Beechwood was the only game in town. SHIP, a former CNO subsidiary, was a distressed long-term care insurer in runoff. It entered into three investment management agreements with Beechwood as a means of boosting its investment income at a time when its own legacy long-term care portfolio faced increasing challenges that it could not meet.

The vociferous protests of innocence by the SHIP and CNO Defendants are irrelevant on these Motions because the Receiver plausibly alleged that upon learning that fraud was afoot, both the SHIP and CNO Defendants elected *not* to terminate their relationship with Beechwood as they were contractually entitled to, but instead participated and substantially assisted in the Platinum insiders' fraud for their own gain. This case is not about whether or not SHIP and CNO knew of the fraud when they invested, but rather, this case is about the SHIP and CNO Defendants' awareness of the Beechwood-Platinum fraud in December 2015 and March 2016, when they actively wrested whatever value they could from the PPCO Funds by structuring, negotiating, and then consummating, the PPCO Loan Transactions. These transactions, which saddled the PPCO Funds with nonperforming loans the insurers, through Beechwood, had originally made to PPCO and PPVA portfolio companies at the greatly inflated price of $69.1 million. To finance the purchases, the PPCO Funds were forced to borrow the funds from the insurers and pledge substantially all of the PPCO Funds' and their subsidiaries' assets as collateral. These transactions were never intended to, and did not, provide the PPCO Funds with fair consideration and hence were fraudulent. The liens the PPCO Funds were forced to pledge now prevent the Receiver from distributing monetized funds to innocent investors and creditors.

At the time these transactions were consummated, Nordlicht had completely abdicated his duty of loyalty to the PPCO Funds and was actively stripping the funds of their most valuable assets. He and certain other insiders stole from the PPCO Funds and rather than stop the fraud, the CNO and SHIP Defendants actively engaged in transactions which only served to further the fraud, thereby aiding and abetting both breach of fiduciary duty and fraud.

The Receiver's RICO claims against the SHIP and CNO Defendants are predicated on their decision to join with the Beechwood Defendants and Platinum in an effort to extricate

themselves from the nonperforming loans. It was at that point the SHIP and CNO Defendants joined the Original RICO Members – collectively utilizing Beechwood to assist PPCO Portfolio Manager in charging management and incentive fees based on over valued assets and charging substantial management fees on account of the Beechwood investments – to facilitate the actual and/or constructive fraudulent conveyances referenced above. In doing so, the members of the RICO Enterprise were each able to profit: (i) the SHIP and CNO Defendants by offloading hopelessly nonperforming loans made to certain PPCO and PPVA portfolio companies for well in excess of their fair market value, while procuring an all-asset lien on the PPCO Funds' assets, (ii) Beechwood through the continuance of investment management fees and (iii) PPCO Portfolio Manager and Nordlicht by continuing to charge the PPCO Funds management fees.

The Motions assert that the Receiver has either failed to properly allege certain claims in the Complaint with sufficient detail or is barred as a matter of law from asserting such claims. For example, certain of the Moving Defendants assert that the Complaint should be dismissed in its entirety under *in pari delicto* and/or the *Wagoner* rule. However, those doctrines do not preclude the Receiver's Complaint because, *inter alia*:

- Both *in pari declicto* and the *Wagoner* rule are inapplicable to the Receiver's claims under the "adverse interest exception." The Complaint establishes that the PPCO Funds were victims, *not* beneficiaries, of the actions complained of therein, *i.e.*, Nordlicht and his cohorts stole *from* the PPCO Funds, not *for* them.

- *In pari delicto* and the *Wagoner* rule are not available to the Beechwood Defendants – corporate insiders with sufficient domination and control over the PPCO Funds to render them each an insider.

- The RICO and securities claims survive the *Bateman Eichler* test because, *inter alia*, permitting defendants who have violated federal statutes to evade liability strictly on the basis that the Receiver's predecessor was directed to engage in similar conduct would thwart the purposes behind such laws. Indeed, this public policy is entitled to greater weight here, where the Receiver seeks to, *inter alia*, avoid the purported all-asset liens precluding distributions to innocent investors and creditors of the receivership estate. Moreover, strict application of *in pari delicto* would render the Receiver statute and Receivership Order, toothless.

Based on the foregoing, the Receiver has standing and may otherwise assert each of the claims set forth in the Complaint. This Court may thus review each such claim under the standard for a motion to dismiss and in doing so, should sustain such claims because:

- the Complaint sufficiently pleads plausible claims for (i) aiding and abetting breach of fiduciary duty, (ii) aiding and abetting fraud, (iii) violations of the RICO statute and (iv) securities fraud in light of the applicable relaxed pleading standards;
- the Receiver has standing to assert, and the Complaint properly asserts, claims under the NYDCL for fraudulent conveyances; and
- this Court has personal jurisdiction over CNO, 40|86 Advisors and PBIH.

II. STATEMENT OF FACTS

The facts set forth in the Receiver's Complaint are incorporated by reference herein. In addition, for the Court's convenience, annexed hereto as **Schedule A** is a chart listing the causes of action applicable to each Defendant and the specific paragraphs of the Complaint setting forth the requisite elements necessary to satisfy each cause of action.

III. ARGUMENT

A. THE CLAIMS IN THE COMPLAINT ARE SUFFICIENTLY PLED.

1. The Complaint Satisfies Rule 8(a).

As set forth herein, the Complaint satisfies Federal Rule of Civil Procedure ("**FRCP**") 8(a)(2) by providing "a short and plain statement of the claims showing the Receiver is entitled to relief" that contains "sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Importantly, this Court has already ruled that "group pleading" arguments are subject to a "low bar" under Rule 8(a). *In re Platinum-Beechwood Litig.*, 2019 WL 1570808, at *15 (S.D.N.Y. Apr. 11, 2019). The Complaint meets these standards as specified at **Schedule A**.

2. The Receiver's Causes of Action are Plausible

The Complaint alleges in detail how the SHIP and CNO Defendants actively engineered several fraudulent conveyances with PPCO Master Fund through Beechwood in order to reduce their exposure to underperforming loans. The allegations in the Complaint make clear that the CNO and SHIP Defendants knew of the Platinum/Beechwood relationship at that time, but rather than exercising their contractual right to terminate their relationship with Beechwood, they exercised self-help. In an effort to undermine this narrative, BCLIC and WNIC mischaracterize the Receiver's theory by arguing that the Receiver's arguments are implausible. Why, according to BCLIC and WNIC, would they knowingly invest with fraudsters and thereby commit financial suicide? But that question is of the Defendants' own making. The Receiver does not assert that BCLIC and WNIC knowingly invested in a fraud with Beechwood. Rather, the Receiver asserts that upon learning of the fraud, BCLIC and WNIC chose not to take lawful ameliorative action but rather, compelled Beechwood and the PPCO Funds into consummating transactions which had but one goal: mitigate the risk of loss by obtaining liens on substantially all of the PPCO Funds' assets, even those not supporting the assets into which they had originally invested.

Both the SHIP and CNO Defendants improperly seek to have this Court decide factual issues on a motion to dismiss by asking this Court to consider alleged facts from outside the four corners of the Complaint.[3] However, "[i]n considering a motion to dismiss, 'a district court may [only] consider the facts alleged in the complaint, documents attached to the complaint as

[3] *See, e.g.,* SHIP MOL at 3-4 (referring to Platinum as a "Ponzi scheme") at 4 ("SHIP invested roughly 10% of its assets with Beechwood, and Fuzion invested nothing"), at 4 ("a 5.85% return was not out of the norm during that time"; "SHIP was experimenting at the margins in the Beechwood relationship, not acting in desperation"), at 4-5 ("Beechwood exercised complete investment discretion as a fiduciary, and SHIP's understanding of asset valuations depended entirely on what Beechwood or its agents represented to SHIP."), at 5 ("Beechwood's manipulations in December 2015 and March 2016 … resulted in massive losses to SHIP"); BCLIC MOL at 23 (referring to email and purported facts not referred to in the Complaint).

exhibits, and documents incorporated by reference in the complaint.'" *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 316 F. Supp. 3d 635, 645 (S.D.N.Y. 2018) (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010)).

3. The Complaint Satisfies Rule 9(b)

In an effort to halt this case, the Moving Defendants rely heavily, but erroneously, on FRCP 9(b). Although Rule 9(b) governs the Receiver's fraud-based claims, including her claims under RICO, for securities fraud claims and for aiding and abetting fraud, a relaxed standard for pleading applies here because the Receiver is an outsider to the transactions referred to in the Complaint who can only plead based on second-hand knowledge.[4] *In re Ahead by a Length, Inc.*, 100 B.R. 157, 166 (Bankr. S.D.N.Y. 1989). This relaxed pleading standard is particularly appropriate here because the Complaint pleads a complex scheme involving numerous transactions, *U.S. ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 326 (S.D.N.Y. 2004), and many details of the Moving Defendants' involvement in that scheme are peculiarly within their own knowledge. *Sunrise Indus. Joint Venture v. Ditric Optics, Inc.*, 873 f. Supp. 765, 772 (E.D.N.Y. 1995).

While the CNO Defendants and the SHIP Defendants claim that the Receiver violated FRCP 9(b) by pleading upon information and belief, in *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972), on which BCLIC/WNIC rely, the Second Circuit recognized that the pleading standard under Rule 9(b) is relaxed "as to matters peculiarly within the adverse parties' knowledge [but the] allegations must then be accompanied by a statement of facts upon which the belief is founded." *See DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987). The Complaint includes such a statement, includes detail to support the claims,

[4] The current Receiver was not appointed until July 6, 2017. Complaint ¶ 11.

and extensively cites to sources supporting the statement. *See, e.g.*, Complaint ¶¶ 24, 138 (citing to specific paragraphs of the BCLIC/WNIC Complaint).

4. The Moving Defendants' Group Pleading Arguments Fail

BCLIC/WNIC and the Beechwood Defendants assert that the Receiver has engaged in impermissible "group pleading" thereby violating Rule 9(b). Yet, as the Defendants recognize, the Complaint need only "inform each defendant of the nature of his alleged participation in the scheme." *Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 388 (S.D.N.Y. 2016); *In re Ahead by a Length, Inc.*, 100 B.R. at 167 (Bankr. S.D.N.Y. 1989); *In re Refco, Inc. Sec. Litig.*, 2009 WL 7242548, at *9 (S.D.N.Y. Nov. 13, 2009), *report and recommendation adopted sub nom. In re Refco Sec. Litig.*, 2010 WL 5129072 (S.D.N.Y. Jan. 12, 2010), citing *Silverman v. H.I.L. Assoc., (In re Allou Distributors, Inc.)*, 387 B.R. 365, 385 (Bankr.E.D.N.Y.2008). The Complaint meets this standard by pleading the who, what, where, when and how of the fraud. Complaint ¶¶ 91-258.

Moreover, group pleading is permissible here where, as here, the Complaint alleges a tight weave of connections between the Defendants, such that any entity playing an essential role in the fraud could be responsible for the acts of its affiliates. *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 406 (S.D.N.Y. 2010) ("Like streams converging to form a mighty river, any entity playing an essential role [] is responsible for what [] its subsidiaries did downstream").[5]

[5] For example, the Complaint pleads a "tight weave" among the Beechwood Defendants, including, among others, Beechwood Bermuda Investment Holdings, Ltd., with "ownership in and ultimate control of Beechwood … held by Nordlicht, Huberfeld, Bodner and Levy …, [and] Taylor, as President, and Feuer, as Chief Executive Officer, maintain[ing] ostensible and nominal management authority, with a management team … largely composed of personnel employed by or otherwise connected to the Platinum Funds," and operations originally conducted out of PPVA Portfolio Manager's office space. Complaint ¶¶ 108-113. Likewise, the Complaint details the close connections between the CNO Defendants, the close connection of the SHIP Defendants, and their common involvement in the PPCO Loan Transactions. *See* Complaint ¶¶ 120-122, 144-150, 156, 160-162.

B. *IN PARI DELICTO* AND THE *WAGONER* RULE DO NOT BAR THE RECEIVER'S CLAIMS

The Moving Defendants, other than the SHIP Defendants, incorrectly argue that the doctrine of *in pari delicto* bars all of the Receiver's claims. All of the Moving Defendants other than PBIH incorrectly argue that the Receiver lacks standing to sue under the *Wagoner* rule.

"The doctrine of *in pari delicto* mandates that the courts will not intercede to resolve a dispute between two wrongdoers." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (2010). In applying this doctrine, courts hold that "the acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals." *Id*. at 465.

Under the *Wagoner* rule, "[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir.1991). Unlike *in pari delicto*, which is an affirmative defense, the *Wagoner* rule is a rule of "prudential standing" which deprives a plaintiff of standing to assert a claim. Like *in pari delicto*, the *Wagoner* rule depends on imputation of an agent's acts to the wrongdoing corporation.

Both doctrines are inapplicable here for numerous reasons.

First, both *in pari declicto* and the *Wagoner* rule are inapplicable to the Receiver's claims because the Platinum insiders' actions are imputed to and were for the benefit of PPCO Portfolio Manager and PPVA Portfolio Manager, not the PPCO Funds.[6] Complaint ¶¶ 77, 80,

[6] The PPCO Funds are hedge funds with assets that consist of their investments in portfolio companies, interest receivable and cash, but not goodwill. Consequently, the PPCO Funds' assets have a value equal primarily to the net asset value of the PPCO Funds' investments, interest receivable and cash, but not goodwill. Thus, unlike the corporations in *Kirschner*, the PPCO Funds do not receive a benefit, even a short-term benefit, from a fraud that results in their continued existence.

185-192. In fact, the Platinum insiders' conduct was adverse to the interests of the PPCO Funds under the "adverse interest exception" to both doctrines. The adverse interest exception "rebuts the usual presumption that the bad acts of managers acting within the scope of their employment are imputed to the corporation." *In re TS Employment, Inc.*, 597 B.R. 543, 552 (Bankr. S.D.N.Y. 2019). The exception applies "where the corporation is actually the victim of a scheme undertaken by the agent to benefit himself or a third party personally, which is therefore entirely opposed (*i.e.*, 'adverse') to the corporation's own interests," such as where the agent has "totally abandoned his principal's interests" and is "acting *entirely* for his own or another's purposes," including, for example, "outright theft or looting or embezzlement – where the insider's misconduct benefits only himself or a third party; *i.e.*, where the fraud is committed *against* a corporation rather than on its behalf." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466-67 (2010) (emphasis supplied).

Here, the Complaint describes extensive transactions caused by Nordlicht that victimized the PPCO Funds:

- PPCO Master Fund's entry into the PPCO Loan Transactions and Securities Purchases, where the CNO Defendants, the SHIP Defendants and the Beechwood Defendants sold nonperforming loans to PPCO Master Fund for $69.1 million, (far in excess of their value), the PPCO Funds were saddled with liens on substantially all of their and their subsidiaries' assets, the subsidiaries of PPCO Master Fund guaranteed those loans, and PPCO Master Fund was left with worthless loans to its portfolio companies (Complaint ¶¶ 221-58);

- transactions funded in part by the Moving Defendants designed to benefit PPVA at PPCO's expense, including PPCO Master Fund's temporary purchase of an interest in Black Elk, which subsequently resulted in a $24 million damage claim against PPCO Master Fund by the Black Elk bankruptcy trustee instead of a recovery by PPCO Master Fund (Complaint ¶ 336);

- $11.4 million in incentive fees paid to PPCO Master Fund's general partner based on inflated valuations (Complaint ¶¶ 184, 190, 289, 324); and

- $26 million in management fees paid to PPCO Portfolio Manager based on inflated valuations (Complaint, ¶¶ 186, 191, 324);

These transactions collectively led to taking money out of the PPCO Funds' pockets and putting it in the pockets of the Platinum insiders. Thus, these are the functional equivalent of "theft or looting or embezzlement" that, under *Kirschner*, is the classic example of the adverse interest exception to *in pari delicto* and the *Wagoner* rule allowing the Receiver's claims to proceed. *In re Refco Sec. Litig.*, 779 F. Supp. 2d 372, 376 (S.D.N.Y. 2011) (Rakoff, J.), *aff'd sub nom. Krys v. Butt*, 486 F. App'x 153 (2d Cir. 2012); *Neogenix Oncology, Inc. v. Gordon*, 133 F. Supp. 3d 539, 548 (E.D.N.Y. 2015).

