UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANTS WASHINGTON NATIONAL INSURANCE COMPANY'S AND BANKERS CONSECO LIFE INSURANCE COMPANY'S REPLY IN SUPPORT OF MOTION DISMISS THE FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

The Receiver does not address—let alone refute—the central points of WNIC and BCLIC's motion to dismiss, which is fatal to the Receiver's claims against them.[1] *First*, the Receiver does not refute that WNIC and BCLIC were merely reinsurance cedents who transferred approximately $600 million to Reinsurance Trusts managed by Beechwood. Upon transfer, WNIC and BCLIC became secured creditors of the Trusts, with Beechwood—and it alone—having exclusive control over those assets. Br., at 5–6. So, all of the conclusory allegations in the FAC that WNIC and BCLIC directed or engaged in transactions with Platinum are contradicted by the plain language of the Reinsurance Agreements, which demonstrate that Beechwood controlled those investment decisions. Moreover, given Beechwood's control of the Trusts, the Receiver cannot cite a ***single fact*** (literally, not one) demonstrating that WNIC or BCLIC directed or engaged in ***any*** transaction with Platinum.

Second, the Receiver's claims against WNIC and BCLIC are undone by the most telling omissions of all. The Receiver controls some nine million pages of documents from Platinum's servers. Plus, WNIC and BCLIC have produced to the Receiver several millions of additional pages of documents from CNO and Beechwood. Despite possessing this vast trove of information, the Receiver has not identified and cannot identify ***one single representation***—let alone a misrepresentation—that WNIC or BCLIC made to Platinum. Worse yet, she cannot

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[1] Unless stated otherwise, citations to the docket refer to the docket in *Cyganowski v. Beechwood Re et al.*, 1:18-cv-12018-JSR. Citations to "Br.," refer to WNIC and BCLIC's brief in support of their motion to dismiss (Dkt. No. 169). Citations to "Opp. Br.," refer to the Receiver's opposition brief (Dkt. No. 256). Citations to paragraph numbers refer to the First Amended Complaint (Dkt. No. 83, the "FAC"), and defined terms have the same meaning as those in the FAC.

identify ***even one single communication*** that transpired between Platinum and WNIC or BCLIC before, during, or after the term of the Reinsurance Agreements. The Receiver has nothing.

Third, the Receiver ignores the key holding of the Second Circuit that guts so many of her claims. Her entire theory of liability against WNIC and BCLIC is that, when WNIC and BCLIC supposedly learned of the Platinum-Beechwood fraud in December 2015 (or March 2016, her theory is not clear), instead of exercising their contractual right to terminate the Reinsurance Agreements then (despite their doing so upon completion of their investigation), they "exercised self-help." Opp. Br., at 6. The Second Circuit, however, has already held, on even starker facts, that a secured creditor cannot be liable in these circumstances. Br., at 15–16.

Fourth, the Receiver fails to explain the plausibility of her theory that WNIC and BCLIC intentionally committed financial suicide, by knowingly keeping $600 million of assets backing policyholder claims with fraudsters who were bent on diverting those assets to keep a fraud scheme afloat, particularly when—as the Receiver admits (¶ 151)—WNIC and BCLIC remained on the hook for the entirety of those policyholder liabilities when the fraud scheme cratered. Br., at 10–12. The Receiver's strike suit against WNIC and BCLIC should be dismissed.

I. THE RECEIVER IS NOT EXCUSED FROM BASIC PLEADING STANDARDS.

The Receiver makes several excuses to justify her inability to state any *facts* showing that BCLIC or WNIC did anything to harm PPCO. None are persuasive. *First*, she argues that as a receiver she should be held to a more lenient pleading standard because she is "an outsider to the [FAC's] transactions." Opp. Br., at 7. That is nonsense. The Receiver has controlled the Platinum servers and some nine million pages of documents for an extensive period of time and conducted an intensive "investigation into the pre-receivership business and affairs of the Receivership Entities." ¶ 24. Receivers are regularly held to Rule 9(b)'s particularity requirement, as the rule is meant to protect defendants and does not exempt receivers. *See, e.g.*,

Armstrong v. McAlpin, 699 F.2d 79, 90 (2d Cir. 1983); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 425–27 (S.D.N.Y. 2007).

