UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	18-cv-06658 (JSR)
MELANIE L. CYGANOWSKI, Plaintiff, -v- BEECHWOOD RE LTD., et al., Defendants.	:	18-cv-12018 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF BEECHWOOD'S MOTION TO DISMISS SHIP'S CROSS-CLAIMS AND THIRD-PARTY COMPLAINT

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PRELIMINARY STATEMENT

SHIP is a long-term care insurer that has been accused of fraud and racketeering by the SEC-appointed receiver of Platinum Partners Credit Opportunities Fund (the "Receiver"). As the Receiver's First Amended Complaint makes clear, and as SHIP now seems to implicitly concede, it either knew or should have known of Beechwood's relationship with Platinum as the connection was well-known, transparent, and obvious. Despite this reality, in the face of the Receiver's allegations, and in a blatant effort to re-write history, SHIP attempts to distance itself from Beechwood and Platinum through a series of baseless counterclaims against Movants, each of which should be dismissed.

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[1] All terms not defined herein shall have the same meaning as they do in the Cross-Claims and Third-Party Complaint (the "TPC") of Third-Party Plaintiff Senior Health Insurance Company of Pennsylvania ("SHIP").

[2] In addition to the arguments set forth below, Movants hereby incorporate all applicable arguments from the memoranda of law submitted in support of the motions to dismiss filed by David Bodner, Beechwood Re Investments LLC Series C, Beechwood Trusts No. 8-14, and Monsey Equities LLC.

First, SHIP's claims against the Feuer Family Trust, the Taylor-Lau Family Trust, the Beechwood Global Distribution Trust, the Feuer Family 2016 Acq Trust, and the Taylor-Lau Family 2016 Acq Trust must be dismissed because none of them are proper parties to this suit. A trust does not have the capacity to be sued as a party defendant. Because SHIP has sued the wrong parties, its claims must be dismissed.

Second, because SHIP has failed to file a timely answer to Beechwood's counterclaims in this consolidated action, Beechwood's allegations in that pleading should be deemed admitted. This includes, among other things, the concession from Greg Serio, a member of SHIP's board of trustees, that [redacted] it also includes the admission from Brian Wegner, SHIP's former CEO, that Beechwood's relationship with Platinum—which was clear to anyone who bothered to read Beechwood's marketing material, its deal documents, its valuation reports, or to simply use Google—[redacted] Because SHIP's admissions concede key elements of the underlying claims, they are fatal.

Third, even if SHIP had not already conceded key elements of the underlying claims, dismissal would still be required in light of SHIP's impermissible reliance on group pleading. The TPC is a matryoshka doll of defined terms. As such, it is virtually impossible to determine who is being accused of what. Thus, as written, the TPC, fails to provide Movants with fair notice of what SHIP's claims are and the grounds upon which they rest and should be dismissed on that basis as well.

Fourth, group pleading aside, SHIP has failed to state a claim for aiding and abetting fraud and aiding and abetting breach of fiduciary duty against Beechwood Holdings, BBL, MSD Administrative, Beechwood Capital, N Management, the Feuer Family Trusts, the Taylor-Lau Family Trusts, and the 2016 Acquisition Trusts, *i.e.*, the non-asset manager Movants. Stripped

of all conclusory and discredited allegations, SHIP fails to allege substantial assistance. Indeed, SHIP's claims appear to rest on the mere existence of these entities, as opposed to any affirmative act that they have undertaken. Accordingly, these claims should be dismissed.

Fifth, SHIP has failed to state a claim for civil conspiracy. Among other deficiencies, SHIP cannot demonstrate the primary torts upon which its civil conspiracy claim purports to rely. The claim also fails under New York's intracorporate conspiracy doctrine; and it relies on allegations that are either wholly conclusory, impermissibly pled against Movants without differentiation, or merely re-hash SHIP's underlying allegations of fraud and breach of fiduciary duty. This claim too should be dismissed.

Sixth, SHIP's unjust enrichment claim, which parrots the same allegations from SHIP that this Court has rejected twice before, should be dismissed again for the same reasons. Not only does an express agreement govern the rights at issue, but SHIP's well-pleaded allegations do nothing more than allege general, non-specific benefits, which are insufficient to plead an unjust enrichment claim.