Moreover, "if the malfeasor has engaged in more than one scheme, it is possible to find that certain schemes inured to the benefit of the corporation but that others did not." *In re Bennett Funding Grp., Inc.*, 336 F.3d 94, 100 (2d Cir. 2003). As set forth herein, the Complaint alleges multiple schemes, and it remains to be seen through discovery whether some inured to the benefit of the corporation while others did not. *In re Refco Sec. Litig.*, 779 F. Supp. 2d 372, 376 (S.D.N.Y. 2011), *aff'd sub nom. Krys v. Butt*, 486 F. App'x 153 (2d Cir. 2012); *Neogenix Oncology, Inc. v. Gordon*, 133 F. Supp. 3d 539, 548 (E.D.N.Y. 2015).

Second, because the Complaint refers to multiple actors, the "sole actor rule" does not apply here as the Beechwood Defendants argue.[7] *See In re 1031 Tax Grp., LLC*, 420 B.R. 178, 204 (Bankr. S.D.N.Y. 2009) ("The sole actor rule applies when 'the principal is a corporation and the agent is its sole shareholder.'"). Moreover, the "innocent insider" exception defeats the sole actor rule where, as here, the Complaint alleges the existence of innocent persons (managing director, chief financial officer, portfolio manager and in-house counsel), who had the power to stop the fraud and would have taken the steps necessary to stop the fraud, if they had proper

[7] The "sole actor rule," is an exception to the adverse interest exception and applies when the principal is a corporation and the agent is its sole shareholder. *In re Lehr Constr. Corp.*, 528 B.R. 598, 610 (Bankr. S.D.N.Y. 2015).

knowledge of the fraud. *In Re Lehr Construction Corp.*, 528 B.R. 598, 610 (Bankr. S.D.N.Y. 2015); *In re 1031 Tax Grp., LLC*, 420 B.R. 178, 205 (Bankr. S.D.N.Y. 2009); Complaint ¶ 20. This is plainly sufficient at the pleading stage. *In re Allou Distributors, Inc.*, 387 B.R. 365, 391 (Bankr. E.D.N.Y. 2008); *In re Refco Sec. Litig.*, 779 F. Supp. 2d 372, 377 (S.D.N.Y. 2011), *aff'd sub nom. Krys v. Butt*, 486 F. App'x 153 (2d Cir. 2012).

To defeat the Receiver's allegations of innocent insiders, the Beechwood Defendants raise fact-based issues, such as the length of time that Mandelbaum and Shah worked at the PPCO Funds that cannot be decided on this Motion. Moreover, their reliance on *In re Bennett Funding Grp., Inc.*, 336 F.3d 94, 100 (2d Cir. 2003) is misplaced. There, the Second Circuit upheld the District Court's grant of summary judgment on a factual record that included more than 8,000 pages of affidavits and other documents and had previously denied a 12(b)(6) motion on the same ground, and found, based upon that record, that the independent directors were "impotent to actually do anything." 336 F.3d at 94, 101, 102. To the extent the Court determines that more detailed allegations are required, the Court should grant leave to amend. *See In re Tax Group, LLC*, 420 B.R. at 207.

Third, *in pari delicto* and the *Wagoner* rule do not bar fraudulent conveyance claims. *Wimbledon Fin. Master Fund, Ltd. v. Wimbledon Fund, SPC on behalf of Class C Segregated Portfolio*, 162 A.D.3d 433, 434 (1st Dep't 2018) (citing *FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 150 A.D.3d 492, 497 (1st Dep't 2017)); *Cobalt Multifamily Inv'rs I, LLC v. Arden*, 46 F.Supp. 3d 357, 363 (S.D.N.Y. 2014). Importantly, in *Cobalt*, the Court also explained that a receiver has standing to assert such claims on behalf of the transferor. 46 F. Supp.3d at 361-64. For similar reasons, *in pari delicto* and the *Wagoner* rule are inapplicable to the Receiver's claims under the NYDCL.

Fourth, federal law governs the application of *in pari delicto* and *Wagoner* to the Receiver's federal RICO and securities claims. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985); *Republic of Iraq v. ABB AG*, 768 F.3d 145, 163 (2d Cir. 2014). Under *Bateman Eichler*, *in pari delicto* bars a federal claim "only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Bateman Eichler*, 472 U.S. at 310-11. Here, the Moving Defendants do not satisfy either prong and they fail the *Bateman Eichler* test.

As to the first prong, a record beyond the pleadings needs to be developed as to whether the Platinum insiders' actions should be imputed to the PPCO Funds. PPCO Portfolio Manager agreed to manage the PPCO Funds in portfolio management agreements. Complaint ¶ 77. Further, the Platinum insiders' actions were for the benefit of PPCO Portfolio Manager, and not the PPCO Funds. A determination of whether the acts of the Platinum insiders who were employed by PPCO Portfolio Manager should be imputed to the PPCO Funds necessarily depends on a review of those agreements and other discovery, and thus, whether the PPCO Funds bear substantially equal responsibility for the violations they seek to redress.

The second prong of *Bateman Eichler* is also unsatisfied. In *Gordon v. Royal Palm Real Estate Inv. Fund I, LLLP*, 320 F. Supp. 3d 910, 919 (E.D. Mich. 2018), an SEC receiver for a convicted Ponzi-schemer and two corporations he used to perpetrate a Ponzi scheme sued to recover nearly $10 million from the persons and entities at the center of the fraudulent investment scheme involving a separate investment fund, asserting claims for securities law violations and other claims. The entire investment in the fund was derived from funds that had

come from the scheme. The court held that the first prong of the *Bateman Eichler* test was satisfied because the Ponzi-schemer and his corporations had at least substantially equal responsibility for the violations the receiver alleged, but that *in pari delicto* did not bar the receiver's securities fraud claims because the second prong of the *Bateman Eichler* test was not satisfied. The court explained:

> Permitting parties who have plainly violated federal securities laws to evade liability for their actions strictly on the basis that another individual has engaged in similar conduct would thwart the purposes behind such laws ….
>
> More importantly perhaps, precluding this action would not serve to protect the investing public. In making this determination, the Court considers who will actually benefit from an award of the money at issue….
>
> Any award Plaintiff receives in this case will be distributed to Legisi's defrauded investors. If the Court were to bar Plaintiff's claims, the real parties affected by such a ruling would be members of the investing public. Given such policy implications, the Court will not bar Plaintiff, who ultimately seeks relief for innocent investors, from pursuing federal securities claims.

320 F. Supp. 3d at 919-20 (citations omitted).

Here, as in *Gordon*, permitting parties such as the Defendants, who have violated federal statutes, to preclude the Receiver, an innocent successor, from pursuing her claims under those statutes would significantly interfere with the effective enforcement of federal law and protection of the investing public. This is especially true because one of the Receiver's goals in bringing this litigation is to avoid liens presently precluding distribution to innocent investors and creditors of the receivership estate.

Fifth, *in pari delicto* and the *Wagoner* rule are not available to corporate insiders. This exception derives from the notion that "it would be inequitable to allow an insider to rely on such imputation because it would essentially shield the insider from the 'consequences of their own

handiwork.'" *In re PHS Grp. Inc.*, 581 B.R. 16, 30–31 (Bankr. E.D.N.Y. 2018); *In re FKF 3, LLC*, 2018 WL 5292131, at *8 (S.D.N.Y. Oct. 24, 2018); *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 124 n.26 (Bankr. S.D.N.Y. 2011). Here, the Beechwood Defendants cannot rely on these doctrines because they are insiders.

In addition, even an "outsider" may surrender an *in pari delicto* defense if the outsider exerts sufficient domination and control over the guilty entity to render it an insider. *In re PHS Grp. Inc.*, 581 B.R. at 33 ("'Even a third-party professional, typically the quintessential outsider, may surrender an *in pari delicto* defense where it exerts sufficient domination and control over the guilty corporation to render itself an insider.'") (*quoting In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 124 (Bankr. S.D.N.Y. 2011)). "Control" does not require total and singular domination akin to an alter ego finding. *Id*. The control analysis considers the totality of the circumstances, including: (1) the closeness of the relationship between the corporation and the third party; (2) the degree of the third party's involvement in the corporation's affairs; (3) whether the third party had the opportunity to self-deal; and (4) whether the third party holds or held a controlling interest in the corporation. *See id*. at 33.

The Complaint details how the Beechwood Defendants and the Platinum insiders were one and the same:

- "At the helm of the transactions for the Platinum Funds was Nordlicht, sitting in the hopelessly conflicted role he carved out for himself as Chief Investment Officer and equity holder in the Platinum Funds, while being one of the ultimate and most active owners of Beechwood." Complaint ¶ 171.
- "Beechwood's management team was largely comprised of personnel employed by or otherwise connected to the Platinum Funds." Complaint ¶ 111.
- "Steering these transactions for Beechwood was Levy, he too sitting in the hopelessly conflicted role he carved out for himself by being Chief Investment Officer and equity holder in Beechwood, while being a portfolio manager of the Platinum Funds." Complaint ¶ 172.

The foregoing demonstrates that Platinum insiders owned and controlled the Beechwood Defendants and the PPCO Funds, causing and executing all of the wrongful acts alleged therein. Allowing the *in pari delicto* and *Wagoner* defenses would thus permit the Beechwood Defendants to use their own wrongdoing as a shield to prevent the PPCO Funds from recovering from them. As such, the corporate insider exception applies to the Beechwood Defendants, and *in pari delicto* and *Wagoner* are inapplicable to the Beechwood Defendants.

Sixth, under the *Wagoner* rule, "[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." *Wagoner*, 944 F.2d at 120. Through the Complaint, the PPCO Feeder Funds and the Blocker Fund, creditors of PPCO Master Fund, assert the claims against the Defendant. Thus, the *Wagoner* rule does not bar their claims.

For these reasons, the Complaint should not be dismissed by virtue of *in pari delicto* or the *Wagoner* rule.

C. THE RECEIVER'S RICO CLAIMS SHOULD BE SUSTAINED

The Receiver sufficiently alleges violations under 18 U.S.C. §§ 1962(c) and 1962(a).[8]

1. The Receiver's RICO Claims Are Not Subject to the PSLRA

(a) Dismissal Based on the PSLRA Is Premature

The Receiver's RICO claims are not barred by the Private Securities Litigation Reform Act ("**PSLRA**") amendment to the Civil RICO statute, 18 U.S.C. § 1964(c), which only

[8] Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Section 1962(a) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity … to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

prohibits civil suits that "rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities." Despite the fact that the RICO claims are based on actions wholly separate from any securities fraud, all of the Moving Defendants seek dismissal of the Receiver's RICO and securities fraud claims. They cannot have it both ways. Unless and until this Court rules that the Receiver has alleged an actionable securities fraud claim against at least one defendant in connection with her RICO claim, dismissal of the RICO claims on this ground is premature.

(b) The Predicate Offenses Are Not Actionable Securities Fraud

The Beechwood Defendants, BCLIC/WNIC and SHIP misinterpret the PSLRA securities fraud exception as well as the grounds for the Receiver's RICO claims. As properly construed, the RICO claims do not rely on conduct that is actionable as securities fraud.

Actionable securities fraud requires a defendant to have, at a minimum: "(1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Boock*, 2011 WL 3792819, at *21 (S.D.N.Y. Aug. 25, 2011). The "in connection with" requirement is critical; conduct unrelated to the purchase or sale of securities cannot give rise to actionable securities fraud, and consequently, cannot support the application of the PSLRA bar. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277, n.11 (2d Cir. 2011) (a court must ask "not whether a plaintiff can state a claim under a non-securities related predicate act, but whether the allegations that form the basis of [the non-securities-related] predicate act occur in connection with securities fraud)" (citation and quotation omitted).

To occur "in connection with" a purchase or sale of a security, the fraudulent misrepresentation or omission must be "material to a decision by one or more individuals (other than the fraudster) to buy or to sell a covered security." *Chadbourne & Parke LLP v. Troice*, 134

S. Ct. 1058, 1066 (2014) (internal quotation marks omitted); *Leykin v. AT&T Corp.*, 423 F. Supp. 2d. 229, 241 (S.D.N.Y. 2006). For PSLRA to apply, "the fraud itself must be integral to the purchase and sale of the securities in question," and "[c]onduct that is merely incidental or tangentially related to the sale of securities will not meet [this] standard." *Id.*

The predicate acts alleged by the Receiver in support of her RICO claims are premised on actions constituting aiding and abetting breach of fiduciary duty and fraud. *To wit*: the predicate acts of racketeering committed by the Defendants include, but are not limited to, using the mails and wires of interstate commerce to:

> (i) transmit communications and documents which assisted Nordlicht and others in the breach of fiduciary duty to the Platinum Fund investors and creditors; and
>
> (ii) transmit communications and documents which assisted Nordlicht and others in perpetuating a fraud on the investors and creditors of the Platinum Funds.

Complaint ¶ 283. While the additional predicate acts pled by the Receiver include participating in the structuring and consummating of the fraudulent PPCO Loan Transactions and transmitting communications and documents that facilitated the PPCO Loan Transactions, those acts are the bases for the Receiver's fraudulent conveyance claims, not her securities law claims. The securities law claims are premised on different facts, *i.e.*, that the Defendants misrepresented, with an intent to deceive, the PPCO Funds in connection with their purchase of a security, namely the Purchased Securities. Complaint ¶¶ 312-316. Thus, the facts pled by the Receiver in support of her RICO claim were not acts "in connection with" a purchase or sale of a security.

This conclusion is consistent with this Court's April 22, 2019 decision in the *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.* Action ("**SHIP Action**"). In the SHIP Action, SHIP argued that a RICO enterprise existed among certain of the Beechwood Defendants, and the "object of the criminal enterprise was to entice SHIP to part with its money." *In re Beechwood-*

Platinum Litigation, 2019 WL 1759925, at *8 (S.D.N.Y. Apr. 22, 2019). This Court concluded that the alleged RICO participants obtained the funds from SHIP precisely for the purpose of acquiring securities and the fraud coincided with the securities transactions and so, the PSLRA applied. *Id.* at *8. In reaching its conclusion, this Court found that the facts before it were similar to those in *Picard v. Kohn*, where the allegation was that multiple defendants were "attracting investors to supposed diversified investment funds that, in reality, did nothing more than feed money into Madoff Securities." *Id.* (*quoting Picard v. Kohn*, 907 F. Supp. Ed 392, 396 (S.D.N.Y. 2012)). This Court concluded that "SHIP's allegations are barred by the RICO Amendment insofar as the gravamen of SHIP's mail and wire fraud claims is that Beechwood tunneled SHIP's assets to Platinum." *Id.* at *8.

In reaching its decision, this Court contrasted SHIP's allegations against factual situations in which the PSLRA would *not* apply. This Court, importantly, noted that "[t]he only allegations to which this [PSLRA] bar arguably does not apply are the allegations that defendants misrepresented the market value of SHIP's assets in connection with defendants' regular withdrawal of performance fees." *Id.* at *8. While these allegations in the SHIP Action were sufficient predicates, the SHIP complaint only alleged that the defendants' withdrawals took place over 22 months, which is less than the two years required, so they were ultimately found to be an insufficient period to establish a pattern. *Id.*

While SHIP's RICO claims were based on the use of funds it invested to purchase securities, the Receiver's RICO claims in this case are based on the Defendants: (i) assisting Nordlicht and his cohorts in their breach of fiduciary duty to the Platinum Fund investors and creditors; (ii) assisting Nordlicht and his cohorts in perpetuating a fraud on the investors and creditors of the Platinum Funds; and (iii) actively participating in the structuring and

consummation of the fraudulent conveyance transactions in or about December 2015 and March 2016, which saddled PPCO Master Fund with liens on substantially all of its assets, and those of its subsidiaries, without receiving fair consideration in return. Complaint ¶ 302. Actions such as those were recognized by this Court in the SHIP Action as *not* being prohibited by the PSLRA as the basis for a RICO claim. The predicate acts here are not actionable securities fraud so the PSLRA bar does not apply and the RICO claims in the Complaint are sufficiently pled.

2. The Receiver's RICO Claims are Properly Pled

The Supreme Court "made clear that it would not interpret civil RICO narrowly." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 139 n.6 (2d Cir. 2001) (*citing Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)). In *Sedima*, the Supreme Court rejected an interpretation of civil RICO that would have confined its application to "mobsters and organized criminals." 473 U.S. at 499. Instead, the Court held: "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* (internal citation omitted); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 479 (2006) (Breyer, J., concurring in part and dissenting in part) ("RICO essentially seeks to prevent organized criminals from taking over or operating legitimate businesses. Its language, however, extends its scope well beyond those central purposes."). Thus, a court should not dismiss a civil RICO claim simply because the alleged conduct is not a quintessential RICO activity. *Flexborrow LLC v. TD Auto Fin. LLC*, 255 F. Supp. 3d 406, 414-15 (E.D.N.Y. 2017).