Second, the Receiver argues that she should be held to a lesser standard because the details of WNIC and BCLIC's "involvement in that scheme are peculiarly within their own knowledge." Opp. Br., at 7. But if WNIC and BCLIC schemed with Platinum and Beechwood to defraud PPCO (¶ 7), evidence of it would be apparent in the nine million pages of Platinum documents she controls, not to mention the millions of other pages that have been produced to her.[2]

Third, the Receiver argues that she can lump defendants together because the FAC alleges "a tight weave of connections between the Defendants . . . ." Opp. Br., at 8. If that were true, any plaintiff alleging fraud could sidestep Rule 9(b) by concluding that all the defendants were in on it together. That is obviously not the law. *Leemon v. Burns*, 175 F. Supp. 2d 551, 556 (S.D.N.Y. 2001).[3] The FAC does not satisfy Rule 9(b).

[2] In addition to controlling Platinum's own server with nine million pages of documents, she also has had (a) WNIC's and BCLIC's production of 27,170 documents to the SEC, which included 189,320 pages, since December 2018, when WNIC and BCLIC voluntarily produced them to her, and (b) Beechwood's productions to the SEC, with 157,835 documents, covering 1,270,820 pages. *See* Declaration of John M. Aerni, submitted herewith.

[3] The only case the Receiver cites in support of this relaxed pleading standard is wholly distinguishable. There, the plaintiff alleged facts *with particularity* showing that the defendants were part of the same corporate structure and "shared office space, management, names and goals." *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 405–06 (S.D.N.Y. 2010). This Court relied in part on *Anwar* in holding that claims against the masterminds of the Platinum-Beechwood fraud could be sustained under the group pleading doctrine. *See In re Platinum-Beechwood Litig.*, 2019 U.S. Dist. LEXIS 62745, at *35–36 (S.D.N.Y. Apr. 11, 2019).

II. ***SHARP* IS DISPOSITIVE OF THE AIDING AND ABETTING AND FRAUDULENT CONVEYANCE CLAIMS.**

Sharp[4] makes clear that a secured creditor taking repayment pursuant to an antecedent debt gives "fair consideration" *as a matter of law*—regardless of whether it knew the funds it received upon repayment were fraudulently obtained. That disposes entirely of the Receiver's fraudulent conveyance claims because the *only* transfer of assets to WNIC and BCLIC was their September 2016 recapture of *the Trusts*' assets. *Sharp* also dooms her aiding and abetting claims because secured creditors like WNIC and BCLIC are entitled to engage in self-help, and cannot be liable for "arrang[ing] to extricate [themselves] from the risk," even if they were "in a position to blow the whistle on the [ ] fraud, but did not." *Sharp*, 403 F.3d at 53.

Realizing that *Sharp* destroys her claims against WNIC and BCLIC, the Receiver now attempts a 180° turn, dumping her theory of "subsequent transferee" liability altogether,[5] and instead pretends that WNIC and BCLIC were parties to a transaction with PPCO. The Receiver's *Alice in Wonderland* fiction takes two forms, both of which are foreclosed by *Sharp*.

First, the Receiver tries to "collapse" all of the transactions, such that WNIC and BCLIC would become "effective transferees" of the PPCO Loan Transactions. Opp. Br., at 49–50. But *Sharp* makes clear that such an attempt to collapse transactions "has no applicability where, as here, it is undisputed that [the agreement creating the antecedent debt] was made in good faith

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[4] *Sharp Int'l Corp. v. State St. Bank & Trust Co.*, 403 F.3d 43 (2d Cir. 2005).