Seventh, SHIP's claims are barred by the doctrine of *in pari delicto*. SHIP has not only admitted facts which are fatal to its claims against Movants, it has also admitted facts sufficient to establish that it fraudulently induced Beechwood to issue a $50 million surplus note to SHIP—a note on which SHIP has failed to pay any principal or interest. In light of SHIP's admission that it fraudulently induced Beechwood to enter into the surplus note transaction, all of SHIP's claims should be dismissed pursuant to the doctrine of *in pari delicto* as well.

FACTUAL BACKGROUND

Count One and Count Two of the TPC allege that BAM II, BAM GP, BAMAS, MSD Administrative, Beechwood Holdings, BBL, Beechwood Capital, N Management, and the 2016 Acquisition Trusts aided and abetted fraud and breaches of fiduciary duty. (TPC ¶¶ 410-28.)

They allege that BAM II, BAM GP, BAMAS, MSD Administrative, Beechwood Holdings, BBL, Beechwood Capital, N Management, and the 2016 Acquisition Trusts did so by consummating fraudulent transactions. (*Id.* ¶¶ 415, 424).

Count Three and Count Four of the TPC allege that the Feuer Family Trust, the Taylor-Lau Family Trust, and the 2016 Acquisition Trusts aided and abetted fraud and breaches of fiduciary duty, *id.* ¶¶ 429-44, by virtue of either (1) their formation, or (2) their participation the August 2016 repurchase transactions. (*Id.* ¶¶ 431-34, 441.)

Count Five alleges that BAM II, BAM GP, BAMAS, MSD Administrative, Beechwood Holdings, BBL, Beechwood Capital, N Management, the Feuer Family Trust, the Taylor-Lau Family Trust, and the 2016 Acquisition Trusts "conspired with Beechwood, Feuer, Taylor, and Levy to commit fraud in the inducement against SHIP by fraudulently inducing SHIP to enter each of the three IMAs and in turn invest SHIP's funds pursuant to those IMAs, as well as by causing or inducing SHIP to enter into other investments." (*Id.* ¶ 446.) It also alleges that these parties "conspired with Beechwood, Feuer, Taylor, and Levy" by (1) misrepresenting the nature and performance of SHIP's investments (*id.* ¶ 447); (2) denying SHIP access to full and accurate information about the nature and performance of its investments, and by claiming and collecting millions of dollars in performance fees from SHIP (*id.* ¶ 448); (3) participating in the June 2016 AGH Transactions (*id.* ¶ 449); or (4) participating in the August 2016 repurchase (*id.* ¶ 450).

Count Seven alleges that the Feuer Family Trust, the Taylor-Lau Family Trust, and the 2016 Acquisition Trusts "were direct or indirect beneficiaries of Performance Fees paid to the Beechwood Entities or monies earned from transactions in which Beechwood favored its own interests or Platinum's interests over SHIP's interests," and were unjustly enriched. (*Id.* ¶ 462.) Similarly, it alleges that BAM II, BAM GP, BAMAS, MSD Administrative, Beechwood Holdings, BBL, Beechwood Capital, N Management, and the 2016 Acquisition Trusts were

unjustly enriched "[t]o the extent that they received the proceeds of unearned Performance Fees or monies earned from transactions favoring Beechwood's or Platinum's interests over SHIP's and thus were enriched" as well. (*Id.* ¶ 464.)

Count Eight alleges that, under the Beechwood Re, BBIL, and BAM IMAs, "SHIP is entitled to indemnification for the conduct alleged against it in the PPCO Action." (*Id.* ¶ 468.) SHIP seeks declaratory relief. (*Id.* ¶ 471.)

LEGAL STANDARD

To survive a motion to dismiss, a complaint must satisfy Rule 8(a) by stating a claim for relief that is plausible on its face. Fed. R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (citation omitted). Furthermore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

SHIP's claims based on allegedly fraudulent conduct (*e.g.*, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, civil conspiracy) must also be pleaded with specificity under Rule 9(b). Fed. R. Civ. P. 9(b). To satisfy the specificity requirement, SHIP must "(1) specify the statements that [it] contends [are] fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). Moreover, it is well settled that a party does not comply with Rule 9(b) when it engages in "group pleading"—making allegations against a group of defendants generally instead of pleading the specifics of a fraud claim against each defendant individually. *See id.* at 1175; *Javier v. Beck*, No. 13-cv-2926, 2014 WL 3058456, at *12 (S.D.N.Y. July 3, 2014).