(a) Beechwood

To plead a RICO violation, a plaintiff must allege that the defendant engaged in at least two predicate acts of "racketeering activity," defined to include a host of state and federal offenses. 18 U.S.C. §§ 1961(1), (5). In the instant action, the Receiver alleges that the

Beechwood Defendants and the CNO and SHIP Defendants engaged in the predicate acts of mail and wire fraud under sections 1341 and 1343 of title 18. Complaint ¶¶ 264, 265, 269, 270, 283 and 304. In addition to alleging two predicate acts, a RICO plaintiff must plead, among other things, continuity to establish that the racketeering activity constitutes a "pattern." *See Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 2019 WL 1759925, at *7 (S.D.N.Y. Apr. 22, 2019). Continuity, in turn, "is both a closed- and open ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* (*citing H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)).

The Beechwood Defendants assert that the Receiver has failed to adequately allege continuity because her RICO claims "are too narrow in number of victims, time, and purpose to constitute a continuous pattern of racketeering." Beechwood MOL at 16. In determining whether continuity exists this Court should not limit its consideration to the duration of the scheme but should also look at the overall context in which the acts took place, *Pier Connection, Inc. v. Lakhani*, 907 F.Supp. 72, 75 (S.D.N.Y. 1995); *see also United States v. Kaplan*, 886 F.2d 536, 542–43 (2d Cir. 1989), *cert. denied*, 493 U.S. 1076, 110 S.Ct. 1127 (1990), including the number of victims and participants, and the number, variety and extent of the defendants' goals, and whether there are separate schemes. *GICC Capital Corp. v. Tech. Fin. Grp., Inc.*, 67 F.3d 463, 467 (2d Cir. 1995); *Pier Connection*, 907 F.Supp. at 78. However, while duration of a scheme in and of itself is not the touchstone for asserting a RICO claim, it is relevant to the analysis. For example, closed-ended continuity may be demonstrated by showing a "series of related predicates extending over a substantial period of time." *H.J. Inc.*, 492 U.S. at 242, 109 S.Ct. at 2902. The *H.J. Inc.* Court did not define "substantial," beyond stating that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not

satisfy this requirement." *Id.*

The Complaint alleges a closed-ended scheme which lasted from approximately early 2013 through the commencement of the receivership in December 2016, a period of well over two and a half years. Complaint ¶ 286. Thus, on the face of the Complaint the Receiver has alleged a continuous scheme. *See, e.g., Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521 (2d Cir. 1994) (finding that closed-ended continuity had been established by pleading that securities were sold in violation of securities laws several times within one year); *Farberware, Inc. v. Groben*, 764 F.Supp. 296, 306 (S.D.N.Y. 1991) (stating that "the pleading of repeated similar acts over a ten-month period adequately alleges a continuing scheme to defraud plaintiff").

Moreover, the Receiver's allegations setting forth the overall context in which the acts took place establish the adequacy of her RICO pleadings. The facts alleged by the Receiver tell a story in which over two and half years the Beechwood Defendants, later joined by the SHIP and CNO Defendants, each participated in the operation and/or management of an enterprise which committed numerous unlawful acts, including, but not limited to:

> (i) transmitting communications and documents which assisted Nordlicht and certain other insiders in breaching their fiduciary duty to the PPCO Funds;
>
> (ii) transmitting communications and documents which assisted Nordlicht and certain other insiders in perpetuating a fraud on the PPCO Funds; and
>
> (iii) actively participating in the structuring and consummation of the fraudulent conveyance transactions in or about December 2015 and March 2016 which saddled the PPCO Master Fund with liens on substantially all of its assets, and that of its subsidiaries, without receiving fair consideration in return.

Complaint ¶ 304.

Initially, the Original RICO Members, numbering over 20 entities and individuals, utilized Beechwood to (i) assist PPCO Portfolio Manager in charging management and incentive

fees based on over-valued assets and (ii) charge substantial management fees on account of the Beechwood investments inuring to the benefit of each of the Original Members of the RICO Enterprise. Subsequently, when the SHIP and CNO Defendants joined the RICO Enterprise, Beechwood was used to facilitate actual and/or constructive fraudulent conveyances which inured to the benefit of each of the members of the RICO Enterprise through the garnering of unearned fees or reduction of liabilities (such as LTC liabilities). Complaint ¶ 262. And the victims of the RICO Enterprises are numerous, numbering into the hundreds, including each of the PPCO Funds and their respective investors and creditors. Complaint ¶¶ 239, 258, 285 and 289. Thus, Beechwood's Motion should be denied.

(b) BCLIC/WNIC

BCLIC/WNIC argue that the Receiver has failed to plead that they "participa[ted] 'in the operation or management'" of the enterprise. However, "the 'operation or management' test typically has proven to be a relatively low hurdle for plaintiffs to clear, especially at the pleading stage." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 176 (2d Cir. 2004) (citations omitted); *see AIU Ins. Co. v. Olmecs Med. Supply, Inc.*, 2005 WL 3710370, at *8 (E.D.N.Y. Feb. 22, 2005). Indeed, "enterprise" is subject to FRCP Rule 8(a) notice pleading and is subject to a "liberal pleading standard." *SKS Constructors, Inc. v. Drinkwine*, 458 F. Supp. 2d 68, 79 (E.D.N.Y. 2006); *see also RD Mgmt. Corp. v. Samuels*, 2003 WL 21254076, at *5 (S.D.N.Y. May 29, 2003).

In *RD Mgmt. Corp.*, the court explained that "'the word "participate" makes clear that RICO liability is not limited to those with *primary* responsibility for the enterprise's affairs,'" but only "*some part* in directing the enterprise's affairs is required," and thus concluded that allegations inferring that a defendant had some part in directing the affairs of the "enterprises in question" were sufficient to defeat a motion to dismiss. 2003 WL 21254076, at *7-8 (emphasis

added); *see also Conte v. Newsday, Inc.*, 703 F. Supp. 2d 126, 135 (E.D.N.Y. 2010) (*quoting DeFalco v. Bernas*, 244 F.3d 286, 310 (2d Cir. 2001)). The Complaint sets forth sufficient allegations to conclude that BCLIC and WNIC participated in the operation or management of the enterprises by alleging that they:

> (i) actively participated in the structuring and consummation of the fraudulent conveyance transactions in or about December 2015 and March 2016 which saddled PPCO Master Fund with liens on substantially all of its assets, and those of its subsidiaries, without receiving fair consideration in return; and
>
> (ii) transmitted communications and documents that facilitated the PPCO Loan Transactions and Securities Purchases through which PPCO Master Fund was saddled with liens on substantially all of its assets, and those of its subsidiaries, without receiving fair consideration in return.

Complaint, ¶ 304(iii)-(iv).

BCLIC/WNIC also argue that they did not receive or reinvest racketeering income. However, BRe BCLIC Primary, BRe BCLIC Sub, BRe WNIC 2013 LTC Primary and BRe WNIC 2013 LTC Sub (collectively, the "**BCLIC/WNIC Trusts**") held assets of BCLIC and WNIC (Complaint ¶¶ 43, 45), BCLIC and WNIC were their sole beneficiaries (Dkt. 171-2 at 30,171-3 at 21, 171-4 at 24, 27, 30, 171-8 at 3, 171-8 at 32, 171-9 at 28, 171-9 at 31), and the BCLIC/WNIC Trusts' assets were ultimately demanded by, and upon information and belief were thereafter transferred to, BCLIC/WNIC (CNO's 8-K dated September 29, 2016, Dkt. 171-10 at 6). At this early stage, these allegations are sufficient to plead both an "association in fact" and the CNO Defendants' active participation.

(c) SHIP Defendants

SHIP and Fuzion assert that the Receiver failed to allege "'the existence of an agreement to violate RICO's substantive provisions.'" SHIP MOL at 24. However, the Complaint alleges that "the SHIP Defendants agreed and committed to participate in [the RICO Enterprise's] fraudulent scheme and purposes through two or more predicate acts of racketeering activity."

Complaint ¶ 269. Specifically, the SHIP Defendants "assisted Nordlicht and his cohorts in their breach of fiduciary duty to the Platinum Fund investors and creditors, assisted Nordlicht and his cohorts in perpetuating a fraud on the investors and creditors of the Platinum Funds, actively participated in the structuring and consummating of the fraudulent conveyance transactions in or about December 2015 and March 2016 which saddled the PPCO Funds with liens on substantially all of its assets, and that of its subsidiaries, without receiving fair consideration in return and in connection with the foregoing, committed mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343." Complaint ¶ 269.

D. THE SECURITIES FRAUD CLAIMS SHOULD BE SUSTAINED

The Complaint's Fourth Cause of Action seeks relief for violations of Section 10(b) of the Exchange Act, 15 U.S.C. Section 78(b), and Rule 10b-5 promulgated thereunder. Specifically, the Complaint alleges that SHIP, BCLIC, WNIC, CNO and Beechwood, together with the Platinum insiders controlling the PPCO Funds, employed a plan, scheme and conspiracy whereby they misrepresented the value of the Purchased Securities to PPCO Master Fund at a time when they each knew these loan instruments were nonperforming and were therefore worth only a fraction of par value. This misrepresentation was relied upon by PPCO Master Fund, which had been left abandoned by Nordlicht, to its detriment in entering into the transaction through which it incurred approximately $69.1 million in debt in consideration for assets worth only a fraction of that amount. The securities fraud claims in the Complaint are sufficiently pled, and the Motions should be denied. Complaint ¶¶ 309-21.

"In order to establish a claim under [Section 10(b) and Rule 10b–5], a plaintiff bears the burden to prove that (1) the defendant made a material misrepresentation or omission; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 378 (S.D.N.Y. 2015)

(quotation omitted). Fed. R. Civ. P. 9(b) requires particularity when pleading fraud ("**Rule 9**"). Section 21D(b)(2) of the PSLRA, which governs scienter pleading in securities fraud actions, incorporates Rule 9 and establishes a heightened rule for pleading inferences involving scienter that requires the complaint to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

1. The Complaint Sufficiently Alleges Misrepresentation

The Complaint alleges that each party involved in the sale of the Purchased Securities, (*i.e.*, SHIP, BCLIC, WNIC, and CNO as the sellers, Beechwood as the securities investment advisor and the Platinum insiders controlling PPCO Master Fund as buyers) knowingly executed each transaction at a sale price well above the actual value of the securities, thereby effectively misrepresenting the value of those securities. Complaint ¶¶ 232-34, 248-50, 310-16. By this deceptive conduct, each knowingly made an implied misrepresentation that the sale price was fair. These allegations are sufficient for a claim of federal securities fraud.

Contrary to Defendants' assertions, the Second Circuit will find deceptive conduct in connection with the sale of securities to be implied misrepresentations under Section 10(b) and Rule 10b-5 without the uttering of words. In *Van Cook v. SEC*, 653 F.3d 130, 140-41 (2d Cir. 2011), *cert. denied* 132 S. Ct. 1582 (2012), an introducing broker providing services to clients trading in mutual funds created a false impression that trades he submitted on behalf of his clients were placed before the 4 p.m. deadline, when mutual fund shares are credited with that days' net asset value, but where in fact the trades were actually submitted with the benefit of market moving information after 4 p.m. The SEC determined that Van Cook's conduct of placing the trades in this manner – without uttering a word – constituted an implied misrepresentation that violated Section 10(b) and Rule 10b-5. The Second Circuit affirmed the SEC's findings: "We now . . . conclude that late trading of the sort committed by Van Cook

constitutes an implied misrepresentation in violation of Rule 10b5 and Section 10(b)." *Van Cook*, 653 F.3d at 140-41 (emphasis added); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 158-59 (2008) ("[c]onduct itself can be deceptive," and liability under Section 10(b) and Rule 10b-5 does not require "a specific oral or written statement"); *SEC v. Pentagon Capital Mgmt. PLC*, 612 F. Supp. 2d 241, 261 (S.D.N.Y.2009); *SEC v. Simpson Capital Mgmt., Inc.*, 586 F. Supp. 2d 196, 204-05 (S.D.N.Y.2008).

The similar conduct of SHIP, BCLIC, WNIC, CNO and Beechwood by their participation in the transactions in the Purchased Securities described in the Complaint, at prices well above the known actual value, constitutes implied misrepresentations. Accordingly, the Complaint sufficiently alleges a misrepresentation under Section 10(b) and Rule 10b-5.

2. Particularity and Scienter Have Been Sufficiently Pled

Courts will analyze a complaint in its entirety to get the full flavor of the allegations to test if the strong inference of scienter requirements of Section 21D(b)(2) of PSLRA, which necessarily incorporates the particularization requirements of Rule 9, have been complied with:

> In making this determination, a court considers whether "*all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." When so considered, the inference of scienter must be "cogent and at least as compelling as any opposing inference one could draw from the facts alleged."

In re Petrobras Sec. Litig., *supra* 116 F. Supp. 3d at 382 (citations omitted). The Second Circuit summarized what is required to demonstrate the required strong inference in *Novak v. Kasaks*, 216 F.3d 300, 308-09 (2d Cir.2000):

> The requisite strong inference may arise where the complaint sufficiently alleges that the defendants: (1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor.

Id. at 311 (internal citations omitted).

Here, the Complaint sets forth allegations describing the desperate circumstances at the PPCO Funds, which gave birth to Beechwood so as to keep the funds afloat. Complaint ¶¶ 91-109. It further alleges the precarious posture that the CNO and SHIP Defendants were in arising from the floundering LTC insurance industry, with which CNO struggled for years, and which brought them as a last resort to Beechwood. Complaint ¶¶ 114-140. The Complaint also alleges facts demonstrating that CNO and 40|86 Advisors' Chief Investment Officer, Eric Johnson ("**Johnson**"), who was also the Executive Vice President for BCLIC and WNIC, knew the truth behind the Platinum-related transactions at issue (Complaint ¶¶ 134, 196-201); that after holding these securities for a time CNO, BCLIC, WNIC, and SHIP all knew them to be non-performing and therefore that the true value was only a fraction of the par value set forth on the financial statements they all received (Complaint ¶¶ 202-206); that Beechwood was directed by the CNO and SHIP Defendants to sell these securities back to PPCO Master Fund, which was carried out at the inflated par value (Complaint ¶¶ 181, 205); that the CNO and SHIP Defendants benefitted by unloading these securities (Complaint ¶¶ 310-316); that Beechwood benefitted by keeping these entities – at least for the time being – as its primary investors serving to prop up the PPVA Funds (Complaint ¶¶ 179-180); and that the PPCO Funds were injured by being saddled with these overly inflated securities, which inhibited them from acting on the need to timely wind down their business in an orderly fashion. Complaint ¶¶ 313-316.

The full flavor of these allegations establish cogent inferences of scienter that are at least as compelling as any opposing inference one could draw from these facts, which in this instance, is Defendants' argument that they were only victims. Furthermore, since these allegations demonstrate much more than just hoping to transact business for "financial reasons" and

"corporate profit," the cases cited by Defendants in their briefs are inapposite. *See* SHIP MOL at 16-17; BCLIC/WNIC MOL at 12; CNO MOL at 1-2.

Moreover, SHIP's reliance on *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F. 3d 190, 195 (2d Cir. 2008), for the proposition that the Receiver's allegations must impute facts to specific, named executives at the defendant corporate entities is wholly misplaced. Indeed, rather than impose the requirement suggested by SHIP, the Court in *Dynex* specifically stated *the opposite*:

> In most cases, the most straightforward way to raise such an inference for a corporate defendant will be to plead it for an individual defendant. *But it is possible to raise the required inference with regard to a corporate defendant without doing so with regard to a specific individual defendant.*

Id. at 195 (emphasis added). Here, much like the scenario that the *Dynex* Court discussed about the *Tellabs* case,[9] the orders directing Beechwood to unload the worthless securities back to PPCO Master Fund at the misrepresented prices "would have been approved by corporate officials [at the CNO and SHIP Defendants] sufficiently knowledgeable" that the securities at issue were worth less than par. *Id* at 196. Accordingly, the Complaint meets the particularity and scienter requirements without naming individuals at these corporate entities.

