UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW OF DEFENDANT PB INVESTMENT HOLDINGS LTD. IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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PB Investment Holdings Ltd., as successor-in-interest to Beechwood Bermuda Investment Holdings Ltd. (and incorrectly sued as Beechwood Bermuda Investment Holdings Ltd.) ("PBIHL"), submits this reply brief in support of its motion to dismiss the Receiver's First Amended Complaint (the "FAC").

ARGUMENT

The basis for these claims is the existence of a "fraudulent scheme" whose goal "was the personal enrichment of the Platinum Fund insiders through the extraction of significant management and incentive fees." (FAC ¶ 3.) However, of the 426 numbered paragraphs that comprise the FAC, only two of those paragraphs specifically mention PBIHL. (*See id.* ¶¶ 38 & 246.) The generalized and conclusory group pleadings regarding "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants" are inadequate to state a claim against PBIHL.

The extent of the Receiver's allegations against PBIHL consists of: (1) identifying PBIHL's predecessor as "a reinsurance company domiciled in Bermuda with its principal place of business in New York" (*id.* ¶ 38); and (2) alleging that, on March 21, 2016, a purported agent for PBIHL—and several other entities—received multiple transfers of funds for the agent's segregated accounts (*id.* ¶ 246). These allegations fail to specify how PBIHL was specifically involved in any wrongdoing, and how it may have benefitted from this wrongdoing. At best, the FAC alleges a tenuous relationship between PBIHL and other defendants to this lawsuit. Accordingly, the Receiver's claims against PBIHL should be dismissed with prejudice.

I. THE GROUP PLEADING RULE BARS THE RECEIVER'S CLAIMS.

The Receiver attempts to avoid dismissal by claiming that "group pleading is permissible where, as here, the [FAC] 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." (Opp. at 8.) This is an impermissible interpretation of what the group pleading rule allows.

The Receiver cites authority that undermines her position. In *Anwar v. Fairfield Greenwich Limited*, the court focused on group pleading where a claimant seeks to hold primary actors liable for the downstream acts of their subsidiaries. 728 F. Supp. 2d 372, 406 (S.D.N.Y. 2010). The Receiver does not, and cannot, allege that PBIHL was a primary actor in the events made the basis of the FAC. Rather, the FAC is rife with instances where the Receiver identifies the primary actors as Nordlicht, Huberfeld, Bodner, Levy, and others. (*See, e.g.*, FAC ¶¶ 57 – 60.) The 116-page FAC mentions PBIHL in two paragraphs. (*See id.* ¶¶ 38 & 246.) The Receiver presents nothing in her Opposition Brief to suggest how these mentions translate into PBIHL "playing an essential role in the fraud." (Opp. at 8.)

The Receiver's argument also fails to consider the Court's April 11, 2019 and June 21 opinions in the *Trott* case. The April 11 opinion explained that group pleading is appropriate for those defendants who are "alleged to have been a high-level corporate insider." (Apr. 11, 2019 Op. at 45.) The Receiver does not, and cannot, allege that PBIHL was such an insider.

Also, the April 11 opinion did not find that group pleading was permissible for all allegations, even those involving non-insiders. The opinion noted that group pleading applied to corporate insiders who were responsible for statements in a group-published document. (*Id.* at 22 – 23.) The Court did not accept group pleading as applied to claims regarding individual fraudulent conduct. In fact, the Court dismissed the claims against certain "Beechwood Entities" for "impermissible group pleading" that lacked specific allegations. (*Id.* at 34 – 35.)

The Court's June 21 opinion then completely dismissed PBIHL from the *Trott* case. In that opinion, the Court noted that PBIHL was "named in a single paragraph of the SAC, and [was] not charged with any specific wrongdoing." (June 21 Op. at 58.)