[5] The Receiver argues that these claims should nevertheless survive because "[t]he Complaint satisfies Rule 8 by providing 'fair notice' to BCLIC and WNIC." Opp. Br., at 53–54. She misses the point, as providing "notice" of a claim that fails as a matter of law does not avoid dismissal. Nor are there any issues of fact precluding dismissal (her other last-ditch argument, *id.* at 50–51), as a secured creditor who takes repayment pursuant to a valid antecedent debt does so for "fair consideration," and with requisite "good faith," as a matter of law. *Sharp*, 403 F.3d at 54–56.

long before the purportedly fraudulent transfer. No ground exists therefore to 'collapse' that [transaction] into other (non-contemporaneous) bad-faith maneuvers." 403 F.3d at 55 (distinguishing *HBE Leasing Corp. v. Frank*, 48 F.3d 623 (2d Cir. 1995), the main case relied upon by the Receiver).[6] The Reinsurance Agreements that entitled WNIC and BCLIC to recapture the Trust assets were entered into in February 2014, years before the PPCO Loan Transactions, and the Receiver concedes WNIC and BCLIC *did not know* about the Platinum-Beechwood fraud at that time. *See* Opp. Br., at 6. Hence, the transactions cannot be "collapsed."

Second, the Receiver misstates the facts in *Sharp* to claim—without any legal support—that *Sharp* does not apply to secured creditors alleged to have known of, actively participated in, substantially assisted with or benefited from the primary fraudulent transfer. Opp. Br., at 52–53; *see id.*, at 41 (making same argument with respect to aiding and abetting claims). But that is ***exactly*** what *Sharp* holds, because that is exactly what was alleged in *Sharp*. Four different courts examining the facts in *Sharp* expressly considered—and rejected—the very argument the Receiver makes now.[7]

In *Sharp*, the bankruptcy trustee argued that State Street knew of the debtor's fraud and "gave no warnings and blew no whistles." *Sharp*, 403 F.3d at 48; *see also id.* at 50 (stating that the debtor looted $19 million after the bank "allegedly should have blown the whistle"). Instead, the bank "elected not to foreclose on the loan" (*id.* at 51) even though "it had the right to

[6] *HBE Leasing* confirms that "[i]f . . . the debtor . . . uses [fraudulent proceeds] for some other legitimate purpose, including the preferential repayment of pre-existing debts . . . then the entire transaction, even if 'collapsed,' cannot be a fraudulent conveyance." 48 F.3d at 635.

[7] The *Sharp* line of cases includes the Second Circuit case cited above and its companion state court and bankruptcy court cases, *Albion Alliance Mezzanine Fund, L.P. v. State St. Bank and Trust Co.*, 8 Misc. 3d 264 (N.Y. Sup. 2003), *aff'd*, 767 N.Y.S.2d 619 (N.Y. App. Div. 2003) (collectively, "*State Street*"), and *In re Sharp Int'l Corp.*, 281 B.R. 506 (Bankr. E.D.N.Y. 2002) ("*Sharp Bankruptcy*").

foreclose and pull the plug" on the whole fraud scheme. *Id*. at 48. The bank, driven by its own self-interest, wanted to be repaid and hence it consented to the debtor taking additional loans from other creditors that it knew the debtor could not repay—and that it knew were being solicited with fraudulent representations—so the debtor would repay the bank, thus "extricat[ing] itself from the risk." *Id*. at 53. The Second Circuit held that such conduct did not give rise to any liability because the bank was under no duty to warn anyone else and, as a secured creditor, had the complete right to be repaid on its antecedent debt even if the debtor was, with the bank's knowledge and assistance, stealing from other creditors to repay the bank.[8] This is fatal to the Receiver's argument that WNIC and BCLIC were under a duty to blow the whistle and can be liable for not doing so, even if, as the Receiver asserts, WNIC and BCLIC knew of the fraud and kept silent so Beechwood could raise funds elsewhere to repay them.

As set forth below, the tortious acts of the secured lender/subsequent transferee (State Street) in *Sharp* was lightyears worse than what the Receiver has alleged against WNIC and BCLIC:[9]

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[8] Judge Easterbrook's opinion in *B.E.L.T., Inc. v. Wachovia Corp.*, 403 F.3d 474 (7th Cir. 2005) is in accord. There, a bank knew that "mischief was afoot" with its "financially unstable" borrower. *Id*. at 476. The bank remained silent while the debtor borrowed from others to repay the bank. Affirming the dismissal of all claims against the bank, the court held that the bank was under no duty to warn others, was entitled to keep silent and that receiving funds—even those fraudulently procured by the debtor from other creditors—as repayment for an antecedent debt was not a fraudulent transfer or tortious in any way. *Id*. at 477.