3. Issues of Fact Concerning Beechwood's Discretionary Authority Bar Dismissal

Defendants maintain that Beechwood had sole investment authority in the accounts for SHIP, BCLIC and WNIC and, as such, Receiver's securities fraud claim should fail. But since BCLIC/WNIC's own pleadings allege that they *directed* Beechwood to "unwind" these

[9] The *Dynex* Court discussed the facts in the *Tellabs* case upon its remand by the United States Supreme Court to the Seventh Circuit, in *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F. 3d 702, 708 (7th Cir.2008). *See Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., supra*, 531 F. 3d at 196.

transactions, which direction Beechwood carried out, there are now issues of fact as to whether or not Beechwood maintained discretionary authority – at least as it relates to the specific securities fraud transactions at issue in the Complaint. *See* BCLIC/WNIC Complaint (1:16-cv-07646, Dkt. No. 1). As such, it is Defendants' argument that fails.

Because the Complaint alleges that CNO, BCLIC, WNIC and SHIP directed Beechwood to sell certain loan instruments back to PPCO Master Fund, which was admitted by SHIP, BCLIC and WNIC in their pleadings, this contradicts the argument that only Beechwood had investment authority, at least as it relates to the Purchased securities transactions at issue.

At the very least, if there is an issue of fact as to this issue, a dispositive motion seeking to grant the claim must be denied. *Fustok v. Conticommodity Servs., Inc.*, 577 F. Supp. 852, 857 (S.D.N.Y. 1984). Accordingly, Defendants' motions to dismiss should be denied.

4. The Receiver's Securities Fraud Action is Timely

The Receiver's Section 10(b) claims are not barred by the two year-statute limitations period after the discovery. A reasonably diligent plaintiff does not "discover" the facts constituting securities fraud until the plaintiff can plead the facts "with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss." *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011). Here, a receiver was not appointed until December 19, 2016. Appointing an SEC receiver is a drastic measure reserved for instances where the receivership entities were dominated and controlled by wrongdoers. Since that was exactly the situation here, the statute of limitations should be tolled by the doctrines of adverse domination and equitable estoppel until, at the earliest, the time a receiver was appointed.

Under the adverse domination doctrine, when an entity is dominated and controlled by wrongdoers, the statute of limitations is tolled during that period because it cannot be expected that the wrongdoers, or those who collude with the wrongdoers, will bring their behavior before

the attention of the courts. *See Meridien Int'l Bank Ltd. v. Gov't of the Republic of Liberia*, 23 F. Supp. 2d 439, 447-448 (S.D.N.Y. 1998); and *Independent Trust v. Stewart Information Services Corp.*, 665 F.3d 930, 938 (7th Cir. 2012). Here, the Complaint alleges that SHIP, BCLIC, WNIC, CNO and Beechwood colluded with the Platinum insiders controlling PPCO Master Fund with respect to the misrepresentation of the value of the securities at issue, and that in reasonable reliance on that misrepresentation PPCO Master Fund was injured by being saddled with these inflated securities, which inhibited the PPCO Funds from acting on the need to timely wind down their business in an orderly fashion. As a result, the very wrongdoers whose actions led to the appointment of a receiver, Nordlicht and other insiders, "effectively dominated and controlled" the PPCO Funds.

Equitable estoppel should also apply here. "Equitable estoppel is another doctrine which tolls the statute of limitations when a party claiming to benefit from the statute . . . misrepresent (sic) the situation in such a manner that equity requires tolling of the statute." *Meridien*, *supra*, 23 F. Supp. 2d at 447. With respect to the federal securities fraud claims in the Complaint, equitable estoppel is demonstrated by showing that: "(1) [SHIP, together with BCLIC, WNIC, CNO, Beechwood and the Platinum Insiders controlling PPCO Master Fund] made a definite misrepresentation of fact, and had reason to believe that [PPCO Master Fund] would rely on it; and (2) [PPCO Master Fund] reasonably relied on that misrepresentation to [its] detriment." *Id.*

Thus, the two-year limitations period should run *after* December 19, 2016, *after* the Receiver had the opportunity to conduct an investigation and discovered facts to plead securities

fraud with particularity. Because the Receiver filed the Complaint on December 19, 2018, within two years of a receiver's appointment, the securities fraud claim is timely.[10]

The sole support cited by SHIP for its statute of limitations argument, *Gavin/Solmonese LLC v. D'Arnaud-Taylor*, 639 Fed. App'x 664 (2d Cir. 2016), is of no moment. First, *Gavin/Solmonese* is not instructive because the plaintiff in that case was a bankruptcy trustee and not, as here, an equity receiver, who was appointed to protect assets of the entity that, until the Receiver's appointment, had been dominated and controlled by wrongdoers actively hiding the true facts from discovery. As such, unlike in *Gavin/Solmonese*, until the Receiver's investigation commenced "the information alleged in the complaint and integral documents" were not known or freely available. *Id.* at 667. Moreover, the active concealment of the fraud by these wrongdoers hid any "storm warnings" that the then incapacitated corporate entity or any investor could have acted on if it was able to. *Id.* Regardless, SHIP's reliance on *Gavin/Solmonese* is misplaced because it is a Summary Order, and cannot be relied upon as precedent, as the face of the decision itself it clearly states: "RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT." *Id.* at 664 (emphasis in text).

5. Reliance Has Been Sufficiently Pled

The Complaint alleges, as set forth above, that the securities transactions at issue saddled PPCO Master Fund with securities that were priced at par, but were actually worth only a fraction of that amount, and that as a result, and in reliance upon the inflated value of the PPCO Funds' holdings, it failed to avail itself of a timely and orderly wind-down of its business.

[10] At a minimum, since the Complaint sufficiently pleads the wrongdoing of the Platinum insiders at the PPCO Fund, the Receiver is entitled to discovery and to avoid dismissal upon the instant motions: "Until the issues of domination and control, which are fact based, are more fully litigated, the statute of limitations must be deemed not to have expired." *Meridien*, 23 F. Supp. 2d at 447.

Before those transactions – indeed since the Purchased Securities were originally purchased from PPCO Master Fund – the Purchased Securities at issue had been held in the managed accounts for which Beechwood maintained discretionary authority (until it was directed to sell these securities back to PPCO Master Fund, as discussed *supra*). During this time period it was evident that these loan instruments were nonperforming. As the investment manager for these accounts, Beechwood knew this information. Accordingly, Beechwood fails in arguing that there can be no justifiable reliance because Nordlicht and Levy "had superior knowledge regarding information that would shed light on the 'true value' of the Purchased Securities…" Beechwood MOL at 20. When the securities transactions were consummated, Nordlicht had completely abdicated his fiduciary duties to the PPCO Funds and thus, PPCO Master Fund was compelled to accept the values Nordlicht and Beechwood ascribed to them. Also, the Complaint alleges that two of the PPCO Funds had independent directors who had nondelegable duties to stop any fraud, but failed to do so. Complaint ¶ 337. Clearly, they failed to do so because they accepted the Purchased Securities in reliance upon the misrepresented value.

Finally, Beechwood's reliance upon *Saltz v. First Froniter, L.P.*, 485 F. App'x 461, 465 (2d Cir. 2012) is misguided because there, the complaint did not allege any misrepresentations, implied or otherwise, as to certain defendants, and the court concluded: "Without making any allegations supporting reliance on a material misstatement or of an omission by one with a duty to speak, there can be no Section 10(b) liability." *Id.* But here, reliance upon the implied misrepresentations has been sufficiently pled against Beechwood, who was the investment advisor that actually executed the intentionally mispriced sales transactions at issue.

6. Control Person Liability Is Sufficiently Pled

The Fifth Claim for Relief sufficiently pleads violations of Section 20 of the Exchange Act. Specifically, the Complaint alleges that Defendants Feuer and Taylor were control persons of Beechwood and that CNO was a control person of BCLIC and WNIC.

Section 20(a) of the 1934 Act provides in relevant part as follows: "Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." The Second Circuit has held that "to establish a prima facie case" under § 20(a), "a plaintiff must show" a primary violation, control and "that the controlling person was 'in some meaningful sense [a] culpable participant[] in the fraud perpetrated by [the] controlled person[].'" *SEC v. First Jersey Securities, Inc.*, 101 F3d 1450, 1472–1473 (2d Cir. 1996), *quoting Lanza v. Drexel & Co*, 479 F.2d 1277, 1299 (2d Cir. 1973). Once a plaintiff makes out a prima facie case, "the burden shifts to the defendant to show that he acted in good faith, and that he did not directly or indirectly induce the act or acts constituting the violation." *Id.*

The Complaint alleges that "in BCLIC and WNIC's own words, 'Huberfeld and Nordlicht partnered and conspired with Defendants Moshe M. Feuer, Scott Taylor and David Levy to form a reinsurance company, Beechwood Re Ltd. . . . with the objective of entering into one or more reinsurance treaties with insurance companies, so that they could take control of reinsurance trust fund assets and use those assets to benefit Platinum, thereby enriching Platinum's and Beechwood's owners.'" BCLIC/ WNIC Complaint ¶ 5; Complaint ¶ 108. The Complaint continues: "The ownership in and ultimate control of Beechwood was held by

Nordlicht, Huberfeld, Bodner and Levy (in part through trusts), while Taylor, as President, and Feuer, as Chief Executive Officer, maintained ostensible and nominal management authority, with Levy." Complaint ¶ 110. Thus, Feuer and Taylor were the co-conspirators whose role it was to give the operation ostensible respectability as officers in the company. They were the front men. As such, they were culpable participants who had direct *or indirect* control over the operation. Accordingly, the claim has been sufficiently pled.

The Complaint also alleges that CNO directed the actions of BCLIC and WNIC, and further that each and every action taken by BCLIC and WNIC discussed in this Complaint was done in concert with, and at the direction of, CNO as a culpable participant. Complaint ¶¶ 128-134.[11] As such, CNO is liable as a control person. *See Elbit Systems, Ltd. v. Credit Suisse Group.*, 917 F. Supp. 2d 217, 228–29 (S.D.N.Y. 2013). "Whether a person is a 'controlling person' is a fact-intensive inquiry, and generally should not be resolved on a motion to dismiss." *Katz v. Image Innovations Holdings, Inc.*, 542 F.Supp.2d 269, 276 (S.D.N.Y.2008). Accordingly, § 20 control person liability for CNO also has been sufficiently pled.

E. THE COMPLAINT STATES A CLAIM FOR AIDING AND ABETTING BEACH OF FIDUCIARY DUTY

"A claim for aiding and abetting a breach of fiduciary duty requires, inter alia, that the defendant knowingly induced or participated in the breach." *In re Platinum-Beechwood Litig.*, 2019 WL 1570808, at *8 (S.D.N.Y. Apr. 11, 2019) (quoting *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014)).

As demonstrated below, the Complaint states a claim for aiding and abetting breach of

[11] The cited paragraphs from the Complaint expressly allege that CNO directly or indirectly controlled BCLIC and WNIC. Due to a scrivenor's error, the allegation is not included in the Fifth Claim for Relief, but it was obviously intended to be included. If necessary, the Complaint can be amended to include that allegation. *See* FRCP 15(a)(d).

fiduciary duty by alleging facts supporting each of these requirements:

- Nordlicht and PPCO Master Fund breached their fiduciary duties to the PPCO Funds by
    - causing PPCO Master Fund to enter into transactions including the PPCO Loan Transactions and Securities Purchases, which benefitted only Beechwood, the CNO Defendants, the SHIP Defendants and the PPVA Funds, to the detriment of the PPCO Funds (Complaint ¶¶ 221-58, 324);
    - causing PPCO Master Fund to make a temporary purchase of an interest in Black Elk in order to benefit the PPVA Funds, not the PPCO Funds (Complaint ¶ 324); and
    - systematically misrepresenting and overvaluing the PPCO Funds' net asset value in order to pay unearned management and professional fees to insiders (Complaint ¶¶ 3, 6, 19, 103, 184, 185, 324);
- each of the Moving Defendants had knowledge of, and substantially assisted in, those breaches (Complaint ¶¶ 177-220); and
- as result, the PPCO Funds sustained damages (Complaint ¶330).

1. <u>Rule 9(b) is Inapplicable to this Claim</u>

The Receiver's claims for aiding and abetting breach of fiduciary duty are only subject to the notice pleading standard under FRCP 8(a). *See Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 2003 WL 22218643, at *8 (S.D.N.Y. Sept. 25, 2003); *Official Comm. of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 2002 WL 362794, at *8 (S.D.N.Y. Mar. 6, 2002). Relying on *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014), the Beechwood Defendants argue that the Receiver's claim for aiding and abetting breach of fiduciary duty is subject to Rule 9(b). That is wrong.

Krys held that "[i]n asserting claims of fraud – including claims for aiding and abetting fraud or a breach of fiduciary duty that involves fraud – a complaint is required to plead the circumstances that allegedly constitute fraud 'with particularity.'" *Id.* Here, the Receiver's claim for aiding and abetting breach of fiduciary duty alleges that Nordlicht and PPCO Portfolio

Manager breached their duties of loyalty and good faith to the PPCO Funds by causing the PPCO Funds to enter into transactions that advantaged the Beechwood Defendants and the PPVA Funds and disadvantaged the PPCO Funds, and that the Defendants knowingly aided and abetted those breaches. Complaint ¶¶ 322-33. This claim does not depend on any party having committed fraud in order to succeed, and – other than the portion of the claim arising out of the "systematic misrepresentation and overvaluation of the PPCO Funds' net asset value" referred to in subpart (i) of paragraph 335 of the Complaint – this claim is not dependent on allegations of misrepresentations or omissions. Consequently, there is no need to comply with Rule 9(b). *See Levy v. Young Adult Institute*, 103 F. Supp.3d 426, 441-47 (S.D.N.Y. 2015) (analyzing whether Rule 9(b) applied to a claim for breach of fiduciary on a transaction by transaction basis). In any event, the Receiver's claim for aiding and abetting fiduciary duty meets the standards in Rules 8(a) and 9(b).

2. The Complaint Pleads the Underlying Breaches of Fiduciary Duty

"'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.'" *In re Platinum-Beechwood Litig.*, 2019 WL 1570808, at *8 (S.D.N.Y. Apr. 11, 2019) (quoting *Independent Asset Mgmt. LLC v. Zanger*, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008)). "Investment advisers, fund managers and others in control of investment funds … owe fiduciary duties to the funds, much as general partners owe fiduciary duties to limited partners" *In re Soundview Elite Ltd.*, 594 B.R. 108, 126-27 (Bankr. S.D.N.Y. 2018).

The Complaint sufficiently pleads the underlying breaches of fiduciary duty by alleging, *inter alia*, that Nordlicht and PPCO Portfolio Manager owed fiduciary duties of loyalty and good faith to the PPCO Funds, which required them to place the funds' interests before their own

while exercising due care in the decision-making process. Complaint ¶¶ 80, 171, 323. *In re Platinum-Beechwood Litig.*, 2019 WL 1570808, at *18 (S.D.N.Y. Apr. 11, 2019). And the Complaint specifically alleges that Nordlicht and PPCO Portfolio Manager disregarded their fiduciary duties to the PPCO Funds. Complaint ¶¶ 13, 80, 171, 323, 324.

While directing that the PPCO Loan Transactions be consummated, Nordlicht was "hopelessly conflicted" as CIO and equity holder in PPCO and PPVA and an active owner in Beechwood. Complaint ¶¶ 4, 57, 170, 171, 328. Further, in addition to taking actions for PPCO Portfolio Manager, Nordlicht took actions to assist the cash-thirsty PPVA Funds, regardless of their effect on the PPCO Funds. Complaint ¶¶ 100, 170, 324. These allegations sufficiently plead Nordlicht's and PPCO Portfolio Manager's underlying breaches of fiduciary duty to the PPCO Funds.

3. The Complaint Pleads "Substantial Assistance" by Each Moving Defendant

The Complaint also sufficiently pleads that each Moving Defendant substantially assisted Nordlicht in breaching his fiduciary duties. To plead "substantial assistance," a plaintiff must allege facts "sufficient to show that [the defendant] knowingly provided substantial assistance to [the breaching party] by 'affirmatively assist[ing], help[ing], conceal[ing] or fail[ing] to act when required to do so, thereby enabling the breach to occur.'" *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 142 (2d Cir. 2011) (citation omitted).

The Receiver specifically details the substantial assistance provided to Nordlicht by (i) the Beechwood Defendants (Complaint Sections VI.F.1 and G), (ii) the CNO Defendants (Complaint Sections VI.F.2 and G), and (iii) the SHIP Defendants (Complaint Sections VI.F.3 and G):

- In Section VI.F.1 and G of the Complaint, the Receiver details how the Beechwood Defendants structured, negotiated and implemented several

transactions to facilitate Nordlicht's wrongdoing at a time when they knew Nordlicht had completely abdicated his fiduciary duties to the PPCO Funds. Indeed, the Complaint explains how the Beechwood Defendants, led by Levy, working together with the Platinum Funds, led by Nordlicht, systematically utilized the funds infused by the insurers for transactions consummated at inflated valuations in order to allow Nordlicht to continue to pay himself millions of dollars through management and incentive fees "earned" by PPCO Portfolio Manager.