ARGUMENT

I. SHIP'S CLAIMS AGAINST THE FEUER FAMILY TRUST, THE TAYLOR-LAU FAMILY TRUST, AND THE 2016 ACQUISITION TRUSTS MUST BE DISMISSED BECAUSE THEY ARE NOT PROPER PARTIES TO THIS SUIT

Through the TPC, SHIP has brought claims against the Feuer Family Trust, the Taylor-Lau Family Trust, the Beechwood Global Distribution Trust, the Feuer Family 2016 Acq Trust, and the Taylor-Lau Family 2016 Acq Trust. SHIP's claims against those trusts must be dismissed on the ground that they are not proper parties to this suit.

The weight of authority is clear that a trust does not have the capacity to be sued as a party defendant. *See NFS Servs. Inc., v. Dorchester Trust,* No. 78-cv-4758, 1979 U.S. Dist. LEXIS 11052, at *4 (S.D.N.Y. July 13, 1979) (citing cases); *Limouze v. M. M. & P. Mar. Advancement, Training, Ed. & Safety Program*, 397 F. Supp. 784, 789 (D. Md. 1975) (applying New York law and concluding that "the trust estate is not a person in the eyes of the law and does not have the capacity to be sued as an entity"). Indeed, as this court explained in *Dorchester*, "[a] Trust is a fiduciary relationship by which the trustees hold legal title to property for the benefit of others, and a suit by strangers to the trust must be brought against the trustees thereof individually and not the fictional entity." 1979 U.S. Dist. LEXIS 11052, at *5. Accordingly, the trustee, as the owner of the legal property of the trust, is the real party in interest with the power to defend actions in the name of the trust pursuant to Fed. R. Civ. P. 17(b). Because SHIP has brought this suit against trusts themselves, the complaint should be dismissed as against those parties.

II. ALL OF SHIP'S CLAIMS SHOULD BE DISMISSED IN LIGHT OF SHIP'S ADMISSIONS IN THE SHIP ACTION

The Federal Rules of Civil Procedure are quite clear: "An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the

allegation is not denied." Fed. R. Civ. P. 8(b)(6); *see also SG Equip. Fin. USA Corp. v. Nikitin*, No. 09-cv-7167, 2010 WL 743762, at *1 (S.D.N.Y. Mar. 2, 2010) ("Plaintiff's factual allegations relating to liability are deemed admitted by virtue of Defendants' failure to file a timely answer.") (citation omitted). Moreover, a party's admissions in connection with a pleading may properly be considered in the context of a motion to dismiss under Rule 12(b)(6). *See Abraham v. Leigh*, No. 17-cv-5429, 2018 WL 3639930, at *4 (S.D.N.Y. June 27, 2018).

Here, on March 20, 2019, various Beechwood-related parties filed counterclaims against SHIP in the consolidated action related to, among other things, a surplus note issued to SHIP by BRILLC. *See* ECF No. 190. Under the Federal Rules of Civil Procedure, SHIP had 21 days to answer. Fed. R. Civ. P. 12(a)(1)(B) ("A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.") Yet, nearly three months after being served, SHIP has not answered, moved, or otherwise responded.[3] Accordingly, under Rule 8(b)(6), the allegations in Beechwood's counterclaims concerning the surplus note should be deemed admitted and considered in connection with this motion.

Such admissions are fatal to SHIP's claims here. For example, SHIP's aiding and abetting and civil conspiracy claims sound in fraud. Accordingly, SHIP must establish that it justifiably relied on any alleged misstatements or omissions that form the basis of these claims. "As a matter of law, a sophisticated plaintiff [like SHIP] cannot establish that it entered into an

[3] On April 5, 2019, SHIP made an application to delay briefing on Beechwood's advancement motion so that it could cross-move for summary judgment on both indemnification and advancement in connection with Beechwood's counterclaims. (Lipsius Decl. Ex. 1.) The Court denied this application on the basis that a current briefing schedule had already been set, and was proceeding on an expedited basis. (*Id.*) It was left for SHIP to seek a briefing schedule at oral argument May 1. (*Id.*) But SHIP did not seek a briefing schedule at the time, nor has it raised it in the 44 days since. Nor has SHIP made an application for any sort of stay or extension.

arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties." *UST Private Equity Inv'rs Fund, Inc. v. Salomon Smith Barney*, 288 A.D.2d 87, 88 (1st Dep't 2001); *see also Centro Empresarial Cempresa S.A. v. Am. Movil S.A.B. de C.V.*, 17 N.Y.3d 269, 279 (2011) ("When the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it."). SHIP now concedes that it failed to exercise *any* diligence, let alone a heightened degree of diligence, despite being a sophisticated party and knowing about Beechwood's relationship with Platinum. Specifically, by failing to answer Beechwood's crossclaims, SHIP has admitted the following: (1) it understood that BRILLC had capitalized BRE and BBIL (ECF No. 190 ¶ 292); (2) it had every reason to know that Nordlicht was associated with BRILLC given that he executed documents in connection with the surplus note on behalf of "N Management LLC," as Manager for BRILLC (*id.*); (3) SHIP's advisors [redacted] (*id.* ¶ 294); (4) despite this, SHIP chose not to conduct any additional due diligence on the Beechwood Entities (*id.*); (5) SHIP chose not to do so because, according to a member of its own board of trustees, [redacted] (*id.* ¶ 297); and (6) SHIP's attitude towards due diligence was so lax that [redacted] (*id.*). In light of this, SHIP's claims should be dismissed.

Moreover, in addition to pleading justifiable reliance, because most of SHIP's claims sound in fraud, SHIP must establish that any misrepresentations or omissions on which it purportedly relied were material. And, in light of SHIP's failure to timely respond to

Beechwood's crossclaims, SHIP has admitted that this was not the case. (*Id.* ¶ 296.) Indeed, as SHIP's CEO Brian Wegner informed the company's board of directors in October 2016, months after the Platinum scandal broke: [redacted] (*Id.*) In light of this admission, SHIP cannot establish the primary torts on which its aiding and abetting and conspiracy claims purport to rely.

Even if SHIP had timely filed an answer to Beechwood's crossclaims, it would have no choice but to admit these allegations. The correspondence mentioned above, from SHIP's CEO and members of its board of trustees, are nothing if not explicit admissions that speak *directly* to key elements of this case. Moreover, SHIP repeatedly invokes the allegations from the Receiver's First Amended Complaint in the TPC, seeming to incorporate the document by reference. (TPC ¶¶ 52, 414, 423, 446.) And the Receiver's allegations are clear: SHIP was not misled about Beechwood's relationship with Platinum, which was highlighted in marketing documents, easily discoverable online, and obvious to anyone who deigned to conduct even basic due diligence. (*See*, *e.g.*, ECF 209 ¶¶ 112, 139, 210.)

III. SHIP FAILS TO SATISFY RULES 8 AND 9(B) BY RELYING ON IMPERMISSIBLE GROUP PLEADNG

"Although Fed. R. Civ. P. 8 does not demand that a complaint be a model of clarity or exhaustively present the facts alleged, it requires, at a minimum, that a complaint give each defendant 'fair notice of what the plaintiff's claim is and the ground upon which it rests.'" *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (quoting *Ferro v. Ry. Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961)). A complaint fails to give fair notice when it

"lump[s] all the defendants together in each claim and provid[es] no factual basis to distinguish their conduct . . . ." *Id.*; *see also TheECheck.com, LLC v. NEMC Fin. Servs. Grp. Inc.*, No. 16-CV-8722, 2017 WL 2627912, at *2 (S.D.N.Y. June 16, 2017); *Zegelstein v. Chaudhry*, No. 16-CV-3090, 2017 WL 4737263, at *1 (S.D.N.Y. Oct. 18, 2017).

Although the TPC runs nearly 500 paragraphs, "lumping" defendants together is precisely what SHIP has done here, purporting to identify Movants through a complex and confusing series of nested definitions. Put simply, a defendant should not need to perform algebra to decipher the allegations in a complaint, let alone the claims for which they have been sued. Because that is what the TPC requires Movants to do, the TPC should be dismissed. *See In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 377 (S.D.N.Y. 2011) (declining to "sift" through "529 paragraph" complaint to "decipher what factual allegations, if any support the existence and materiality of each alleged omission").