[9] The Receiver summarizes her claims against WNIC and BCLIC in her Opposition Brief at 6: upon learning of the "Platinum/Beechwood relationship," WNIC and BCLIC should have "exercise[d] their contractual right to terminate" the Reinsurance Agreements and taken other "ameliorative action" by blowing the whistle on the fraud. Instead, WNIC and BCLIC did not terminate the Agreements and engaged in "self-help" by trying to "mitigate the risk." This is implausible because, while WNIC and BCLIC may have suspected that Beechwood and Platinum had *a relationship*, that is a far cry from believing—let alone knowing—that the two were engaged *in a fraud* (and the Receiver cites no facts demonstrating any knowledge of that). Even if the Receiver's factually-barren claims were somehow accepted under Rule 9(b), *Sharp* still requires that the FAC be dismissed.

- State Street suspected Sharp was engaged in fraud nearly a *year* before calling in its antecedent debt. *State Street*, 8 Misc. 3d at 265–67. Its suspicion was based on multiple concrete data points, including actual knowledge that Sharp (a) was doing business with a known fraudster; (b) had multiple problems with its financial reporting, including its accounts receivable, which State Street had previously set up a lockbox account to monitor; (c) had refused to comply with State Street's requisite accounting procedures; and (d) had a "voracious consumption of cash." *Id.* at 266; *Sharp*, 403 F.3d at 47. By the time it "suspected" fraud, State Street had been lending money to Sharp for nearly a year and a half—the entire time during which Sharp was indeed engaged in a "massive fraud" of the kind suspected by State Street. *See State Street*, 8 Misc. 3d at 265–67.

- Rather than terminate its agreement with Sharp or disclose the suspected fraud to others, State Street enlisted a host of outside counsel and specialists to investigate the fraud, while its own senior executives took active measures to independently confirm all of Sharp's business relationships. *State Street*, 8 Misc. 3d at 266; *Sharp*, 403 F.3d at 47. It even hired outside investigators who spent several months investigating Sharp and its principals. *State Street*, 8 Misc. 3d at 266. Their detailed written reports to State Street confirmed serious issues with Sharp's business. *Id.*

- State Street called a meeting with Sharp, but, knowing that imprisoned fraudsters can't pay their bills, "did not confront Sharp with the results of its investigation into Sharp's customers and accounts receivable. *Instead, the bank proposed that Sharp seek financing from other sources to pay off its indebtedness*" to State Street. *State Street*, 8 Misc. 3d at 266 (emphasis added). Sharp did what State Street asked, soliciting investors to get the financing needed to repay State Street—"*investors whom [State Street] knew Sharp would solicit with falsified financial information*." *Id.* at 271 (emphasis added).

- "While that transaction went forward, State Street gave no warnings and blew no whistles, ignored inquiring calls from the Noteholders, preserved Sharp's line of credit when it had the right to foreclose and pull the plug [and thereby expose Sharp to the investors]," and—perhaps most egregiously—*effectuated the proposed transaction with investors by signing consents permitting Sharp to borrow the money from investors*—"without which Sharp could not have borrowed additional funds from the Noteholders" needed to repay State Street. *Sharp*, 403 F.3d at 48, 52.

- "At the time it gave this consent, State Street knew that the Noteholders were purchasing these notes in reliance on Sharp's fraudulent representations concerning the accuracy of its financial statements. State Street further knew that its consent to the transaction was contractually required and that, absent its consent, the transaction would not be consummated" and State Street would not be repaid. *Sharp*, 403 F.3d at 52 (citation omitted). It gave its consent anyway, and further "assisted Sharp by monitoring the transaction, [and] reviewing the closing documents." *State Street*, 8 Misc. 3d at 271.