And so it is here. PBIHL is only named in two paragraphs, and it is not charged with any specific wrongdoing. The Receiver merely alleges that the purported agent of PBIHL and others received funds. (FAC ¶ 246.) Every other allegation that appears to contemplate PBIHL references it collectively as part of "Beechwood," the "Beechwood Defendants," or the "Beechwood Entities." The FAC fails to give PBIHL fair notice of the claims against it. Therefore, the FAC should be dismissed.

II. THE *IN PARI DELICTO* DOCTRINE BARS THE CIVIL RICO AND COMMON LAW TORT CLAIMS.

The Receiver attempts to argue around application of the *in pari delicto* doctrine by invoking the insider exception, the adverse interest exception, and the *Bateman Eichler* test.[1] (Opp. at 9 – 16.) The Receiver's broad, generalized arguments fail with respect to PBIHL.

A. The Insider Exception Does Not Apply.

The Second Circuit reads the insider exception "narrowly to allow only for suit [] against a fiduciary of the [] corporation, not against third parties who are alleged to have aided and abetted the [] fraud, short of control by the third party over the" corporation. *See Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC* (*In re Madoff Sec.*), 987 F. Supp. 2d 311, 321 (S.D.N.Y. 2013). The law presumes that third parties who are not fiduciaries are not insiders. To overcome that presumption, the Receiver must credibly allege that the third party exercised total domination and

[1] The Receiver raises several arguments that relate to the *Wagoner* Rule and her fraudulent conveyance claims. (*See* Opp. at 12 & 16.) PBIHL does not assert *Wagoner* as a basis for dismissal, and the Receiver does not bring fraudulent conveyance claims against PBIHL (*see* FAC ¶¶ 341 – 416). Therefore, PBIHL does not address these arguments.

control over the company. *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995).

The Receiver recognizes that she must adequately plead facts to overcome this presumption. (*See* Opp. at 15) ("[E]ven 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."). She even provides the Court with a "control analysis" to apply. (*Id.*) Yet, at no point does the Receiver make any allegations against PBIHL that tend to satisfy the control analysis. The Receiver does not even allege that PBIHL was a fiduciary of, or that it dominated or controlled, the PPCO Funds. Instead, the Receiver alleges that *PBIHL* was controlled by individual defendants and persons connected to the Platinum Fund insiders. (*See* FAC ¶ 320.)

Without allegations of a fiduciary relationship or control, the Receiver must allege that PBIHL had "at least a controlling interest in the [company] or . . . exercised sufficient authority . . . so as to unqualifiedly dictate corporate policy and the disposition of" assets to overcome the presumption. *In re Borders Grp., Inc.*, 453 B.R. 459, 469 (Bankr. S.D.N.Y. 2011). The FAC does not contain any allegations against PBIHL in this respect. Therefore, the insider exception does not apply.

B. The Adverse Interest Exception Does Not Apply.

The adverse interest exception is the "'most narrow of exceptions' [and] is reserved for cases of 'outright theft or looting or embezzlement . . . where the fraud is committed against a corporation rather than on its behalf.'" *Picard v. JPMorgan Chase Bank & Co.* (*In re Bernard L. Madoff Inv. Secs. LLC*), 721 F.3d 54, 64 (2d Cir. 2013) (quoting *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 467 (N.Y. 2010)). The Receiver concedes that this exception applies only where the

agent's acts are "entirely opposed (i.e., 'adverse') to the corporation's own interests." (Opp. at 10) (citations omitted).

The Receiver provides no specific support for applying this exception against PBIHL. She instead refers the Court to four different categories of transactions as examples of Nordlicht "victimiz[ing] the PPCO Funds." (*Id.*) Only the first category appears to apply to PBIHL, and even then, only because the citation encompasses one of the paragraphs where the FAC mentions PBIHL. (*Id.*) (citing FAC ¶¶ 221 – 258).