SHIP's allegations against Beechwood Holdings, BBL, MSD Administrative, and Beechwood Capital all should be dismissed on group pleading grounds. For example, other than conclusory allegations about fees and vague references to asset protection schemes, none of which are entitled to be assumed true, the only allegations concerning MSD Administrative are that, as its name suggests, it performed back-office services for certain Beechwood Entities and that its subsidiary was a signatory for Beechwood's office lease. Bizarrely, SHIP seems to place great deal of emphasis on a March 2014 email, referencing that MSD Administrative was responsible for [redacted] (TPC ¶ 21.) But it is not clear why SHIP even discusses the email. Indeed, SHIP does not attempt to explain what it thinks this means, let alone why it thinks that this (apparent typo) suggests something improper. Because there are no well-pleaded allegations about MSD Administrative, the claims against it should be dismissed.

SHIP's claims against Beechwood Capital are also particularly deficient. In its desperation to gin up a single, non-conclusory allegation against that entity, SHIP repackages the specious allegation—initially asserted by PPVA—that [redacted] (TPC ¶ 66.) This is an allegation that this Court has already considered, along with the underlying email on which the allegation was purportedly based, and rejected, concluding that "the exhibit cited does not provide *any evidence* that Platinum Management transferred money to Beechwood Capital, let alone for nefarious purposes." *See In re Platinum-Beechwood Litig.*, No. 18-CV-10936 (JSR), 2019 WL 1570808, at *12 (S.D.N.Y. Apr. 11, 2019) (emphasis added). SHIP's continued lack of diligence should not be countenanced and, because this is the only allegation pled with sufficient particularity to satisfy Rule 9(b), the claim against Beechwood Capital should be dismissed with prejudice.

IV. SHIP'S AIDING AND ABETTING CLAIMS SHOULD BE DISMISSED

As discussed above, SHIP's aiding and abetting claims fail in light of its admissions that it failed to conduct any diligence on Beechwood and either did not view or would not have viewed Beechwood's relationship with Platinum as material. Beyond that, SHIP's aiding and abetting claims against Beechwood Holdings, BBL, MSD Administrative, Beechwood Capital, the Feuer Family Trusts, the Taylor-Lau Family Trusts, and the 2016 Acquisition Trusts, *i.e.*, the non-asset manager Movants, should be dismissed for the additional reasons set forth below.

A. SHIP Fails to State an Aiding and Abetting Claim Against Beechwood Holdings, BBL, MSD Administrative, or Beechwood Capital (Counts 1-2)

SHIP pleads duplicative aiding and abetting claims against MSD Administrative, Beechwood Holdings, BBL, Beechwood Capital, and the 2016 Acquisition Trusts, alleging fraud and breach of fiduciary duty in connection with Beechwood's investment of SHIP assets. (TPC ¶¶ 412, 414.) All of these claims should be dismissed because SHIP has admitted facts that

fatally undermine its ability to establish the underlying torts. However, even were that not so, SHIP still fails to state a claim against the non-asset manager Movants.

To establish a claim for aiding and abetting fraud, SHIP must plead specific facts supporting "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Ritchie Capital Mgmt., L.L.C. v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 338 (S.D.N.Y. 2015), *aff'd*, 821 F.3d 349 (2d Cir. 2016) (quotation omitted). Similarly, to state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege: (1) a breach of fiduciary obligations to another; (2) that the aider and abettor knowingly induced or participated in the breach; and (3) that the plaintiff suffered damages as a result of the breach. *Pope v. Rice*, No. 04-cv-4171, 2005 WL 613085, at *12 (S.D.N.Y. Mar. 14, 2005). In federal court, where the claims sound in fraud, as here, a plaintiff must plead facts supporting these claims in compliance with the heightened standard of Rule 9(b).