- In Sections VI.F.2., 3 and G of the Complaint, the Receiver details how the CNO and SHIP Defendants, through Beechwood,[12] negotiated, structured and consummated the fraudulent conveyance transactions in or about late December 2015 and early 2016 with Nordlicht, knowing, from his title alone, that he owed fiduciary duties to the PPCO Funds yet was compelling their entrance into a series of transactions which was never intended to, and did not, benefit them.

- The Complaint details how the SHIP Defendants actively negotiated and consummated the SHIP Note and its related agreements, many of which SHIP was a direct party to, by, *inter alia*:

    - specifying the two loans that PPCO Master Fund would be compelled to assume;

    - negotiating the SHIP Note "loan amount," which PPCO Master Fund would pay back to SHIP in consideration for assigning the loans;

    - negotiating the terms and conditions of the December 2015 Security Agreement;

    - negotiating the terms and conditions of the SHIP Note;

    - negotiating the MSA Subsidiary Guarantee, including the entities comprising the MSA PPCO Subsidiaries; and

    - working with Beechwood and the PPCO Funds to close the sale of the

[12] Amongst the Beechwood Defendants which participated in these transactions were: (i) BAM Administrative by serving as administrative agent for the benefit of the CNO and SHIP Defendants and structuring and executing numerous agreements as agent (Complaint ¶¶ 202, 224, 226, 228, 230, 233, 236, 240, 241, 244, 246, 247, 344); (ii) BAM I by serving as "asset manager" for the Beechwood Reinsurance Trusts (Complaint ¶ 148) which were parties to the fraudulent transactions (Complaint ¶¶ 165, 246); (iii) BBIL by serving as asset manager for SHIP (Complaint ¶ 165) and receiving some of the proceeds from the SHIP Note (Complaint ¶ 230) and (iv) Beechwood Re by serving as asset manager under the BRe IMA and receiving proceeds from the SHIP Note (Complaint ¶¶ 230, 231). Funds were round-tripped through various Beechwood entities, including, *inter alia*, BBIL and Beechwood Bermuda Investment Holdings, Ltd. (Complaint ¶ 246).

SHIP Note and related agreements. Complaint ¶¶ 221-39.

- The SHIP Defendants took the foregoing actions knowing that Nordlicht had completely abdicated his fiduciary duties to the PPCO Funds by compelling their entry into a transaction which was never intended to, and did not, benefit them. Complaint ¶ 220.[13]

- The Complaint details how the SHIP and CNO Defendants actively negotiated and consummated the March NPA and its related agreements (including, for example, the March NPA Notes, the Amended Security Agreement and the NPA Guaranty), to which many of which SHIP and the BCLIC/WNIC Trusts, of which BCLIC and WNIC were the sole beneficiaries, were parties, by, *inter alia*:

    - specifying that PPCO Master Fund would be compelled to assume the Northstar Indenture Debt;

    - negotiating the aggregate amounts to be "loaned" by them under the March NPA;

    - negotiating each of the March NPA Notes;

    - negotiating the terms and conditions of the Amended Security Agreement;

    - negotiating the Northstar Debt Assignment Agreement; negotiating the NPA Guaranty, including the entities comprising the NPA Guarantors; and

    - working with Beechwood and Nordlicht to close the sale of the March NPA. Complaint ¶¶ 240-254.

- The SHIP and CNO Defendants took the foregoing actions knowing Nordlicht had completely abdicated his fiduciary duties to the PPCO Funds by compelling their entry into a transaction which was never intended to, and did not, benefit them. Complaint ¶ 256.

While BCLIC/WNIC assert that *Sharp International Corp. v. State Street Bank & Trust Co.*, 403 F.3d 43 (2d Cir. 2005) and *Chemtex, LLC v. St. Anthony Enterprises, Inc.*, 490 F. Supp.2d 536 (S.D.N.Y. 2007) support a holding that they did not aid and abet Nordlicht's breaches of his fiduciary duty, those cases are inapposite.

[13] Fuzion advised SHIP in the transactions at issue and provided SHIP with all of its employees. Complaint ¶ 7, 11. It also administered the BCLIC and WNIC long term care policies ceded under the reinsurance agreements. Complaint ¶ 149.

Unlike in *Sharp*, in which the plaintiff did not even allege that the defendant provided any direct assistance to the fraudsters, the Complaint here alleges that, at a time when the CNO Defendants knew of the Platinum/Beechwood relationship and knew of Nordlicht's duty to the PPCO Funds, the CNO Defendants actively negotiated, structured and consummated fraudulent transactions which only served their interests and not those of the PPCO Funds. In doing so, they knew that Nordlicht was breaching his fiduciary duties to the PPCO Funds and thereby assisted him in breaching such duties. Also unlike the lender in *Sharp*, the CNO Defendants did more than merely arrange to get themselves repaid on a debt – they actively took advantage of Nordlicht's conflicts of interest to cause PPCO Master Fund to enter into transactions with the BCLIC/WNIC Trusts, of which BCLIC and WNIC were the sole beneficiaries, that deprived the PPCO Funds and their subsidiaries of tens of millions of dollars of value and stymied distributions to creditors of the receivership estate.

BCLIC/WNIC's reliance on *Chemtex* is also misplaced. Unlike the present case, *Chemtex* involved summary judgment (not a motion to dismiss) in favor of a lender on a claim for aiding and abetting fraudulent conveyance where the plaintiff failed to "come forward with evidence that [the lender] had actual knowledge of any alleged [wrongdoing]" and the court addressed the lender's "inaction." 490 F. Supp. 2d at 546-47. As set forth above, the Complaint alleges that the CNO Defendants knew of the Platinum/Beechwood relationship and Nordlicht's duties to the PPCO Funds, yet actively negotiated, structured and consummated fraudulent transactions which provided no benefit to the PPCO Funds and enabled the BCLIC/WNIC Trusts to take tens of millions of dollars of value from them. By doing so, they assisted Nordlicht in breaching such duties.

4. The Complaint Alleges that Each of the Moving Defendants Had "Actual Knowledge" of the Breaches of Fiduciary Duty

As this Court has explained:

> "A claim for aiding and abetting a breach of fiduciary duty requires, *inter alia*, that the defendant knowingly induced or participated in the breach…. Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty."

In re Platinum-Beechwood Litig., 2019 WL 1570808, at *8 (S.D.N.Y. Apr. 11, 2019) (quoting *Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2002)).

Actual knowledge may be pled and proven through circumstantial evidence. *Silvercreek Mgt., Inc. v. Citigroup, Inc.*, 346 F. Supp. 3d 473, 487 (S.D.N.Y. 2018); *People ex rel. Cuomo v. Coventry First LLC*, 52 A.D.3d 345, 346 (1st Dep't 2008), *aff'd*, 13 NY3d 108 (2009). Further, even if Rule 9(b) applied – which it does not – Rule 9(b) expressly provides that "knowledge … may be alleged generally."

Here, the Complaint pleads that each of the Moving Defendants had actual knowledge of Nordlicht's and PPCO Portfolio Manager's hopeless conflicts of interest and breaches of fiduciary duty by pleading that Nordlicht's and his cohorts divided loyalties were facially obvious, making it impossible for the Moving Defendants to avoid knowing they were aiding and abetting a breach of their duties. Complaint ¶ 328.

(a) The CNO and SHIP Defendants

The Complaint establishes "actual knowledge" by each of the Moving Defendants by establishing that the time of the PPCO Loan Transactions, the CNO and SHIP Defendants (i) knew of the fraud being perpetrated by Platinum, through Beechwood and (ii) knew Nordlicht both owned interests in Platinum and Beechwood while serving in a management capacity at various Platinum entities yet consummated a series of fraudulent transactions with PPCO Master

Fund by which Nordlicht openly failed to fulfill his fiduciary duties to PPCO Master Fund by compelling the fund to assume near worthless debt in consideration for almost $70 million. Complaint ¶ 196-207, 208-13, 219-20, 221-58, 328-29. Consequently, the CNO and SHIP Defendants negotiated, structured and consummated the PPCO Loan Transactions with Nordlicht knowing that Nordlicht was willing to violate his duties of loyalty and good faith to the PPCO Funds in order to facilitate the CNO and SHIP Defendants' goals. Complaint ¶ 196-207, 208-13, 219-20, 221-58, 328-29.

(b) The Beechwood Defendants

The Complaint also adequately pleads that the Beechwood Defendants had "actual knowledge" of the breaches of fiduciary duty by setting forth facts that the Beechwood Defendants took certain actions "[k]nowing full well that … Nordlicht and Levy were breaching their fiduciary duties." Complaint ¶ 179. Because "[t]he ownership in and ultimate control of Beechwood was held by Nordlicht, Huberfeld, Bodner and Levy (in part through trusts), while Taylor, as President, and Feuer, as Chief Executive Officer, maintained ostensible and nominal management authority, with Levy," "Beechwood's management team was largely comprised of personnel employed by or otherwise connected to the Platinum Funds." Complaint ¶¶ 110-112.

Beechwood was ostensibly owned and controlled by Platinum insiders yet entered into countless transactions with Platinum, none of which could even facially be arms-length. Specifically, in the PPCO Loan Transactions and Securities Purchases, the Beechwood Defendants (controlled by Nordlicht, Huberfeld, Bodner, Levy, Taylor and Feuer) had "actual knowledge" that Nordlicht and PPCO Portfolio Manager were breaching their fiduciary duties to the PPCO Funds because these transactions were not consummated to provide any benefit to PPCO Master Fund.

Thus, the Complaint pleads the Moving Defendants' "substantial assistance" and

"knowing[] participat[ion] in [the] breach[es]" of fiduciary duty, as well as in the underlying fraud consistent with both the low bar under Rule 8(a) and the relaxed pleading standards applicable to the Receiver under Rule 9(b). *See Johnson*; *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 517-18 (S.D.N.Y. 2011). Consequently, the Complaint states a claim for aiding and abetting breach of fiduciary duty against each of the Moving Defendants. To the extent the Court determines that it does not due to a deficiency in pleading, the Receiver seeks leave to amend this claim.

F. AIDING AND ABETTING FRAUD IS SUFFICIENTLY PLED

"To establish liability for aiding and abetting fraud under New York law, the plaintiffs must show (1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *In re Platinum-Beechwood Litig.*, 2019 WL 1570808, at *9 (S.D.N.Y. Apr. 11, 2019) (quoting *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014)).

The Complaint states a claim for aiding and abetting fraud against each of the Moving Defendants by alleging each of these three elements.

First, the Complaint alleges fraud in that Nordlicht systematically misrepresented and overvalued the PPCO Funds' net asset value for the purposes of, *inter alia*, allowing PPCO Portfolio Manager to charge ever increasing management fees. Only Beechwood disputes that this element is satisfied, arguing that reliance on misrepresentations is not pled, and, because Nordlicht's knowledge is imputed to the PPCO Funds, the PPCO Funds could not have justifiably relied on any misrepresentations. However, in light of the relaxed pleading standards applicable to the Receiver, the underlying fraud is adequately pled. For example, investors in the PPCO Funds and the independent directors of PPCO Fund International and PPCO Fund International A presumably relied on Nordlicht's misrepresentations in financial statements.

Complaint ¶ 90(iv) ("[i]f the independent directors had detected any fraud they would have had a nondelegable duty to stop that fraud by, among other things, reporting that fraud to the proper regulatory and/or governmental authorities."). Moreover, for the reasons set forth in Section III.B above, Nordlicht's state of mind is not imputed to the PPCO Funds.

Second, the Complaint sufficiently alleges "substantial assistance" in the fraud by each of the Moving Defendants. The Receiver specifically details the substantial assistance provided to Nordlicht by (i) the Beechwood Defendants (Complaint Section VI.F.1), (ii) the CNO Defendants (Complaint Section VI.F.2), and (iii) the SHIP Defendants (Complaint Section VI.F.3):

- In Section VI.F.1 of the Receiver details how the Beechwood Defendants structured, negotiated and implemented several transactions[14] to facilitate the Platinum/ Beechwood fraud at a time when they were well aware that fraud was afoot. Indeed, the Complaint explains how the Beechwood Defendants, led by Levy, working together with the Platinum Funds, led by Nordlicht, systematically utilized the funds infused by the insurers to prop up the Platinum Funds and their portfolio companies through a combination of debt and equity transactions, substantially all of which were consummated at inflated valuations in order to allow Nordlicht to continue to pay himself millions of dollars through management and incentive fees "earned" by PPCO Portfolio Manager.[15]

- The SHIP Defendants took the foregoing actions knowing Nordlicht compelled

[14] Amongst the Beechwood Defendants which participated in these transactions were: (i) BAM Administrative by serving as administrative agent for the benefit of the CNO and SHIP Defendants and structuring and executing numerous agreements as agent (Complaint ¶¶ 202, 224, 226, 228, 230, 233, 236, 240, 241, 244, 246, 247, 344); (ii) BAM I by serving as "asset manager" for the Beechwood Reinsurance Trusts (Complaint ¶ 148) which were parties to the fraudulent transactions (Complaint ¶¶ 165, 246); (iii) BBIL by serving as asset manager for SHIP (Complaint ¶ 165) and receiving some of the proceeds from the SHIP Note (Complaint ¶ 230) and (iv) Beechwood Re by serving as asset manager under the BRe IMA and receiving proceeds from the SHIP Note (Complaint ¶¶ 230, 231).

[15] As senior managers of the Beechwood Defendants, Feuer and Taylor had the power to, and did, direct the actions of, the Beechwood Defendants (Complaint, ¶¶ 320) and in doing so, directly assisted Nordlicht to engage in each of these transactions which served to prop up the PPVA Funds and the PPCO Funds to facilitate PPCO Portfolio Manager in charging unearned management fees based on over-valued assets (Complaint ¶¶ 110, 173 and 264) and thereby assisted Nordlicht in breaching his fiduciary duties to the PPCO Funds. Complaint ¶ 173.

the PPCO Funds into transactions which was never intended to, and did not, benefit them. Complaint ¶ 220.[16]

- The Complaint details how the SHIP and CNO Defendants actively negotiated and consummated the March NPA and its related agreements (including, for example, the March NPA Notes, the Amended Security Agreement and the NPA Guaranty) by, *inter alia*:
  - specifying that PPCO Master Fund would be compelled to assume the Northstar Indenture Debt;
  - negotiating the aggregate amounts to be "loaned" by them under the March NPA;
  - negotiating each of the March NPA Notes;
  - negotiating the terms and conditions of the Amended Security Agreement;
  - negotiating the Northstar Debt Assignment Agreement; negotiating the NPA Guaranty, including the entities comprising the NPA Guarantors; and
  - working with Beechwood and Nordlicht to close the sale of the March NPA. Complaint ¶¶ 240-254.
- The SHIP and CNO Defendants took the foregoing actions knowing Nordlicht compelled the PPCO Funds into transactions which was never intended to, and did not, benefit them. Complaint ¶ 256.

Third, the Complaint sufficiently alleges facts giving rise to an inference of "actual knowledge" of the acts of fraud on the part of each of the Moving Defendants, including the fact that Nordlicht and PPCO Portfolio Manager were obviously causing the PPCO Funds to enter into transactions that were contrary to their interests. Complaint ¶ 196-207, 208-13, 219-20, 329.

G. THE RECEIVER'S FRAUDULENT CONVEYANCE CLAIMS SHOULD BE SUSTAINED

The Receiver's Thirteenth through Seventeenth Claims for Relief seek avoidance of obligations, liens and transfers made in connection with the PPCO Loan Transactions against BAM Administrative, SHIP, the BCLIC/WNIC Trusts, BCLIC and WNIC under NYDCL §§

[16] Fuzion advised SHIP in the transactions at issue and provided SHIP with all of its employees. Complaint ¶ 7, 11.

273, 274 - 278. Only BCLIC and WNIC seek dismissal of these claims.