The allegations regarding PBIHL are vague. They also do not resolve the fact that one of the central allegations in the FAC is that Platinum Insiders/PPCO agents created "Beechwood" and sold assets to it to stave off liquidity issues at the PPCO Funds. (*See id.* ¶¶ 105 – 107 & 177 – 178.) *See, e.g., Walker, Truesdell, Roth & Assocs., Inc. v. Globeop Fin. Servs., LLC*, 43 Misc. 3d 1230(A) (Sup. Ct. N.Y. Cty. 2013). Accordingly, the allegations fail to suggest that abandonment or looting occurred. *See ICP Strategic Income Fund, Ltd. v. DLA Piper L.L.P. (U.S.)* (*In re ICP Strategic Income Fund, Ltd.*), 730 Fed. App'x 78, 82 (2d Cir. 2018); *Concord Capital Mgmt, LLC v. Bank of Am., N.A.*, 102 A.D.3d 406, 406, 958 N.Y.S.2d 93 (1st Dep't 2012). The adverse interest exception does not apply.

C. *Bateman Eichler.*

The Receiver next attempts to preserve her claims by arguing that dismissal is not proper under *Bateman Eichler*. (Opp. at 13.) Considering New York's strong preference for robust application of the *in pari delicto* doctrine, the Receiver's argument fails.

First, the FAC alleges enough to show that the PPCO Funds bear "at least substantially equal responsibility for the" alleged violations made the basis of this lawsuit. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 – 11 (1985). The Receiver acknowledges that the

PPCO Funds were founded and controlled by Platinum insiders. (*See* FAC ¶¶ 57 – 60 & 101 – 106). The Receiver also notes that these same insiders "partnered and conspired with" other insiders for the benefit of the PPCO Funds. (*See id.* ¶ 178.)

Second, precluding this lawsuit against PBIHL "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. PBIHL's inclusion in the FAC as a peripheral actor certainly suggests that PBIHL's dismissal will not affect the Receiver's ability to proceed against the other defendants. Therefore, the Receiver's claims against PBIHL should be dismissed.

III. THE RECEIVER'S REMAINING CLAIMS SHOULD BE DISMISSED.

The Receiver spends the remainder of her Opposition Brief presenting reasons why her claims against the "Beechwood Defendants" and other defendant groups should survive dismissal. None of these reasons specifically addresses PBIHL or its grounds for dismissal.

The absence of any direct argument is fatal. Even so, the following subsections touch upon the Receiver's argument (to the extent that they could apply to PBIHL).

A. Civil RICO.

The Court has already found that identical claims advanced by SHIP were barred by the RICO Amendment. *See Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.* (*In re Platinum-Beechwood Litig.*), No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 67952, at *8 (S.D.N.Y Apr. 22, 2019). The FAC alleges the Beechwood Entities used reinsurance funds to enter into "non-commercial transactions" to purchase "certain PPVA Fund assets" to "generate much needed cash for the PPVA Funds while maintaining the fiction of inflated valuations." (FAC ¶ 170.) That falls within the RICO Amendment, as does conduct undertaken to keep a Ponzi scheme alive. *See Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012).

The Receiver attempts to distinguish the predicate acts of racketeering set forth in the FAC. For example, she says the "RICO claims in this case are based on" aiding and abetting fraud, aiding and abetting breaches of fiduciary, and "actively participating in the structuring and consummation of the fraudulent conveyance transactions in or about December 2015 and March 2016." (Opp. at 20 – 21.) These allegations fail to show, with the requisite particularity, that PBIHL engaged in mail or wire fraud that is enough to constitute a pattern of racketeering activity. A civil RICO claim focuses "on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise." *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987). Simply tying PBIHL to a RICO enterprise is insufficient to allege a civil RICO claim. The Receiver does not identify a single predicate act of racketeering involving PBIHL. *See Gross v. Waywell*, 628 F. Supp. 2d 475, 493 – 95 (S.D.N.Y. 2009). Further, the allegations that do relate to PBIHL fail to meet the Second Circuit's two-year continuity requirement. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008).