Here, the TPC does not include a single well-pleaded allegation concerning how Beechwood Holdings, BBL, MSD Administrative, N Management, or Beechwood Capital substantially assisted any purported fraudulent statement or omission. SHIP does not allege that Beechwood Holdings and BBL were anything more than holding companies (TPC ¶¶ 12, 14); it does not allege that either of them had any operations or employees, let alone took any specific actions in support of the alleged misconduct (*see id*.) Similarly, SHIP does not allege that MSD Administrative did anything more than provide back-end administrative services for the Beechwood Entities. (*Id*. ¶ 21.) Accordingly, the claims against each of these entities should be dismissed. *See, e.g.*, *Berman v. Morgan Keegan & Co., Inc.*, 455 F. App'x 92, 96 (2d Cir. 2012) (executing transactions "insufficient to constitute 'substantial assistance.'"); *CRT Invs., Ltd. v.*

BDO Seidman, *LLP*, 85 A.D.3d 470, 472 (1st Dep't 2011) ("'[S]ubstantial assistance' … means more than just performing routine business services ….'").

Moreover, to establish substantial assistance, SHIP must plead that "the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Berman*, 455 F. App'x at 96. Putting aside the fact that the only Beechwood Capital-related allegation in the TPC that is pleaded with sufficient particularity to satisfy Rule 9(b) has already been considered and rejected by this Court, the allegations fail for other reasons as well. For example, the allegations concerning Beechwood Capital are so far removed temporally from the alleged wrongdoing that they cannot be said to have proximately caused the harm for which SHIP now complains. SHIP's aiding and abetting claims against Beechwood Capital are predicated on the allegation that it played a role in consummating certain fraudulent transactions. (TPC ¶¶ 414, 424.) The Beechwood Capital-related allegations in the TPC, conclusory as they are, are from early 2013; Beechwood did not begin to negotiate the first IMA with SHIP until more than a year later. (*Id.* ¶ 137.) There is no allegation that Beechwood Capital played a role in any transaction, let alone a fraudulent one. Thus, as in the PPVA action, the Court should dismiss SHIP's claims against Beechwood Capital here.

B. SHIP's Aiding and Abetting Claims Against the Feuer Family Trusts, the Taylor-Lau Family Trusts, and the 2016 Acquisition Trusts Should be Dismissed (Counts 3-4)

SHIP also asserts two additional aiding and abetting claims against the Feuer Family Trust, Taylor-Lau Family Trust, and the 2016 Acquisition Trusts. These too are duplicative of each other. First, SHIP alleges that the Feuer Family Trust and the Taylor-Lau Family Trust were instrumentalities through which Nordlicht, Huberfeld, Bodner, and Levy concealed their alleged (indirect minority beneficial) ownership interest in Beechwood. (TPC ¶¶ 430, 441.) Second, SHIP alleges that the 2016 Acquisition Trusts, which participated in the repurchase of

interests in the Beechwood companies in 2016, were somehow meant to "further Nordlicht, Huberfeld, and Bodner's economic interest in Beechwood Holdings and BBL by changing the companies' ownership structure, while maintaining the intended economic beneficiaries." (*Id.* ¶ 34; *see also id.* ¶¶ 432-34, 441.) These allegations are illogical and insufficient to state a claim.

As a preliminary matter, SHIP's suggestion that the Feuer Family Trust and the Taylor-Lau Family Trust somehow concealed Nordlicht's, Huberfeld's, Bodner's, or Levy's alleged ownership interest in Beechwood is belied by SHIP's allegations elsewhere in the TPC. SHIP alleges that the Feuer Family Trust was "created to hold Mark Feuer's ownership interest in Beechwood Holdings and BBL" and was "an alter ego of Mark Feuer." (*Id.* ¶ 27.) Similarly, it alleges that the Taylor-Lau Family Trust was "created to hold Scott Taylor's ownership interest in Beechwood" and was "an alter ego of Scott Taylor." (*Id.* ¶ 28.) Neither trust has or is alleged to have had any association with Nordlicht, Huberfeld, Bodner, or Levy. Accordingly, there is no way in which they could have concealed those individuals' purported ownership interests in any entity. Moreover, SHIP fails to allege anywhere in the TPC that it was aware that the Feuer or Taylor-Lau Family Trusts even existed.[4] Thus, the suggestion that they were somehow misled by some naming convention does not make sense.

SHIP's allegations concerning the 2016 Acquisition Trusts are similarly deficient. SHIP does not allege, and cannot maintain, that it relied on a statement from Beechwood after July 2016. Indeed, this Court has already held twice that SHIP failed to allege reliance and injury in connection with July and August representations purportedly made on behalf of Beechwood. *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 529 (S.D.N.Y. 2018)

[4] *See* Point II, *supra*, regarding SHIP's knowledge that it was doing business with Nordlicht and Levy and its acknowledged failure to conduct any due diligence.