Avoidance of the PPCO Loan Transactions against BCLIC and WNIC is adequately alleged under NYDCL §§ 273, 274, 275 and 277 because the Complaint provides that PPCO Master Fund did not receive "fair consideration" for pledging liens on substantially all of their assets.[17] The other requirements of NYDCL §§ 273-275 and 277 are satisfied as well.[18] Avoidance of the PPCO Loan Transactions is also proper under NYDCL § 276 because PPCO Master Fund entered into them with the intent to hinder, delay and defraud its present and/or future creditors.[19]

Avoidance of the PPCO Loan Transactions is also proper under NYDCL § 278, because: (a) the BCLIC/WNIC Trusts were established "for the sole use and benefit of [BCLIC or WNIC]" (Dkt. No. 170-11, p. 2, § 2.1(a); Dkt. No. 170-12, p. 2, § 2.1(a)), who actively

[17] PPCO Master Fund "purchased" assets from SHIP and the four BCLIC/WNIC Trusts for more than their fair market value, and to do so incurred $69.1 million in loan obligations to them guaranteed by the NPA Guarantors and the MSA PPCO Subsidiaries.

[18] BCLIC and WNIC do not dispute, for purposes of the BCLIC/WNIC Motions, that the BCLIC/WNIC Trusts did not give "fair consideration" to the PPCO Funds, or that the other requirements of Sections 273-75 and 277 are met.

[19] Paragraph 350 of the Complaint, which is part of the Ninth Claim for Relief, expressly alleges that PPCO Master Fund entered into several of the transactions comprised by the PPCO Loan Transactions and Securities Purchase with the intent to hinder, delay and defraud. Due to a scrivener's error, that allegation is not included in the Fourteenth Claim for Relief, but it was obviously intended to be included. To the extent necessary, the Complaint can be amended to include such an allegation. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

Nevertheless, BCLIC and WNIC assert, without any legal authority, that this "deficiency" cannot be cured because, according to BCLIC and WNIC, the initial transferees themselves – the BCLIC/WNIC Trusts – must have had fraudulent intent for the Complaint to state a claim under NYDCL § 276. BCLIC/WNIC MOL at 24. There is no basis for that assertion. *See HBE Leasing Corp. v. Frank*, 61 F.3d 1054, 1059 n. 5 (2d Cir. 1995) ("to prove actual fraud under § 276, a creditor must show intent to defraud on the part of the *transferor*") (emphasis added).

participated in those conveyances,[20] and (b) BCLIC and WNIC were subsequent transferees of the assets, rights, liens, or proceeds transferred. *See Amusement Indus., Inc. v. Midland Ave. Assocs., LLC*, 820 F. Supp. 2d 510, 533 (S.D.N.Y. 2011) (defendant that assisted in fraudulent transfer and was either a transferee or a beneficiary of the transfer may be sued for fraudulent conveyance).

BCLIC and WNIC seek dismissal of the Receiver's claims on three grounds: (1) they were "purchaser[s] for fair consideration without knowledge of the fraud at the time of the purchase" in that they were secured creditors, repossessing assets from the BCLIC/WNIC Trusts to satisfy an antecedent debt; (2) the Receiver lacks standing to avoid transfers made by the NPA Guarantors and the MSA PPCO Subsidiaries because she is not their creditor; and (3) the Receiver's claim under NYDCL § 277 should be dismissed because BCLIC and WNIC are not partners of any alleged transferor entity. BCLIC/WNIC MOL at 19-25. None of those grounds withstands scrutiny.

1. NYDCL § 278(1) Does Not Immunize BCLIC and WNIC

(a) Relief Against BCLIC and WNIC Is Proper Because BCLIC and WNIC Were Sole Beneficiaries of the BCLIC/WNIC Trusts and Active Participants in the Fraudulent Conveyances

BCLIC and WNIC argue that they are "immunized" from liability under NYDCL § 278(1) because, "[w]hile the Receiver may (or may not) have claims against Beechwood that Beechwood did not give 'fair consideration' to PPCO Master Fund for any specific transaction engineered by the fraudsters, BCLIC and WNIC, as subsequent transferees for value, cannot be liable for those transfers." BCLIC MOL at 19-20. Thus, BCLIC and WNIC must show, as a matter of law, that they are "purchaser[s] *for fair consideration without knowledge of the fraud at*

[20] Complaint ¶¶ 42, 43, 45, 224, 238, 240, 378, 385, 394, 402, 412, 379, 386, 395, 403.

the time of the purchase." NYDCL § 278(1) (emphasis added)

However, BCLIC and WNIC cannot meet this standard at this stage because accepting the Complaint's salient allegations as true, they demonstrate that not only were they the sole beneficiaries of numerous conveyances made to the BCLIC/WNIC Trusts in the PPCO Loan Transactions, but they actively participated in those conveyances. Complaint ¶¶ 42-45; Dkt. No. 170-11, p. 2, § 2.1(a); Dkt. No. 170-12, p. 2, § 2.1(a). Because they actively participated in the transactions, and because neither they nor the BCLIC/WNIC Trusts gave reasonably equivalent value in those transactions, the PPCO Funds are entitled to have those conveyances set aside as to BCLIC and WNIC, and recover money damages from them for fraudulent transfer. *Kim v. Ji Sung Yoo*, 311 F. Supp. 3d 598, 613 (S.D.N.Y. 2018), *aff'd sub nom. Tae H. Kim v. Ji Sung Yoo*, 2019 WL 2337018 (2d Cir. June 3, 2019) citing *Cadle Co. v. Newhouse*, 74 Fed. App'x 152, 153 (2d Cir. 2003); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1172 (2d Cir. 1993); *RTC Mortg. Tr. 1995 S/N1 v. Sopher*, 31 F. App'x 37, 38 (2d Cir. 2002).

Notably, BCLIC and WNIC's own cases, *Shefner v. Beraudiere*, 127 A.D.3d 442, 5 N.Y.S.3d 100, 101-02 (1st Dep't 2015), and *BBCN Bank v. 12th Ave. Restaurant Group Inc.*, 150 A.D.3d 623, 624, 55 N.Y.3d 225 (1st Dep't 2017), accept that dismissal is inappropriate where the subsequent transferee was a participant in the transfers. *See also Fed. Nat. Mortg Ass'n v. Olympia Mortgage Corp.*, 2006 WL 2802092 at *10 (E.D.N.Y. Sept. 28, 2006). In these circumstances, the subsequent transfers cannot be isolated from the initial transfers as BCLIC and WNIC would have this Court do.

To the contrary, the transfer between the BCLIC/WNIC Trusts and BCLIC and WNIC must be viewed as but one step in a multi-step transaction, in which fraudulent transfers were made from PPCO Master Fund to or for the benefit of BCLIC and WNIC. *Orr v. Kinderhill*

Corp., 991 F.2d 31, 35 (2d Cir.1993) ("We will not turn a blind eye to the reality that [two conveyances] constituted a single integrated transaction."). Indeed, courts will "collapse" a series of transactions when it is demonstrated that: (i) "the consideration received from the first transferee [is] reconveyed by the debtor for less than fair consideration or with an actual intent to defraud creditors;" and (ii) that the initial transferees "have actual or constructive knowledge of the entire scheme that renders [the] exchange with the debtor fraudulent." *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995)*; accord In re Best Prods. Co., Inc.*, 168 B.R. 35, 56–57 (Bankr. S.D.N.Y. 1994) (courts frequently examine the defendant's knowledge "of the structure of the entire transaction and ... whether its components were part of a single scheme") (internal quotation marks and citation omitted); *see also Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley Co.*, 284 B.R. 355, 370 (Bankr. S.D.N.Y. 2002). Here, the Complaint alleges that BCLIC and WNIC played integral roles in the fraud, with actual knowledge and purposeful intent, and directed the BCLIC/WNIC Trusts' participation in the fraudulent transactions because they were the sole beneficiaries of the assets in the BCLIC/WNIC Trusts.[21] As such, they became effective transferees under the PPCO Loan Transactions and Securities Purchases.

Similarly, the issues of "fair equivalen[cy]" between the consideration given by PPCO Master Fund and any consideration given by BCLIC and WNIC, and whether BCLIC and WNIC were acting in "good faith" (each of which are required for "fair consideration") also raise issues of fact that cannot be decided in BCLIC and WNIC's favor on their motion. *In re Actrade Fin. Techs. Ltd.*, 337 B.R. 791, 803 (Bankr. S.D.N.Y. 2005) ("Whether fair consideration has been

[21] Actual knowledge exists where "initial transferor was intimately involved in the formulation or implementation of the plan by which the proceeds of the loan were channeled to the third-party." *Sunbeam*, 284 B.R. at 370; *accord United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1303 n. 8 (3d Cir.1986); *Lippi v. City Bank*, 955 F.2d 599, 610 (9th Cir. 1992).

given in any circumstance is fact-driven, and not subject to any mathematical formula."). Thus, BCLIC's and WNIC's assertion that "when they recaptured the Trust assets, they also recaptured all policy holder liabilities (thus relieving Beechwood of the obligations to pay policyholder claims)," (BCLIC/WNIC MOL at 20), is not only legally irrelevant as to whether the earlier transfer can be recovered from BCLIC and WNIC, but, even if it were relevant, it would raise issues of fact to whether BCLIC and WNIC gave a "fair equivalent" for the value they received, and whether they acted in "good faith" that cannot be resolved on their motion.

The authorities that BCLIC and WNIC rely on involving secured lenders or factors are inapposite because those secured lender and factors were not themselves beneficiaries of the trusts that received the initial transfers, and did not actively participate in the initial transfers. Indeed, in *Chemtex*, 490 F. Supp. 2d at 544, 545, which was decided on a motion for summary judgment, a factor exercised rights under a factoring agreement by selling off its client's inventory and taking cash collateral to reduce its client's debt, with no knowledge of the plaintiff unsecured creditor's existence. Unsurprisingly, the court held that the factor came within the "special protective carve-out for innocent purchasers for value under the New York statute." 490 F. Supp. 2d at 544. By contrast here, BCLIC and WNIC were not "innocent purchasers" because they were the sole beneficiaries of the trusts that received the initial transfers from the Debtors for less than "fair consideration," and were knowing and active participants in causing those transfers.

Untramar Energy Ltd. v. Chase Manhattan Bank, N.A., 191 A.D.2d 86, 91 (1st Dep't 1993), is inapplicable because it merely held that an insolvent debtor "may properly assign asset to a creditor as security or an antecedent debt although the effect of the transfer will be to prefer that creditor." Here, BCLIC's and WNIC's involvement in the PPCO Loan Transactions and

Securities Purchases take this case outside of that rule. *MacDraw, Inc. v. The CIT Group Equipment Financing, Inc.*, 157 F.3d 956, 964 (2d Cir. 1998), is similarly inapposite because it addressed an unjust enrichment claim, not a fraudulent conveyance claim, and the court merely quoted the same language from *Ultramar Energy Ltd.* addressed above.

Sharp International Corp. v. State Street Bank & Trust Co., 403 F.3d 43 (2d Cir. 2005), is also not on point. There, a secured lender that was still owed $12.25 million of a $20 million demand line of credit, secured by the borrower's overstated assets, correctly suspected fraud at the borrower and demanded repayment. *Id.* at 47-48. The borrower fraudulently raised an additional $17.5 million from other existing noteholders so as to repay the $12.25 million owed to State Street. *Id.* at 48. The Second Circuit affirmed the dismissal of the constructive fraudulent conveyance claim asserted by borrower's trustee in bankruptcy because, unlike the Receiver here, the *Sharp* plaintiff failed to allege a lack of fair consideration. It also upheld dismissal of the actual fraudulent conveyance claim because, unlike here, the actual transaction it sought to avoid – the payment to the lender – did not "hinder, delay or defraud, either present or future creditors." *Id.* at 56-57. Instead, the fraud alleged in the complaint "relate[d] to the manner in which Sharp obtained new funding from the Noteholders, not [the borrower's] subsequent payment of part of the proceeds to [the lender]." *Id.* at 56. That is different from the instant action because the PPCO Loan Transactions and Securities Purchases did "hinder, delay or defraud," present and future creditors.

Moreover, *Sharp* does not stand for the proposition that a transfer made with fraudulent intent cannot be avoided if it was made "on account of antecedent debt," as BCLIC and WNIC contend. To the contrary, *Sharp* reiterates that "where actual intent to defraud creditors is proven, the conveyance will be set aside regardless of the adequacy of consideration given."

Sharp, 403 F.3d at 56 (*citing U.S. v. McCombs*, 30 F.3d 310, 328 (2d Cir. 1994)). Here, the Receiver has alleged that BCLIC and WNIC knew of the fraud at the time the transfers to the BCLIC/WNIC Trusts were made. These allegations of knowledge of the fraud at the time of the transfer further remove the instant matter from the purview of the rule articulated in *Sharp*.

(b) The Receiver May Recover Funds Subsequently Transferred to BCLIC and WNIC

New York law also allows the Receiver to assert fraudulent conveyance claims against BCLIC and WNIC as subsequent transferees of the millions of dollars the BCLIC/WNIC Trusts were paid under the PPCO Loan Transactions. *See Farm Stores, Inc. v. Sch. Feeding Corp.*, 102 A.D.2d 249, 255, 477 N.Y.S.2d 374 (2d Dep't 1984) ("each transferee ... is liable to the creditor to the extent of the value of the money or property he or she wrongfully received."); *RTC Mortg. Tr. 1995-S/N1 v. Sopher*, 171 F. Supp. 2d 192, 201 (S.D.N.Y. 2001) (plaintiff may recover money damages against parties who participate in the fraudulent transfer and are either transferees of the assets or beneficiaries of the conveyance).

In determining whether a claim to recover fraudulent transfers from a subsequent transferee is adequately pled, this Court need only apply Rule 8 analysis. *In re Bernard L. Madoff Inv. Securities, LLC*, 440 B.R. 243, 269 (Bankr. S.D.N.Y. 2010) (citation omitted). Thus, the Receiver must provide only a "short and plain statement of the claim showing that [she] is entitled to relief." FRCP 8(a)(2). This is to ensure that defendant receives "fair notice of what the … claim is and the grounds upon which it rests." *In re Bernard L. Madoff Inv. Securities, LLC, 440 B.R. at 269* (*citing In re Henderson*, 423 B.R. 598 (Bankr. N.D.N.Y. 2010) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S.Ct. 1955 (2007)) (internal quotations omitted)).

The Complaint satisfies Rule 8 by providing "fair notice" to BCLIC and WNIC of the

transfer sought to be recovered and the subsequent transfers thereafter sought to be recovered. Complaint ¶¶ 240, 246(i)-(v). It also alleges that in late 2016, BCLIC and WNIC recaptured the BCLIC/WNIC Trusts' assets, which included portions of the sale of PPCO Master Fund's loan obligations. Complaint ¶ 257 (*citing* WNIC's and BCLIC's Proof of Claim in Receivership dated March 28, 2019 at ¶ 10). Indeed, BCLIC and WNIC have conceded this fact. *See, e.g.*, BCLIC/WNIC MOL at p. 20 ("WNIC and BCLIC came into possession of the disputed assets only when they recaptured the assets from the Trusts …"). Moreover, the Receiver alleges that any assets held in the BCLIC/ WNIC Trusts solely belonged to BCLIC and WNIC, which could demand a transfer of those assets at any time. Complaint ¶¶ 42-45.

The Complaint thus "adequately apprises" BCLIC and WNIC, the alleged recipients of the transfers, of "which transactions are claimed to be fraudulent and why, when they took place, how they were executed and by whom." *Sec. Inv. Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 318 (Bankr. S.D.N.Y. 1999); *see also Silverman v. K.E.R.U. Realty Corp. (In re Allou Distributors, Inc.)*, 379 B.R. 5, 30-31 (Bankr. E.D.N.Y. 2007).

2. The Receiver Has Standing to Assert Fraudulent Transfer Claims to Avoid Obligations and Liens Against the NPA Guarantors and the MSA PPCO Subsidiaries

BCLIC and WNIC incorrectly argue that the Receiver lacks standing to assert NYDCL claims because (i) only a receiver for a creditor of the transferor, not a receiver for the transferor, may bring such claims and (ii) the Receiver is not a receiver for a creditor of the NPA Guarantors and the MSA PPCO Subsidiaries. BCLIC and WNIC are wrong for three reasons.

First, BCLIC and WNIC neglect to mention that the Complaint specifically states that the Receiver brings the fraudulent transfer claims directly on behalf of creditors of the transferor.[22]

[22] Complaint ¶ 15 ("Defendants' actions damaged not only PPCO Master Fund but also the PPCO Feeder Funds, and the PPCO Blocker Fund, each of which is a creditor of PPCO Master

Consequently, the Receiver has standing under the NYDCL to bring fraudulent conveyance claims on behalf of the PPCO Feeder Funds and the PPCO Blocker Fund, each of which is a creditor of the transferor, PPCO Master Fund.

