UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-JSR
MELANIE L. CYGANOWSKI, AS EQUITY RECEIVER FOR PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND, et al., Plaintiff, v. BEECHWOOD RE LTD., et al., Defendants.	Case No. 1:18-cv-12018-JSR

DEFENDANTS SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA AND FUZION ANALYTICS, INC.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PARTIAL MOTION TO DISMISS THE PPCO RECEIVER'S FIRST AMENDED COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Page(s)

Page(s)

Statutes, Rules, and Regulations

Page(s)

Other Authorities

INTRODUCTORY STATEMENT

The Receiver's opposition to SHIP's motion to dismiss the Investor Claims[1] (ECF No. 442, "Receiver Opp.") fails to explain why she should be permitted to maintain those claims against SHIP and Fuzion when she admittedly stands in the shoes of the Platinum insiders who engineered the underlying fraud. As explained in SHIP's opening brief, the *Wagoner* rule, and the principles supporting the doctrine of *in pari delicto*, bar the Receiver from asserting claims that in reality belong to the wrongdoing receivership entities' creditors or investors. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991). The Receiver cannot change her fate as to SHIP and Fuzion through reliance on inapplicable exceptions to *Wagoner* and legally irrelevant distinctions between the various receivership entities that she represents.

The Receiver also fails to establish that those claims, even if standing existed, have been plausibly stated against SHIP or Fuzion. The Receiver's opposition offers nothing of substance on Fuzion beyond the virtually non-existent allegations specific to Fuzion in the FAC and thus essentially concedes that Fuzion is not a proper defendant. The Investor Claims are insufficiently pled against SHIP for several reasons. The conduct underlying the Receiver's RICO claim involves securities transactions and thus is barred by the RICO Amendment, as this Court has already ruled twice, in dismissing both SHIP's and the PPVA Liquidators' RICO claims. *See* ECF No. 488, 6/21/19 Opinion & Order at 15 ("PPVA MTD Op."); ECF No. 292, 4/22/19 Opinion & Order at 23 ("SHIP MTD Op."). The Receiver's Section 10(b) claim is inadequately pled and time-barred in any event, notwithstanding her appeal to inapplicable equitable tolling doctrines. The Receiver's aiding and abetting claims are defective as to SHIP and Fuzion because such claims require a plaintiff to plead the defendant's actual knowledge of the underlying tort—constructive

[1] Unless otherwise noted, capitalized terms have the meaning set forth in SHIP's opening brief.

knowledge is insufficient—and substantial assistance to achievement of the unlawful scheme. Yet the Receiver's claims rest entirely on the unavailing theory that Beechwood's knowledge and conduct may be imputed to SHIP. Finally, the Receiver's unjust enrichment claim should be dismissed because it does not identify any benefit allegedly conferred upon SHIP or Fuzion, and it is duplicative of the Receiver's fraudulent conveyance claims in any event.

ARGUMENT

I. The Receiver Cannot Escape Application of the *Wagoner* Rule, Which Compels Dismissal of The Investor Claims Against SHIP and Fuzion

A. The Receiver's Own Allegations Establish That the "Adverse Interest" Exception Cannot Apply Against SHIP or Fuzion

The Receiver cannot invoke against SHIP or Fuzion an "adverse interest" exception to the *Wagoner* rule that "is narrow and applies only when the agent has totally abandoned the principal's interests." *Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000). The Receiver concedes that "this most narrow of exceptions" is reserved "for those cases—outright theft or looting or embezzlement—where the insider's misconduct benefits only himself or a third party; i.e., where the fraud is committed *against* a corporation rather than on its behalf." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466, 912 N.Y.S.2d 508, 519 (2010) (emphasis in original). Where the agent commits the fraud both for his own benefit and the benefit of the corporation, "application of the exception would be precluded." *Id.* at 467, 912 N.Y.S.2d at 519. The benefit to the corporation need not be great; "simply keeping a business alive [is] enough of a benefit to defeat the adverse interest exception." *In re ICP Strategic Credit Income Fund Ltd.*, 568 B.R. 596, 611-12 (S.D.N.Y. 2017). The purpose of this bright line is to "avoid[] ambiguity where there is a benefit to both the [agent] and the [principal] …." *Republic of Iraq v. ABB AG*, 768 F.3d 145, 166 (2d Cir. 2014) (quoting *Kirschner*, 15 N.Y.3d at 466, 912 N.Y.S.2d at 519). In applying *Kirschner*, the Second Circuit has held that even if only "some of the misconduct was committed on behalf of" the entity,