B. Securities Fraud.

The Receiver attempts to salvage her securities fraud claim by asserting that the FAC "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 non-performing and were therefore only worth a fraction of par value." (Opp. at 25.) However, the FAC makes no allegation of: (1) PBIHL or anyone acting on its behalf making a material misrepresentation or omission; (2) PBIHL having the requisite mental state to commit a violation; (3) any connection between the misrepresentation or omission and the purchase or sale of a security; or (4) reliance upon the misrepresentation or

omission. The only allegations that directly relate to PBIHL regard BAM Administrative—the alleged agent for PBIHL and others—being involved in multiple funds transfers in March 2016. (*See* FAC ¶ 246). The securities fraud claim should be dismissed.

C. Aiding and Abetting.

The Receiver's aiding and abetting claims are still subject to dismissal because "a corporate insider cannot aid and abet another corporate insider." *In re Grumman Olson Indus., Inc.*, 329 B.R. 411, 425 (Bankr. S.D.N.Y. 2005). "[A] third-party relationship between the aider and abettor and the corporation is a necessary element in any such action." *Solow v. Stone*, 994 F. Supp. 173, 181 (S.D.N.Y.), *aff'd*, 163 F.3d 151 (2d Cir. 1998). Thus, the aiding and abetting claims fail if PBIHL was an insider (as the Receiver contends by arguing the insider exception to the *in pari delicto* doctrine).

Further, the FAC lacks any factual allegations which tend to show that PBIHL had actual knowledge of any wrongful act, or that PBIHL provided substantial assistance to the commission of any of those allegedly wrongful acts. The Receiver contends that PBIHL's involvement consisted of having funds "round-tripped" through it. (*See* Opp. at 39 n.12.) However, the FAC only alleges that "BAM Administrative, as Agent for each of BRe BCLIC Primary, BRe WNIC 2013 LTC Primary, Beechwood Bermuda International Limited and [PBIHL]," received transfers of funds "for its segregated accounts." (FAC ¶ 246.) The FAC does not allege that PBIHL received any portion of these funds, or if it did, that it transferred (or directed its alleged agent to transfer) these funds. This dooms the claim for aiding and abetting breach of fiduciary duty.

The claim for fraud fares no better. The Receiver asserts that she has "alleged each of [the] three elements" of her aiding and abetting fraud claim. (Opp. at 44.) That may be so. However, as already discussed above, nowhere in the FAC is there any indication that PBIHL had knowledge

of, or provided substantial assistance for, any fraud or other wrongdoing. Therefore, the aiding and abetting claims should be dismissed.

IV. THE FAC FAILS FOR WANT OF JURISDICTION.

The Receiver contends, for the first time anywhere, that personal jurisdiction over PBIHL exists because, "under the payoff letters accompanying the March NPA, [PBIHL] 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)." (Opp. at 64.) This conclusory statement is not supported by the actual allegations in the FAC. The allegations are silent as to whether PBIHL received any proceeds from any transaction, let alone from a transaction "through its related entity and agent."

A plaintiff may not amend pleadings to avoid dismissal by alleging new facts in an opposition brief. *See Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998); *Jennings v. Hunt Cos.*, 367 F. Supp. 3d 66, 70 – 71 (S.D.N.Y. 2019); *see also O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss."). The Receiver's new allegations about PBIHL's alleged receipt of proceeds are an attempt to avoid dismissal. These allegations should be disregarded.

The Receiver also attempts to fortify her argument by directing the Court to one or more documents that are outside of the record. (*See* Opp. at 65 n.29.) These documents should be disregarded as well, just as the Court did when it dismissed PBIHL in the *Trott* case. (*See* June 21, 2019 Op. at 58) ("Although plaintiffs have attempted to add specificity by attaching new documents to their opposition brief, the Court will not consider these."). Therefore, the FAC fails for want of jurisdiction against PBIHL.

CONCLUSION

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

Dated: June 26, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on this 26th day of June 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this proceeding.

/s/ Kendal B. Reed
Kendal B. Reed