(July 2016 letter: "SHIP does not explain how it relied on these communications, or how it was injured by that reliance."); *In re Platinum-Beechwood Litig.*, No. 18-CV-6658 (JSR), 2019 WL 1759925, at *6 (S.D.N.Y. Apr. 22, 2019) (August and October 2016 communications: "SHIP does not explain, however, how it relied on these misrepresentations to its detriment.").

V. SHIP'S CIVIL CONSPIRACY CLAIM SHOULD BE DISMISSED (COUNT 5)

To adequately plead claims for civil conspiracy under New York law, a plaintiff must "demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Ritchie Capital Mgmt., L.L.C.,* 121 F. Supp. 3d at 339. In addition, where the claim sounds in fraud, as here, the plaintiff must satisfy Rule 9(b)'s heightened pleading requirements, and the plaintiff "must allege the specific times, facts, and circumstances of the alleged conspiracy." *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 94 F. Supp. 2d 491, 511 (S.D.N.Y. 2000). SHIP fails to meet all the requisite elements here.

First, for the reasons discussed above, SHIP cannot demonstrate the primary torts upon which its civil conspiracy claim purports to rely. By failing to file a timely answer to Beechwood's counterclaims, SHIP has admitted (1) that it was aware of Beechwood's relationship with Platinum, (2) that it failed to perform due diligence on Beechwood, and (3) that Beechwood's relationship with Platinum was not viewed as material at the time SHIP and Beechwood entered into their relationship. Accordingly, SHIP cannot establish an underlying claim for fraud or breach of fiduciary duty, and its conspiracy claim should be dismissed.

Second, SHIP's claim, as alleged, fails under New York's intracorporate conspiracy doctrine. New York does not recognize an independent tort of civil conspiracy. Rather, it permits a claim of civil conspiracy "to connect the actions of separate defendants with an

otherwise actionable tort." *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). Here, SHIP attempts to connect Movants to torts allegedly committed by "Beechwood, Feuer, Taylor, and Levy." (TPC ¶¶ 446-48.) However, based on SHIP's own definition of Beechwood, which is defined to include "the entire Beechwood enterprise," SHIP's claim amounts to an allegation that Beechwood conspired with itself. Generally speaking, under New York's intracorporate conspiracy doctrine, members of the same corporate family cannot conspire with each other as a matter of law. *Christians of Cal., Inc. v. Clive Christian New York, LLP*, No. 13-cv-275 KBF, 2015 WL 468833, at *9 (S.D.N.Y. Feb. 3, 2015). Thus, SHIP's conspiracy claim against Movants fails.

Third, SHIP's civil conspiracy allegations are wholly conclusory, impermissibly pled against Movants without differentiation, and merely re-hash SHIP's underlying allegations of fraud and breach of fiduciary duty. *See Gray & Assocs., LLC v. Speltz & Weis LLC*, No. 150446/2007, 2009 WL 416138, at *17 (N.Y. Sup. Ct. Feb. 2, 2009) (dismissing civil conspiracy complaint as "merely repetitive" of alleged underlying torts); *Invamed, Inc. v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 221 (S.D.N.Y. 1998) (dismissing antitrust claims against corporate affiliates where plaintiff failed to alleged that the affiliates "acted" in any way, whether pursuant to a conspiracy or not); *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, No. 12-CV-3723 (RJS), 2016 WL 5719749, at *7 (S.D.N.Y. Sept. 29, 2016) ("[A] cause of action for civil conspiracy that offers no new allegations beyond those alleged in support of' other tort claims alleged elsewhere must be dismissed as duplicative.") (internal marks and citations omitted).

VI. SHIP'S CLAIM FOR UNJUST ENRICHMENT SHOULD BE DISMISSED (COUNT 7)

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." *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). Relief for unjust enrichment is "available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012). Accordingly, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Id*.