the adverse interest exception cannot apply.[2] *Id.*

The Receiver explicitly alleges that the principals of "the Platinum Funds"—defined to include the PPCO Funds, FAC ¶ 65—"systematically utilized the funds infused by the insurers [including SHIP] to *prop up* the Platinum Funds and their portfolio companies …." *Id.* ¶ 179 (emphasis added); *see also id.* ¶ 5 ("Platinum insiders, along with Moshe Feuer and Scott Taylor," created Beechwood "to gain access to hundreds of millions of dollars in insurance assets" to "infuse into the Platinum Funds and their distressed portfolio companies much-needed cash while also satisfying redemption requests."). The Receiver details a scheme where "PPCO Master Fund used the insurance companies' funds to provide approximately $60 million in support to more than ten of its portfolio companies." *Id.* ¶ 180. The Receiver attempts to sidestep these damning allegations by emphasizing other allegations that she argues show ultimate harm to the PPCO Funds, but that is not how the adverse interest exception works: "[I]f a corporation receives *any* benefit from the fraud, the adverse interest exception will not apply, even if the fraud ultimately causes the corporation to suffer harm in the long term …." *Cobalt Multifamily Inv'rs I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 428 (S.D.N.Y. 2012) (emphasis in original).

The Receiver cannot invoke the adverse interest exception based on the two loan transactions made by Beechwood in SHIP's name, which form the sole basis for the Receiver's claims against SHIP and Fuzion. *See* FAC ¶¶ 221-58. Neither qualifies as "the kind of outright

[2] The Second Circuit's holding is in tension with this Court's holding "that the applicability of the adverse interest exception must be evaluated with respect to specific instances of alleged misconduct." PPVA MTD Op. at 22. SHIP respectfully submits that the question of whether the exception applies should be evaluated in the context of the fraudulent scheme as a whole, rather than on a transaction-by-transaction basis, so as to maintain the exception's status as "the most narrow of exceptions." *Kirschner*, 15 N.Y.3d at 466, 912 N.Y.S.2d at 519. Nevertheless, even under a transaction-by-transaction analysis, the transactions in which SHIP is alleged to have been involved do not fit within the exception, as explained below.

theft or looting or embezzlement to which the exception applies." PPVA MTD Op. at 22.

First, unlike the transactions at issue in the PPVA action, *see id.* at 27, the Receiver does not contend that the PPCO Funds received no consideration in connection with those two loan transactions. Instead, the FAC vaguely alleges that the PPCO Funds did not receive "fair consideration" in the transactions based on a hindsight analysis of the assets transferred. *See, e.g.*, FAC ¶¶ 237, 255. Second, the Receiver admits that the transactions—which did not involve any actual cash changing hands—were intended to reacquire debt instruments previously issued by the PPCO Funds' *own portfolio companies* at or near par value. *See* Receiver Opp. at 10; FAC ¶¶ 248, 250. These transactions were designed to aid the PPCO Funds by "propping up" those portfolio companies with inflated valuations of the subject debt instruments through straw transactions, with nominally arm's-length third parties, in which the instruments were valued at or near par. *See* FAC ¶¶ 179-80. This propping up permitted the PPCO Funds to continue presenting inflated valuations for those portfolio companies to their investors to "stave off redemption requests" and perpetuate the fraud. *Id.* ¶¶ 4-5. The PPCO Funds benefitted, even if the transactions later harmed the PPCO Funds when the fraud unraveled. *See Kirschner*, 15 N.Y.3d at 468, 912 N.Y.S.2d at 520 ("Even where the insiders' fraud can be said to have caused the company's ultimate bankruptcy, it does not follow that the insiders 'totally abandoned' the company.").

B. The Receiver's Federal Claims Are Equally Barred by the Principles Underpinning the *Wagoner* Rule

The Receiver's federal-law Investor Claims against SHIP and Fuzion fare no better than their common-law counterparts, as the same principles apply to the federal claims if a two-part test is satisfied: "(1) plaintiff truly bears at least substantially equal responsibility for the transactions for which he seeks to recover, and (2) barring the suit will not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Ross v. Bolton*,

904 F.2d 819, 825 (2d Cir. 1990); *see also Republic of Iraq*, 768 F.3d at 162-63 (applying test to RICO claims). The Receiver's claims meet both prongs of this test.