- As planned, Sharp promptly transferred the funds it had fraudulently solicited from investors to State Street to repay its antecedent debt. *State Street*, 8 Misc. 3d at 267. Sharp quickly went into bankruptcy and left investors emptyhanded. *Id.*

None of these allegations—even collectively—were sufficient to state a claim against State Street for anything, including participating in or substantially assisting a fraud.[10] ***Nothing*** overcame the decisive principle that a secured creditor is entitled to foreclose an antecedent debt as a matter of law, even if it "knew that there would likely be victims of the [ ] fraud, and arranged not to be among them." *Sharp*, 403 F.3d at 52; *see id.* at 51 ("Ultimately, we conclude that the complaint says no more than that State Street relied on its own wits and resources to extricate itself from peril, without warning persons it had no duty to warn.").[11]

The Receiver nevertheless argues that *Sharp* does not foreclose her actual fraudulent conveyance claim because "the Receiver has alleged that BCLIC and WNIC knew of the fraud at the time the transfers to the BCLIC/WNIC Trusts were made" in March 2016. Opp. Br., at 53. Putting aside that there are no facts pleaded to support that conclusion, the Receiver misreads *Sharp*. Like the Receiver, "Sharp ha[d] alleged State Street's knowledge that the funds used to repay the preexisting debt were fraudulently obtained," *Sharp*, 403 F.3d at 55 (it also alleged

[10] *See, e.g.*, *Sharp*, 403 F.3d at 52 ("State Street's exercise of that right to protect itself rather than its improvident competitors did not constitute participation in [Sharp's] fraud" or affirmative or substantial assistance with it, either). The Receiver's cited cases regarding participation (Opp. Br., at 49) are inapposite, as none involved repayment of an antecedent debt.

[11] The Receiver is wrong that *Ultramar* and *Chemtex* hold differently. *See Ultramar Energy v. Chase Manhattan Bank, N.A.*, 191 A.D.2d 86, 91 (1st Dep't 1993) (secured creditor would have been within rights to take repayment on antecedent debt "even if it had known of [debtor's] financial difficulties and even if [it] had known that such assignment would result in [another creditor] not getting paid"); *Chemtex, LLC v. St. Anthony Enters.*, 490 F. Supp. 2d 536, 548 (S.D.N.Y. 2007) (secured creditor had no obligation to disclose Chemtex's alleged diversion of assets to other creditors, and failure to do so "would not constitute 'substantial assistance' . . . even if [the secured creditor] had known of any effort to defraud Chemtex"); *see also Stanfield Offshore Leveraged Assets, Ltd. v. Life Inst. Co.*, 2008 N.Y. Misc. LEXIS 8037, at *8 (N.Y. Sup. Apr. 11, 2008) (dismissing aiding and abetting claims against insurance companies that knew debtor had lied about its solvency to obtain loans necessary to repay them $50 million of outstanding debt, as "demanding and pressuring a debtor for repayment of a bona fide debt" is "consistent with the creditor's contractual and legal rights" and "does not amount to a corrupt inducement, participation, or substantial assistance necessary to give rise to aider and abettor liability") (citing *Sharp*, 403 F.3d at 51).

State Street knew Sharp was being looted by its principals, which is why it needed additional funding to begin with), but those allegations "inadequately allege[d] fraud with respect to the transaction that Sharp seeks to void"—the *subsequent transfer* to State Street. *Id.* at 56. And there was nothing fraudulent, tortious or wrongful about State Street accepting payment of an antecedent debt. *See State Street*, 8 Misc. 3d at 271.

Here, as in *Sharp*, the Receiver's "factual" averments of fraud—including PPCO Master Fund's intent to defraud—all go to the PPCO Loan Transactions between PPCO, Beechwood and/or the Trusts (which Beechwood controlled). The Receiver does not allege ***any*** fraud with respect to the subsequent (and only) transfer to WNIC and BCLIC—the September 2016 recapture of Trust assets. Nor can she. Even under the worst-case scenario alleged by the Receiver, WNIC and BCLIC were simply collecting on an antecedent debt so they would not be left without the assets needed to pay the policyholder liabilities for which they always remained on the hook. *Sharp* holds that, even if the Receiver had alleged (and she has not) that WNIC and BCLIC affirmatively consented to the PPCO Loan Transactions *for the express purpose of taking those funds in the subsequent recapture*, ***and*** that WNIC and BCLIC did so "with actual or constructive knowledge that [PPCO Master Fund was] engaging in fraud [in the primary transfer], [that still] does not constitute participation in the fraud so as to transform the subsequent repayment of the loan into an intentional fraudulent conveyance." *See State Street*, 8 Misc. 3d at 272 (quoting *Sharp Bankruptcy*, 281 B.R. at 523–24); *Sharp*, 403 F.3d at 56 (subsequent transfer "was at most a preference between creditors").