Second, in these circumstances, a receiver may act on behalf of a transferor. This is permitted, ironically, by the very case on which BCLIC and WNIC rely: *Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008). *Eberhard* establishes that under New York law, when transfers are made by a corporation that is dominated by the wrongdoer (such as here), a receiver appointed to recover assets for the receivership entity – rather than for a wrongdoer who manipulated the dominated entity – has standing to bring claims on the corporation's behalf. *See Eberhard*, 530 F.3d at 132-34.

In *Eberhard*, the receiver represented only the transferor of assets, that is, the individual who allegedly engaged in fraudulent conveyances. The Second Circuit held that the receiver lacked standing to bring fraudulent conveyance claims on the individual's behalf because it would allow him to avoid the consequences of his actions. *Eberhard*, however, relied on, in part, the Seventh Circuit's opinion in *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995).[23] *See Eberhard*, 530 F.3d at 132-34. The Second Circuit expressly endorsed the Seventh Circuit's analysis in *Scholes*, in stating that when transfers are made by corporations that are completely

---

Fund."); ¶ 74 ("PPCO Blocker Fund is a creditor of PPCO Master Fund in that it holds claims for unpaid redemptions in the amount of $17,596,800.61."); ¶ 75 ("The PPCO Feeder Funds, through PPCO Blocker Fund, are also creditors of PPCO Master Fund because (i) they hold claims for unpaid redemptions in the amount of $17,596,800.61 against it and (ii) PPCO Master Fund's portfolio manager breached its fiduciary duty to those entities."); Eighth through Seventeenth Claims for Relief (each of which specifically states that the claim is asserted by the Receiver by and for (i) PPCO Master Fund, (ii) the PPCO Feeder Funds, and (iii) the PPCO Blocker Fund, the latter two being creditors of PPCO Master Fund).

[23] In *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995) the Seventh Circuit held that a receiver for corporations dominated by a Ponzi scheme principal had standing to assert fraudulent transfer claims against third parties because the receiver was acting on behalf of corporations that were instrumentalities in that scheme.

controlled by the wrongdoer, "the transfers were, in essence, coerced." *Id.* at 132. The corporation then becomes the creditor in the coerced transaction and a receiver for the coerced corporation has standing to claw back the transfers. Other decisions in the Second Circuit have allowed receivers to bring fraudulent transfer claims under similar facts. *See Carney v. Montes*, 2014 WL 671263, at *8 (D. Conn. Feb. 21, 2014) (when transfers are made by a corporation dominated by the wrongdoer, a receiver appointed to recover assets for the receivership entity—rather than for a wrongdoer who manipulated the dominated entity—has standing to bring claims on the corporation's behalf); *Ass'n v. Olympia Mortg. Corp.*, 2011 WL 2414685, at *7 (E.D.N.Y. June 8, 2011) ("[s]ince the wrongdoer in such a scenario is not the corporation proper, but rather the management which conveyed away the corporation's assets to the corporation's detriment ... [the corporation's] receiver has standing to pursue a fraudulent conveyance claim against the[ ] defendants."); *Friedman v. Wahrsager*, 848 F.Supp.2d 278, 289–90 (E.D.N.Y.2012) (adopting *Scholes*); *Armstrong v. Collins*, 2010 WL 1141158, at *33 (S.D.N.Y. March 24, 2010) (same).

In *Cobalt Multifamily Inv'rs I, LLC v. Arden*, the court explained that, while *Eberhard* found no standing because it involved a receiver for only the individual transferor, "*Eberhard* … strongly suggests that, '[i]n the Second Circuit, when transfers are made by a corporation that is dominated by the wrongdoer, a receiver appointed to recover assets for the receivership entity – rather than for a wrongdoer who manipulated the dominated entity – has standing to bring claims on the corporation's behalf' to recover the fraudulent transfers." 46 F. Supp. 3d 357, 363 (S.D.N.Y. 2014) (citing *Carney*, 2014 WL 671263, at *8).[24]

Third, BCLIC and WNIC ignore the fact that any security interests conveyed by

[24] *See also Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190–92 & nn. 4–5 (5th Cir.2013) (collecting cases). *Fed. Nat. Mortg. Ass'n v. Olympia Mortg. Corp.*, 2011 WL 2414685, at *7 (E.D.N.Y. June 8, 2011); *Barnet v. Drawbridge Special Opportunities Fund LP*, 2014 WL 4393320, at *16 (S.D.N.Y. Sept. 5, 2014).

subsidiaries of PPCO Master Fund were obviously part and parcel of the PPCO Loan Transactions and Securities Purchases, rather than (as BCLIC and WNIC appear to be claiming) stand-alone transactions in which the BCLIC/WNIC Trusts got something for nothing from the NPA Guarantors and the MSA PPCO Subsidiaries. Importantly, under the Receivership Order, the Receiver was granted the right to sue for and collect … from third parties all "**Receivership Property**," defined as "all property interests of the Receivership Entities, including, but not limited to, monies … claims, rights and other assets, together with all … other income attributable thereto, of whatever kind, which the Receivership Entities own, possess, have a beneficial interest in, or control directly or indirectly." Receivership Order, § 6.A. Each of the NPA Guarantors and the MSA PPCO Subsidiaries is majority owned by PPCO Master Fund, with ultimate corporate authority belonging to PPCO Master Fund. Because the Receiver may "manage, control, operate and maintain the Receivership Entities," the Receiver has the power to direct the corporate actions of the NPA Guarantors and the MSA PPCO Subsidiaries and because the Receiver may sue to collect Receivership Property, the Receiver is authorized to bring suit on behalf of the NPA Guarantors and the MSA PPCO Subsidiaries. Receivership Order § 6.A. Consequently, now that PPCO Master Fund, the NPA Guarantors and MSA PPCO Subsidiaries are controlled by the Receiver, whose only object is to maximize the value of the corporations for the benefit of their investors and creditors, there can be no objection to the Receiver's bringing suit to recover corporate assets wrongfully dissipated by Nordlicht and PPCO Portfolio Manager. *See Scholes v. Lehmann*, 56 F.3d at 754-55.

3. The Receiver's Claim under NYDCL § 277 is Properly Pled

BCLIC and WNIC also argue that the Receiver's claim under NYDCL § 277 should be dismissed because section 277 is applicable only to the conveyance of "partnership property … to a partner …." The plain language of Section 277 provides otherwise:

> Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred …
>
> b. To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

NYDCL § 277.

Thus, the Receiver properly pleads that assets transferred by PPCO Master Fund, a partnership, were unlawfully conveyed to a "person not a partner" (BCLIC and WNIC) without fair consideration to the partnership.

H. THIS COURT HAS PERSONAL JURISDICTION OVER CNO AND 40|86 ADVISORS

The Complaint alleges that the CNO Defendants' actively participated in the Platinum/Beechwood fraud through the structuring and consummation of the PPCO Loan Transactions. While BCLIC and WNIC do not challenge this Court's jurisdiction to hear the Complaint as to those transactions, CNO and 40|86 Advisors seek to do so by divorcing themselves from BCLIC and WNIC. However, the Complaint alleges in detail how each and every action taken by BCLIC and WNIC discussed in the Complaint was done in concert with, and at the direction of, CNO and 40|86 Advisors. Under these facts, this Court has jurisdiction over CNO and 40|86 Advisors on several grounds.

To establish specific personal jurisdiction over CNO and 40|86 Advisors: (1) jurisdiction must be warranted under New York's long-arm statute and (2) exercising jurisdiction must comport with the Fourteenth Amendment's Due Process Clause. *Sonera Holding B.V.*, 750 F.3d 221, 224 (2d Cir. 2014). New York's long-arm statute permits the exercise of specific personal jurisdiction over a foreign defendant when such defendant, *inter alia*, transacts business in New

York, commits a tort in New York or who commits a tort outside New York that causes an injury in New York. CPLR § 302(a)(1)-(3). Jurisdiction lies with this Court under each ground.

First, CNO and 40|86 Advisors transacted business in New York as interpreted under CPLR § 302(a)(1). Through BCLIC and WNIC, CNO (advised by 40|86 Advisors) directed Beechwood to enter into the PPCO Loan Transactions and Securities Purchases, which were consummated for CNO's ultimate benefit. Specifically, the Complaint alleges that:

- Johnson, the Chief Investment Officer and President of 40|86 Advisors, President of CNO, and Executive Vice President of BCLIC and WNIC, oversaw the investment decisions at BCLIC and WNIC (Complaint ¶ 128);
- Because of the overlapping roles played by many of the employees of BCLIC, WNIC, CNO and 40|86 Advisors, each and every action taken by BCLIC and WNIC discussed in the Complaint was done in concert with, or at the direction of, 40|86 Advisors (Complaint ¶¶ 133, 134);
- When negotiating the Reinsurance Agreements with Beechwood Re, CNO and 40|86 Advisors through BCLIC and WNIC interacted by both telephone and email with Beechwood's New York based employees (Complaint ¶ 144);
- Between December 2015 and March 2016, CNO (through its subsidiaries, BCLIC and WNIC, advised by 40|86 Advisors) directed Beechwood (in New York), as their agent, to enter into several transactions with PPCO Master Fund (in New York) knowing that the transactions were not arms-length commercial deals being structured by unconflicted officers, but rather transactions designed to extricate themselves and their affiliates from investments which had become toxic (Complaint ¶ 11, 168, 176, 181, 207, 329, 336); and
- In structuring, negotiating and consummating the March NPA transaction with, *inter alia*, PPCO Master Fund, whose principal place of business is New York, CNO and 40|86 Advisors, through BCLIC and WNIC, provided that the March NPA would be governed by New York law and that any action brought by PPCO Master Fund thereunder would be in New York (Complaint ¶ 26).

Second, New York courts may exercise jurisdiction over any non-domiciliary "who in person or through an agent … commits a tortious act within the state …." CPLR § 302(a)(2). New York courts customarily interpret the term "agent" rather broadly. *Topps Co., Inc. v. Gerrit J. Verburg Co.*, 961 F. Supp. 88, 91 (S.D.N.Y. 1997). To allege an agency relationship for

jurisdiction under CPLR § 302(a)(2), a plaintiff need only allege that the agent acted in New York for the benefit of, with the consent of, and under some control by the non-resident principal. *Emerald Asset Advisors, LLC v. Schaffer*, 895 F. Supp.2d 418, 430 (E.D.N.Y. 2012).

Here, the Receiver has sufficiently alleged that BCLIC and WNIC were mere instrumentalities of CNO, directed by it into each of the complained of acts. Complaint ¶¶ 133, 134. Indeed, the Complaint explains in great detail how CNO was highly incentivized to, and did, direct the actions of BCLIC and WNIC because its financial health was dependent on BCLIC and WNIC. Complaint ¶¶ 127-134. CNO even concedes that any harm suffered by BCLIC and WNIC in turn was suffered by CNO by asserting that it was the victim of the fraud perpetrated by and through Beechwood. *See* CNO Cross-Claims and Third-Party Claims, Dkt. No. 204, ¶ 470. Thus, the Receiver has adequately alleged facts establishing that BCLIC and WNIC acted in New York for the benefit of, with the consent of, and under the control of CNO.

Alternatively, the foregoing facts establish that this Court has jurisdiction over CNO and 40|86 Advisors under the Second Circuit's related "mere department" theory set forth in *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp*., 751 F.2d 117 (2d Cir. 1984), which provides that a court has general jurisdiction over a foreign corporation whose "control [over a local subsidiary] extends far beyond mere ownership," such that the local subsidiary is the "mere department" of the foreign corporation.[25] *Id.* at 120. The Complaint demonstrates that BCLIC and WNIC were "mere departments" of CNO and 40|86 Advisors as provided above. Complaint ¶¶ 127-134.

[25] The mere department theory requires common ownership between the foreign entity and the domestic entity. *Volkswagenwerk*, 751 F.2d at 120. Courts also consider (1) the financial interdependency of the domestic and foreign entities; (2) the degree to which one entity interferes in the selection and assignment of the other's executive personnel and the extent to which the corporations observe corporate formalities; and (3) the degree of control exercised by the parent over the subsidiary's marketing and operational policies. *Id.* at 120–22.

Third, the Complaint demonstrates that this Court has jurisdiction pursuant to CPLR § 302(a)(3) because CNO and 40|86 Advisors knowingly aided and abetted breaches of fiduciary duty and committed other tortious acts that CNO and 40|86 Advisors knew would damage PPCO Master Fund, a New York party. The requirement that CNO "derive substantial revenue from interstate or international commerce" is satisfied because CNO has subsidiaries that write insurance in multiple states. Although CNO and 40|86 Advisors claim that the PPCO Funds' injury somehow occurred in Indiana, because CNO and 40|86 Advisors orchestrated the fraudulent transfers from Indiana, the injury is caused where the first effect of the tort was located that ultimately produced the final economic injury – here, in New York. *Palace Exploration Co. v. Petroleum Dev. Co.*, 41 F.Supp.2d 427, 435 (S.D.N.Y.1998); *Weintraub v Empress Travel Trevose, Two-L's Ltd.*, 2018 WL 4278336, at *5 (S.D.N.Y. 2018); *Justen-Marks Mfg., Ltd. v Soft Things, Inc.*, 2009 WL 10706038, at *10 (E.D.N.Y. 2009). As required by CPLR § 302(a)(3)(ii), injury in New York was also entirely foreseeable to CNO and 40|86 Advisors. It is immaterial that the misrepresentations may have been transmitted from Indiana.

Fourth, the Complaint pleads sufficient facts to support the existence of conspiracy jurisdiction over CNO and 40|86 Advisors. Under New York law, the acts of a co-conspirator may be attributed to a defendant for the purpose of obtaining personal jurisdiction over that defendant. *FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 150 A.D.3d 492, 496 (1st Dep't 2017). The application of conspiracy jurisdiction requires a showing that defendants were part of a conspiracy, at least part of which took place within New York.[26] *See CIBC Mellon Tr. Co. v Mora Hotel Corp. N.V.*, 296 A.D.2d 81, 98 (1st Dep't 2002), *aff'd*, 100 N.Y.2d 215 (2003).

[26] The elements of conspiracy are: (i) an agreement to participate in an unlawful act; (ii) an injury caused by an unlawful overt act performed by one of the parties to the agreement; and (iii) which overt act was done pursuant to and in furtherance of the common scheme. *O'Sullivan v. Deutsche Bank AG*, 2018 WL 1989585, at *5 (S.D.N.Y. 2018).

Here, an agreement by CNO and 40|86 Advisors to participate in a conspiracy with BCLIC and WNIC to enter into fraudulent conveyances can be inferred. In doing so, CNO and 40|86 Advisors indirectly participated in transactions with a New York-based entity, governed by New York law, and with a venue provision providing for the jurisdiction of New York courts. Consequently, the Complaint supports the Court's exercise of conspiracy jurisdiction over CNO and 40|86 Advisors.[27]

Moreover, CNO and 40|86 Advisors are bound by the New York forum selection clause in the PPCO Loan Transactions documents under the "closely related" doctrine, which provides that "a non-party to a contract may be subject to its forum selection clause if the non-party is so 'closely related' to either the parties to the contract or the contract dispute itself that enforcement of the clause against the non-party is foreseeable." *Diamond v. Calaway*, 2018 WL 4906256, at *4 (S.D.N.Y. Oct. 9, 2018). Enforcement of a forum selection clause against a non-signatory is foreseeable when the non-signatory is otherwise involved in the transaction. *Id*. (*quoting Recurrent Capital Bridge Fund I*, 875 F. Supp. 2d 297, 307-08 (S.D.N.Y. 2012)); *Laspata DeCaro Studio Corp. v. Rimowa GmbH*, 2017 WL 1906863, at *6 (S.D.N.Y. May 8, 2017).

The allegations in the Complaint, read in the light most favorable to the plaintiff, are more than sufficient for application of the "closely related" doctrine. *Diamond v. Calaway*, 2018 WL 4906256, at *5 (S.D.N.Y. Oct. 9, 2018). The Complaint alleges that BCLIC and WNIC were mere instrumentalities of CNO, directed by it into each of the complained of acts. Complaint ¶¶ 133, 134. Indeed, the Complaint explains in great detail how CNO was highly incentivized to, and did, direct the actions of BCLIC and WNIC because its financial health was

[27] At a minimum, the Receiver is entitled to jurisdictional discovery regarding, among other issues, CNO and 40|86 Advisors' role in the matters referred to in the Complaint, including their contacts with New York in connection with those matters. *See Int'l Diamond Importers, Inc. v. Oriental Gemco (N.Y.), Inc.*, 64 F. Supp. 3d 494, 519 (S.D.N.Y. 2014).

dependent on BCLIC and WNIC. Complaint ¶¶ 127-134. Thus, it was entirely foreseeable that if PPCO Master Fund sought to enforce its rights under the March NPA, CNO and 40|86 Advisors would be subject to New York law and jurisdiction.