Here, SHIP alleges that Movants "were direct or indirect beneficiaries of Performance Fees paid to the Beechwood Entities or monies earned from transactions in which Beechwood favored its own interests or Platinum's interests over SHIP's interests." (TPC ¶ 462.) Beyond conclusory allegations, the TPC does not include a single allegation specifying how any of the Movants were supposedly enriched at SHIP's expense. In this way, SHIP's allegations are identical to those that this Court previously found insufficient to state a claim for unjust enrichment and should be dismissed for the same reasons.

First, it is long settled that an unjust enrichment claim cannot stand where an express agreement governs the rights at issue. *SCM Grp., Inc. v. McKinsey & Co.*, No. 10-cv-1414, 2011 WL 1197523, at *6 (S.D.N.Y. Mar. 28, 2011) ("Where, as here, it is undisputed that an express and valid contract governs the right at issue, unjust enrichment claims are precluded."); *see also SmartStream Techs., Inc. v. Chambadal*, No. 17-cv-0459, 2018 WL 1870488, at *7 (S.D.N.Y. Apr. 16, 2018) ("[A] valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter.") (marks and citation omitted). This is true for both signatories and non-signatories alike. *Vitale v. Steinberg*, 764 N.Y.S.2d 236, 239 (1st Dep't 2003); *see also Law Debenture v. Maverick Tube Corp.*, No. 06-cv-14320, 2008 WL 4615896, at *12 (S.D.N.Y. Oct. 15, 2008), *aff'd* 595 F.3d 458 (2d Cir. 2010).

SHIP cannot avoid this rule by simply alleging that "none of the Co-Conspirators was a party to any contract for which unjust enrichment is sought." (TPC ¶ 464.) Here, there is no question that the IMAs govern the payment of Performance Fees and the transactions at issue in the TPC.[5] And, as this Court has already explained in dismissing SHIP's prior unjust enrichment claims, "courts in New York state and in this District have found that the existence of a valid and binding contract governing the subject matter at issue in a particular case precludes a claim for unjust enrichment even against a third party non-signatory to the agreement." *In re Platinum-Beechwood Litig.*, 2019 WL 1759925, at *9 (internal marks and citations omitted). This same rationale applies to SHIP's claims here.

Second, as this Court has noted in connection with SHIP's prior claims, merely alleging a general, non-specific benefit is insufficient to plead an unjust enrichment claim. *Senior Health Ins. Co. of Pa.,* 345 F. Supp. 3d at 533 (allegations that certain defendants were "enriched" were "entirely conclusory" and "not entitled to be assumed to be true") (citation omitted). That is precisely what SHIP has done in the TPC, with vague and conclusory references to fees, transaction proceeds, and asset protection schemes. SHIP again fails to explain how any specific Beechwood Party received or utilized SHIP's assets. Accordingly, because SHIP's allegations are entirely conclusory, they should be dismissed on that basis as well.

VII. SHIP'S CLAIMS SHOULD BE DISMISSED ON THE BASIS OF THE *IN PARI DELICTO* DOCTRINE

"New York law defines the *in pari delicto* defense extremely broadly . . . and the New York Court of Appeals has held that even though it is an affirmative defense, 'in pari delicto may

[5] The TPC only references one non-IMA transaction, the June 2016 Agera transaction, and it does not include any allegations concerning specific payments to Beechwood Parties in connection with that transaction.

be resolved on the pleadings . . . in an appropriate case.'" *Picard v. HSBC Bank PLC*, 454 B.R. 25, 37 (S.D.N.Y. 2011) (quoting *Kirschner v. KPMG LLP*, 15 N.Y.3d 446 (2010)). The Second Circuit has held that "[e]arly resolution is appropriate where (as here) the outcome is plain on the face of the pleadings." *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 65 (2d Cir. 2013).

That is the situation presented by this lawsuit. *In pari delicto* is triggered by SHIP's admissions that it committed fraud against Beechwood. (*See, e.g.*, ECF No. 190 ¶ 306.) In light of these admissions, the doctrine of *in pari delicto* bars SHIP's claims against Movants.

CONCLUSION

For the foregoing reasons, the Beechwood Parties respectfully request that the Court enter an order granting their motion to dismiss, and such other and further relief as this Court deems just and proper.

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Global Distribution Trust, Feuer Family 2016 Acq Trust, Taylor-Lau Family 2016 Acq Trust, and Beechwood Capital Group LLC