III. THE RECEIVER DOES NOT ADEQUATELY ALLEGE HER RICO, SECURITIES FRAUD, OR AIDING AND ABETTING CLAIMS.

Citing *no facts* in her FAC showing that WNIC or BCLIC violated RICO, aided and abetted fraud or breach of fiduciary duty, or committed securities fraud, the Receiver simply

compiles an appendix listing the allegations in the FAC that purportedly meet the requirements of Rule 8 (but not Rule 9(b)). Opp. Br., at 5. But the appendix does not even pretend to identify allegations specific to WNIC or BCLIC.[12] In any event, the Receiver's admissions that "the Platinum insiders owned and controlled the Beechwood Defendants and the PPCO Funds, ***causing and executing*** all of the wrongful acts alleged" guts her scattershot and conclusory allegations against WNIC and BCLIC. Opp. Br., at 15 (emphasis added). That admission confirms that the Platinum-Beechwood fraudsters are the bad actors, not WNIC or BCLIC.

And, the Receiver's claims are as implausible as they are barren of facts. It is inherently implausible that—after allegedly discovering the Platinum-Beechwood fraud—WNIC and BCLIC would decide to double down and willingly leave Trust assets in the clutches of Ponzi-scheming fraudsters when WNIC and BCLIC needed those assets to pay policyholder obligations. That would have been suicidal.[13]

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[12] Most of the cited paragraphs either don't mention WNIC or BCLIC, or simply refer to allegations from WNIC and BCLIC's 2016 complaint against certain of the Beechwood fraudsters. *See, e.g.*, ¶¶ 107–112, 121–26, 156, 160–67, 177–80. Others show that BCLIC and WNIC were the *victims* of Beechwood's fraud. *See, e.g.*, ¶ 201 ("Beechwood inflated the value of these tenuous forms of collateral to conclude that the Trusts were over-collateralized."). And the handful of paragraphs that actually mention WNIC or BCLIC are either conclusory (*see, e.g.*, ¶¶ 127–31, 139); contradicted by the terms of the Reinsurance Agreements (*see, e.g.*, ¶¶ 253–54, alleging that the CNO Defendants "structured, negotiated, and consummated" the allegedly fraudulent transactions when the Reinsurance Agreements show that Beechwood, not CNO, controlled any such investment decisions), or irrelevant to fraudulent intent (*see, e.g.*, ¶¶ 114–15, alleging issues in the long-term care insurance industry at large). Tellingly, the appendix states that every fraudulent conveyance claim is asserted against *the Trusts*—not WNIC and BCLIC. *See* Opp. Br., at Schedule A.

[13] *See In re Bernard L. Madoff Inv. Sec. LLC*, 548 B.R. 13, 32 (Bankr. S.D.N.Y. 2016) ("While greed may cloud judgment, it is not plausible that the average financial professional owing fiduciary duties to its own clients and investors would knowingly invest their money in a Ponzi scheme that is doomed to collapse.").

A. The RICO Claims Are Barred by the RICO Amendment.

The Receiver tries to plead her way around the RICO Amendment by arguing that her RICO claims are based on different predicate acts than her securities or fraudulent conveyance claims. Opp. Br., at 18. But, in Count I, the Receiver alleges that the "Defendants" violated RICO by "transmit[ting] communications and documents that facilitated the PPCO Loan Transactions and ***Securities Purchases***." ¶ 283 (emphasis added). The Receiver also alleges that the "Defendants'" racketeering activity harmed PPCO by forcing it to enter into "investments that were speculative, risky, or simply sham transactions." ¶ 289.

The Receiver also argues that the RICO Amendment cannot apply "until this Court rules that the Receiver has alleged an actionable securities fraud claim." Opp. Br., at 17. "This argument, however, is specious." *Friedman v. JP Morgan Chase & Co.*, 2016 U.S. Dist. LEXIS 65558, at *41 (S.D.N.Y. May 18, 2016) (applying RICO Amendment even though the RICO claim was "pleaded only in the alternative"). The RICO Amendment applies even when a "plaintiff cannot itself pursue a securities fraud action against the defendant." *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 (2d Cir. 2011).