The foregoing meets the standards of the New York long-arm statute. "At the pleading stage – and prior to discovery – a plaintiff need only make a prima facie showing that jurisdiction exists." *Schentag v. Nebgen*, 2018 WL 3104092, at *13 (S.D.N.Y. June 21, 2018). "Such a showing entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant[s]." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 81 (2d Cir. 2018).

The exercise of personal jurisdiction over CNO and 40|86 Advisors also comports with constitutional standards. Indeed, "[t]he Second Circuit has stated that it would be 'rare' and 'unusual' for New York's long-arm statute to be satisfied, but not the Due Process Clause." *Advance Tr. & Life Escrow Servs., LTA v. PHL Variable Life Ins. Co.*, 2019 WL 1130153, at *4 (S.D.N.Y. Mar. 12, 2019) (*quoting Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 170 (2d Cir. 2013)). This is not such a "rare" or "unusual" case that due process is absent.

In determining whether an exercise of specific jurisdiction is constitutional, a court looks to "whether there was some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (internal citations and brackets omitted). "[T]he defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

The conduct by CNO and 40|86 Advisors, in negotiating, structuring and consummating

fraudulent transactions governed by New York law and providing for New York court jurisdiction over disputes, meets this test. These defendants purposefully availed themselves of the privilege of conducting activities in New York and the suit-related conduct created a substantial connection with New York, sufficient to render them "essentially at home" in New York state. *See Daimler AG v. Bauman*, 571 U.S. 117, 134 S.Ct. 746 (2014). Since the tortious conduct proximately damaged the PPCO Funds, this Court's exercise of personal jurisdiction over these defendants is constitutional for this reason as well. *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998); *United States v. Prevezon Holdings LTD.*, 122 F. Supp. 3d 57, 77-78 (S.D.N.Y. 2015).

I. PBIH Is Subject to Personal Jurisdiction in this Court

This Court also has personal jurisdiction over PBIH, the purported successor in interest to Beechwood Bermuda Investment Holdings, Ltd. As set forth in the Complaint, the PPCO Loan Transactions and Securities Purchases were consummated at the direction of the CNO Defendants and the SHIP Defendants, through Beechwood, in order to extricate themselves from underperforming loans. Complaint ¶¶ 11, 203. To accomplish their collective goals, Nordlicht and PPCO Portfolio Manager, at the request of the CNO and SHIP Defendants and Beechwood, directed PPCO Master Fund to "borrow" funds under the March NPAs and use the loan proceeds to pay them and certain Beechwood entities. Complaint ¶¶ 246, 247. Specifically, under the payoff letters accompanying the March NPA, PBIH received millions of dollars in proceeds of each of the note purchases through its related entity and agent BAM Administrative (having its primary place of business in New York). Complaint ¶ 246. Now, PBIH, which appears to be or to have been under the control of, among others, Feuer and Taylor, who were or are its directors, both of whom are in New York (Complaint ¶¶ 48-49), seeks to distance itself from the other Beechwood entities generally and BAM Administrative specifically. However, because

Beechwood agreed in the March NPA that New York law would govern its interpretation and any suit commenced by PPCO Master Fund would be brought in New York, PBIH is bound by the New York forum selection clause therein under the "closely related" doctrine described above. The allegations in the Complaint, read in the light most favorable to the plaintiff, are more than sufficient for application of the "closely related" doctrine. The Complaint alleges that the ownership in and ultimate control of Beechwood (including of PBIH) was held by Nordlicht, Huberfeld, Bodner and Levy (in part through trusts), *see* Complaint, ¶¶ 108-13, and that Beechwood was an integral participant in the PPCO Loan Transactions and Securities Purchases. Complaint ¶ 222. Indeed, the PPCO Loan Transactions and Securities Purchases were structured and consummated to, in part, pay PBIH millions of dollars. Specifically, under the payoff letters accompanying the March NPA, PBIH received millions of dollars in proceeds from each of the note purchases through its related entity and agent BAM Administrative Services, which was party to the March NPA.[28] Thus, it was entirely foreseeable that if PPCO Master Fund sought to enforce its rights under the March NPA, PBIH would be subject to New York law and jurisdiction.

Moreover, the exercise of personal jurisdiction over PBIH, an entity with directors in New York, comports with due process because it purposefully availed itself of the privilege of conducting activities within New York through BAM, its related entity, thus invoking the benefits and protections of its laws.[29]

---

[28] Under the payment directions, $69,153,626.82 was directed to BAM Administrative, as Agent for, *inter alia*, PBIH's predecessor, Beechwood Bermuda Investment Holdings, Ltd., for its segregated account. Complaint ¶ 246.

[29] There appears to be an inconsistency between the statement of Henry Komansky in his Declaration in Support of the PBIL MTD that PBIL "has no offtcers, directors or employees residing in New York" (Dkt. No. 166-1 in Case No. 18-cv-12018), and a filing for PBIH with the Government of Bermuda, which lists Feuer and Taylor as directors of PBIH. *See*

J. THE COMPLAINT STATES A CLAIM FOR UNJUST ENRICHMENT

BAM Administrative, SHIP, BCLIC and WNIC move to dismiss the Eighteenth Claim for unjust enrichment. Their arguments should be rejected.

"To state a claim for unjust enrichment under New York law, a plaintiff must allege that: '(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.'" *In re Platinum-Beechwood Litig.*, 2019 WL 1570808, at *9 (S.D.N.Y. Apr. 11, 2019) (quoting *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004)). "Relief for unjust enrichment is available where 'circumstances create an equitable obligation running from the defendant to the plaintiff.'" *Id.* (quoting *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (2012)).

The Complaint sets forth detailed allegations showing that BAM Administrative, the BCLIC and WNIC Defendants, and the SHIP Defendants knowingly caused the PPCO Loan Transactions and Securities Purchases, which were never intended to provide, nor did they provide, fair consideration to PPCO Master Fund, in order to unjustly enrich themselves at the expense of PPCO Master Fund. Complaint ¶¶ 237-258. BAM Administrative, BCLIC, WNIC and SHIP were enriched because they received assets, liens and obligations from PPCO Master Fund and the MSA PPCO Subsidiaries in connection with the PPCO Loan Transactions and Securities Purchases that were greater than the value they transferred in those transactions; that

---

https://www.gov.bm/49773/pb-investment-holdings-ltd-david-l-mylott-49773. Mr. Komansky's Declaration is also carefully worded in a manner that avoids stating whether, at the time of the events at issue, its predecessor, Beechwood Bermuda Investment Holdings, Ltd., had a place of business or directors or officers in New York, who may well have negotiated and implemented the transactions at issue here. Consequently, at a minimum, jurisdictional discovery should be ordered. *See Int'l Diamond Importers, Inc.*, 64 F. Supp. 3d at 519.

enrichment was at the expense of the PPCO Funds; and equity and good conscience militate against permitting BAM Administrative, SHIP and the CNO Defendants to retain what the PPCO Funds are seeking to recover, namely, the liens and loan rights and property transferred to BAM Administrative, BCLIC, WNIC and SHIP. *Id*.

BCLIC and WNIC assert, without support or citation, that the Receiver's unjust enrichment claim "seek[s] the exact same relief as her fraudulent conveyance claims" and should be dismissed "for all of the reasons set forth in this Memorandum." BCLIC/WNIC MOL at p. 25 n. 23. Since no factual or legal basis is given for this argument, it should be rejected. Moreover, since this claim is properly pled in the alternative to the Receiver's fraudulent conveyance claims, and BCLIC and WNIC seek dismissal of those claims, dismissal of this claim would be premature. *See In re Hellas Telecommunications (Luxembourg) II SCA*, 535 B.R. 543, 585 (Bankr. S.D.N.Y. 2015) (denying motion to dismiss unjust enrichment claims as duplicative of fraudulent conveyance claims, where unjust enrichment claims were validly pleaded in the alternative to unjust enrichment claims).

SHIP argues that the Receiver's unjust enrichment claim should be dismissed because it "does not provide for an unusual situation where its tort claims would not provide the requested relief," and BAM Administrative makes a similar argument. *See* SHIP MOL at 25; BW MOL at 25. That argument fails because: (1) SHIP and BAM Administrative simultaneously seek dismissal of the Receiver's tort claims and are therefore arguing that the Receiver's tort claims cannot provide the same relief, and (2) the Receiver's unjust enrichment claim does not duplicate tort recovery because she seeks recovery of property and lien rights transferred to SHIP and BAM, not damages to PPVA. *See e.g., In re Hellas*, 535 B.R. at 585.

Finally, this claim is not simply duplicative of relief available under a contract. Indeed,

BCLIC and WNIC do not have direct contracts with any of the PPCO Funds.

IV. CONCLUSION

The Motions should be denied in their entirety. However, if any of the Motions are granted in whole or in part, dismissal should be without prejudice, with leave to replead. FRCP 15(a)(2); *SHIP v. Beechwood Re Ltd.*, 345 F.Supp.3d 515, 529 (S.D.N.Y. 2018); *Gissin v. Endres*, 739 F.Supp.2d 488, 504 (S.D.N.Y. 2010). None of the Defendants will be prejudiced by this because they are all parties to other pending claims in this action and will regardless be participating in discovery in this action.

Dated: New York, New York
June 12, 2019

Respectfully submitted,

OTTERBOURG P.C.

By: */s/ Erik B. Weinick*
Adam C. Silverstein
William M. Moran
Erik B. Weinick
Andrew S. Halpern
230 Park Avenue
New York, New York 10169
(212) 661-9100
Attorneys for Plaintiff Melanie L. Cyganowski, as Receiver

Schedule A

Defendants	Cause of Action	Relevant Allegations in the Complaint
Beechwood Defendants	Violation of RICO 1962(c)	*See* ¶¶ 107-113 (RICO enterprise) *See* ¶¶ 179-180, 271 (RICO violations by Beechwood)
Beechwood Defendants	Violation of RICO 1962(a)	*See id* (establishing the existence of a RICO conspiracy)
Beechwood Defendants	Violation of RICO 1962(d)	*See id* (demonstrating investment of racketeering income and injury to the PPCO Funds as a result of that investment)
Beechwood Defendants	Violations of Section 10b of the Exchange Act and Rule 10b-5; Violations of Section 20 of the Exchange Act	*See* ¶¶ 179-180, 225-258, 268-271
Beechwood Defendants	Aiding and Abetting Breach of Fiduciary Duty	*See* ¶¶ 57-60, 69, 78-80 (establishing fiduciary duty) *See* ¶¶ 110-113, 149, 169-193 (demonstrating breach of that duty) *See* ¶¶ 107-113, 179-180, 225-258, 268-271 (demonstrating knowledge of fiduciary duty and substantial assistance in breach of fiduciary duty by Beechwood Defendants)
Beechwood Defendants	Aiding and Abetting Common Law Fraud	*See* ¶¶ 107-113, 179-180, 260-71, 225-258, 268-271 (demonstrating knowledge of fraud and substantial assistance in furtherance of the fraud by Beechwood Defendants)
BAM Administrative	Violation of NY Debtor and Creditor Law Section 275 and 278	*See* ¶¶ 73-75 (demonstrating that the Receiver represents creditors of the Receivership entities) *See* ¶¶ 148-153, 167, 177-180, 221-258 (describing the fraudulent conveyances)
BAM Administrative	Violation of NY Debtor and Creditor Law Sections 276 and 278 and for Relief Under Section 276-a	*See id.*
BAM Administrative	Violation of NY Debtor and Creditor Law Sections 273 and 278	*See id.*

BAM Administrative	Violation of NY Debtor and Creditor Law Sections 274 and 278	*See id.*
BAM Administrative	Violation of NY Debtor and Creditor Law Sections 277 and 278	*See id.*
BAM Administrative	Unjust Enrichment	*See* ¶¶ 221-258 (detailing BAM asserted liens)
BAM Administrative	Declaratory Judgment	*See id.*
BCLIC/WNIC Trusts	Violation of NY Debtor and Creditor Law Section 275 and 278	*See* ¶¶ 141-153, 167, 177-180, 221-258 (describing fraudulent transfers)
BCLIC/WNIC Trusts	Violation of NY Debtor and Creditor Law Sections 276 and 278 and for Relief Under Section 276-a	*See id.*
BCLIC/WNIC Trusts	Violation of NY Debtor and Creditor Law Sections 273 and 278	*See id.*
BCLIC/WNIC Trusts	Violation of NY Debtor and Creditor Law Sections 274 and 278	*See id.*
BCLIC/WNIC Trusts	Violation of NY Debtor and Creditor Law Sections 277 and 278	*See id.*
BCLIC/WNIC Trusts	Unjust Enrichment	*See* ¶¶ 221-258 (describing the Trusts' receipt of proceeds from fraudulent transactions)
BCLIC/WNIC Trusts	Declaratory Judgment	*See id.*
CNO Defendants	Violation of RICO 1962(c)	*See* ¶¶107-113, 179-180, 260-271 (RICO generally) *See also* ¶¶ 114-15, 128-31, 139, 141, 151-53, 194-207
CNO Defendants	Violation of RICO 1962(a)	*See id.* (establishing the existence of a RICO conspiracy)
CNO Defendants	Violation of RICO 1962(d)	*See id.* (demonstrating investment of racketeering income and injury to the PPCO Funds' as a result of that investment)
CNO Defendants	Violations of Section 10b of the Exchange Act and Rule 10b-5	*See* ¶¶ 114-15, 128-31, 139, 141, 151-53, 194-207
CNO Defendants	Violations of Section 20 of the Exchange Act	*See id.*

CNO Defendants	Aiding and Abetting Breach of Fiduciary Duty	*See* ¶¶ 114-115, 121-131, 139, 141, 150, 151-53, 158, 160-167, 177-178, 181, 194-207, 221-258, 268-271 (demonstrating knowledge of fiduciary duty and substantial assistance in breach of that duty by CNO Defendants)
CNO Defendants	Aiding and Abetting Common Law Fraud	*See* ¶¶ 114-115, 139, 141, 150-153, 156, 158, 160-167, 177-178, 181, 194-207, 221-258, 268-271 (demonstrating knowledge of fraud and substantial assistance in furtherance of the fraud by CNO Defendants)
SHIP Defendants	Violation of RICO 1962(c)	*See* RICO generally ¶¶ 107-113, 179-180, 183, 259-271 *See* specifically ¶¶ 114-15, 121-126, 150, 156, 158, 160-61, 164, 166, 181-258, 268-271
SHIP Defendants	Violation of RICO 1962(a)	*See id.* (establishing the existence of a RICO conspiracy)
SHIP Defendants	Violation of RICO 1962(d)	*See id.* (demonstrating investment of racketeering income and injury to the PPCO Funds as a result of that investment)
SHIP Defendants	Violations of Section 10b of the Exchange Act and Rule 10b-5; Violations of Section 20 of the Exchange Act	*See* ¶¶ 181-183, 208-258 (detailing securities fraud)
SHIP Defendants	Aiding and Abetting Breach of Fiduciary Duty	*See* ¶¶ 57-60, 69, 78-80 (demonstrating fiduciary duty owed by Platinum principals) *See* ¶¶ 110-113, 169-176 (demonstrating breach of that duty) *See* ¶¶ 181-193, 208-258 (demonstrating knowledge of fiduciary duty and substantial assistance by SHIP Defendants)
SHIP Defendants	Aiding and Abetting Common Law Fraud	*See* ¶¶ 167, 177-193, 208-258, 268-271 (describing SHIP's substantial assistance in the fraud)
SHIP	Violation of NY Debtor and Creditor Law Section 275 and 278	*See* ¶¶ 141-153, 167, 177-180, 208-258 (describing the fraudulent transactions)
SHIP	Violation of NY Debtor and Creditor Law Sections 276 and 278 and for Relief Under Section 276-a	*See id.*

SHIP	Violation of NY Debtor and Creditor Law Sections 273 and 278	*See id.*
SHIP	Violation of NY Debtor and Creditor Law Sections 274 and 278	*See id.*
SHIP	Violation of NY Debtor and Creditor Law Sections 277 and 278	*See id.*
SHIP	Unjust Enrichment	*See* ¶¶ 221-258
SHIP	Declaratory Judgment	*See id.*

CERTIFICATE OF SERVICE

It is hereby certified that on June 12, 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this adversary proceeding.

Respectfully submitted,

OTTERBOURG P.C.

By: */s/ Erik B. Weinick*
Erik B. Weinick