B. The Receiver Cannot Save Her Securities Fraud Claim.

The Receiver alleged (without supporting *facts*) that BCLIC and WNIC made affirmative misrepresentations in structuring the PPCO Loan Transactions. *See, e.g.*, ¶ 234. The Receiver now abandons that theory and argues that WNIC and BCLIC committed securities fraud by making "implied misrepresentations . . . without the uttering of words." Opp. Br., at 26. But the Receiver has not identified ***any*** implied misrepresentation by WNIC or BCLIC, let alone any facts showing that WNIC or BCLIC "participat[ed] in the transactions in the Purchased Securities described in the [FAC]." Opp. Br., at 27. The Receiver's FAC still does no more than allege that WNIC and BCLIC merely turned a blind eye to the Platinum-Beechwood fraud. As

Sharp confirms, such allegations are insufficient to state a claim. *See* Br., at 13; *see also In re J.P. Jeanneret Assocs.*, 769 F. Supp. 2d 340, 377 (S.D.N.Y. 2011).

IV. THE RECEIVER'S STATE AND FEDERAL CLAIMS ARE BARRED BY IN PARI DELICTO.

The Receiver advances a hodgepodge of theories to avoid the application of *in pari delicto* and the *Wagoner* rule. *First*, the Receiver tries to fit into the narrow adverse interest exception by trying to draw a distinction between the PPCO Funds and their portfolio manager (PPCO Portfolio Manager), claiming that (1) only the manager benefited from the years of self-dealing, and (2) discovery is needed to determine whether the funds benefited too. Opp. Br., at 9–11. This is nonsense. The PPCO Funds obviously benefited from the alleged scheme, *a fact the Receiver admits*. *E.g.*, ¶¶ 68–71, 101 (admitting that, without the cash infusion from investments, the PPCO Funds would have been unable to meet their obligations—which is enough to defeat the exception).[14] What's more, the FAC expressly alleges that *PPCO Master Fund*—not the "rogue" PPCO Portfolio Manager—"entered into several of the [subject] transactions . . . with the intent to hinder, delay and defraud." Opp. Br., at 47 n.19. PPCO was not defrauded by rogue "agents;" it itself engaged in fraud through its owners and principals (*i.e.*, the Platinum Insiders). *See In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54, 64–65 (2d Cir. 2013) (rejecting the adverse interest exception because "[i]t is not possible thus to separate BLMIS from Madoff himself and his scheme").

[14] *See Kirschner v. KPMG LLP*, 938 N.E.2d 941, 953 (N.Y. 2010) ("So long as the corporate wrongdoer's fraudulent conduct enables the business to survive—to attract investors and customers and raise funds for corporate purposes—this test is not met."); *see also In re Platinum-Beechwood Litig*., 2019 U.S. Dist. LEXIS 104562, at *48 (S.D.N.Y. June 21, 2019) ("If defendants are correct—and if the Agera Sale provided PPVA with liquidity necessary to sustain the fund's operations—then the Court agrees that the adverse interest exception does not apply.").

Second, the Receiver, discussing a lone case from another jurisdiction, argues that her federal claims are not barred because applying *in pari delicto* "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." Opp. Br., at 14. But the Second Circuit has considered similar arguments and concluded that the application of *in pari delicto* is "well established" under New York and federal law. *In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d at 64 n.13 (citing *Bateman Eichler*, the Supreme Court case cited by the Receiver).

Third, the Receiver claims that *in pari delicto* does not apply to fraudulent conveyance claims. Opp. Br., at 12. But the New York Court of Appeals has never so ruled. On the contrary, it has held that "[t]he principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be weakened by exceptions." *Kirschner*, 938 N.E.2d at 950 (internal quotation marks omitted).

V. THE RECEIVER'S OTHER FRAUDULENT CONVEYANCE ARGUMENTS FAIL.

The Receiver sets forth three reasons why she purportedly has standing to assert fraudulent conveyance claims on behalf of non-Receivership Entities, none of which have merit.

First, the Receiver claims that the FAC alleges creditor status with respect to transfers made by "the transferor, PPCO Master Fund." Opp. Br., at 54–55. But that has no bearing on the Receiver's lack of creditor status with respect to those transfers made by ***non***-Receivership Entities, which are the subject of WNIC's and BCLIC's Motion to Dismiss. The Receiver has not alleged—and does not have—creditor status with respect to any transfers made by the NPA

Guarantors or the MSA PPCO Subsidiaries, and thus has no standing to assert claims that those conveyances were fraudulent.

Second, the Receiver contends that certain cases she cites entitle a receiver to recover fraudulent conveyances on behalf of a receivership entity *transferor* (as opposed to just the *creditor* of a transferor). Opp. Br., at 55–56. Not true. Her cases affirm black letter law that a receiver must stand in the shoes *of a creditor* of a transferor to assert fraudulent conveyance claims—which the Receiver does not.[15] The Receiver does not allege that she stands in the shoes of *any* creditors of the NPA Guarantors or the MSA PPCO Subsidiaries. In any event, none of the NPA Guarantors or MSA PPCO Subsidiaries are Receivership Entities.

Third, recognizing this fatal deficiency, the Receiver turns to facts not alleged in the FAC to claim she has standing because "[e]ach 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" and "the Receiver has the power to direct the corporate actions of the NPA Guarantors and the MSA PPCO Subsidiaries." Opp. Br., at 57. Such assertions cannot be considered on a motion to dismiss. *In re IAC/Interactivecorp Secs. Litig.*, 695 F. Supp. 2d 109, 124 (S.D.N.Y. 2010). They also do not create a basis for standing.

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[15] *Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008), for example, emphasizes the NYDCL's "explicit" requirement that only *creditors* of transferors have standing to bring fraudulent conveyance claims—which is why it dismissed the SEC receiver's § 276 claim. *Id.* at 129, 134–35; *see also id*. at 133 ("[A] receiver's standing to bring a fraudulent conveyance claim will turn on whether he represents the transferor only *or also represents a creditor of the transferor*.") (interpreting Receiver's other cited case, *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995)) (emphasis added). The same is true of *Cobalt Multifamily Inv'rs I, LLC v. Arden*, 46 F. Supp. 3d 357, 363 (S.D.N.Y. 2014) (standing requirement met where transferor entities are "within the [receiver's] estate ***and*** established creditor status") (emphasis added).

The NPA Guarantors and the MSA PPCO Subsidiaries *are not parties to this case* and the Receiver cannot pierce her own veil and, in her own name, pursue fraudulent conveyance claims on behalf of alleged majority-owned subsidiaries. Moreover, because the NPA Guarantors and MSA PPCO Subsidiaries are not Receivership Entities, the authorities the Receiver cites for a receiver's standing to avoid purportedly fraudulent transfers of receivership entities do not help her.[16]

As to her newly-added NYDCL § 277 claim, the Receiver ignores (and hence concedes) two of WNIC and BCLIC's three arguments—namely, that (1) she cannot avoid transfers made by the NPA Guarantors and MSA PPCO Subsidiaries because they are not alleged to be partnerships, and (2) claims pursuant to NYDCL § 277(a) for avoidance of transfers made by PPCO Master Fund to WNIC and BCLIC should be dismissed because neither WNIC nor BCLIC is a "partner" of PPCO Master Fund. Br., at 25.[17]

<u>CONCLUSION</u>

For the foregoing reasons, the Receiver's claims against Defendants WNIC and BCLIC should be dismissed.

[16] Nor does the Receivership Order somehow remedy her lack of creditor standing. The court did not grant (nor could it) the Receiver the ability to pierce her own veil or violate basic law in pursuing claims of non-creditors.

[17] For all of the reasons set forth above, the Receiver's unjust enrichment and declaratory judgment claims—which seek the exact same relief as her fraudulent conveyance claims and are not even listed in her appendix of claims against the CNO Defendants—should be dismissed. *See also B.E.L.T.*, 403 F.3d at 477 ("Calling the receipt of a preference 'unjust enrichment' does not change matters; a preference by any other name is still a preference and cannot be recovered outside bankruptcy.").

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 adversary proceeding.

/s/Adam J. Kaiser
Adam J. Kaiser