The first prong, which is merely a restatement of "the essential elements of the [*in pari delicto*] doctrine," *Peltz v. SHB Commodities*, 115 F.3d 1082, 1090 (2d Cir. 1997), is easily satisfied here. The Receiver does not argue, because she cannot, that the PPCO Funds bear something less than equal responsibility for the fraudulent scheme outlined in the FAC, and instead resorts to platitudes about the need for discovery on that point. Receiver Opp. at 13. Discovery is not needed to establish what is already admitted in the FAC: the PPCO Funds (along with their co-conspirators) unquestionably bear the greatest—not just equal—responsibility vis-à-vis SHIP and Fuzion (and other moving defendants) for the harm to investors flowing from the fraudulent scheme the Platinum insiders created and controlled through use of the PPCO Funds and other means. The FAC acknowledges that the transactions that form the basis for the Receiver's RICO and securities fraud claims resulted directly from the scheme orchestrated by the Platinum Funds and the Platinum insiders, thus satisfying the first prong. *See, e.g.*, FAC ¶¶ 3-6, 65-111 (describing origins of fraudulent scheme and roles of Platinum insiders); *see also Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 547-48 (S.D.N.Y. 2013), *aff'd*, 768 F.3d 145 (2d Cir. 2014) (first prong satisfied where complaint "affirmatively—and emphatically—allege[d] that the Hussein Regime orchestrated the wrongful conduct," and such conduct was "attributable to plaintiff").

The second prong is also satisfied, as effective enforcement of the RICO statute or the federal securities laws will not be thwarted by the availability of the *in pari delicto* defense. *Ross*, 904 F.2d at 825. The Second Circuit explicitly has held that "it is consistent with the purpose of RICO to recognize an *in pari delicto* defense in cases where, as a direct result of the plaintiff's affirmative wrongdoing, the plaintiff bears at least substantially equal responsibility for the RICO

violations of which it complains." *Republic of Iraq*, 768 F.3d at 167-68 (internal quotation marks and citations omitted). Likewise, recognition of *in pari delicto* will not frustrate "the primary purpose of the securities laws," which is "to protect investors by requiring disclosure of material information so that they might make informed decisions regarding public offerings of securities." *Ross*, 904 F.2d at 825. The securities transactions on which the FAC relies were discrete, private transactions involving a limited number of parties—they did not concern securities that were offered to the broader investing public. *See generally* FAC ¶¶ 221-58.[3] Those transactions also do not concern any alleged misrepresentation or misleading omission made to any investors in the PPCO Funds, so barring the *in pari delicto* defense would not promote the goal of "requiring disclosure of material information" to investors. *Ross*, 904 F.2d at 825.

C. The Receiver Cannot Circumvent the *Wagoner* Rule With Conclusory Allegations That the PPCO Feeder Funds Are "Creditors"

The Receiver cannot evade the *Wagoner* rule by relying on the legal fiction that the PPCO Feeder Funds—which were directly involved in the fraudulent scheme—are "creditors of PPCO Master Fund." Receiver Opp. at 16. The purpose of the *Wagoner* rule, and the principles of *in pari delicto* underlying it, is to prevent a wrongdoer "from suing to recover for a wrong that he himself essentially took part in." *Wight*, 219 F.3d at 87. Even accepting as true the Receiver's conclusory allegation that the PPCO Feeder Funds are "creditors of PPCO Master Fund," that does not absolve those entities of their wrongdoing and allow them to assert claims on behalf of the real victims—the investors who entrusted their money to the PPCO Feeder Funds in the first instance. To permit the Receiver to skirt the *Wagoner* rule in this manner would render it a nullity.

[3] The limited and private nature of the transactions at issue here and involving SHIP contrasts sharply with the scheme at issue in *Gordon v. Royal Palm Real Estate Investment Fund I, LLLP*, which involved thousands of defrauded investors. 320 F. Supp. 3d 910, 915 (E.D. Mich. 2018) ("By November 2007, Legisi had raised over $72 million from 3,0000-5,000 investors.")

II. Even If the *Wagoner* Rule Did Not Apply, None of the Investor Claims Can Be Sustained Against SHIP or Fuzion

A. The Receiver's Claims Must Satisfy Rule 9(b)

The Receiver cannot overcome the deficiencies in the FAC's allegations by invoking an amorphous "relaxed pleading standard" for her fraud-based claims on the grounds that she "is an outsider …." Receiver Opp. at 7. The Receiver rests that argument on a 30-year-old bankruptcy court decision. *See id.* (citing *In re Ahead by a Length, Inc.*, 100 B.R. 157, 166 (Bankr. S.D.N.Y. 1989)). More recently, courts have not hesitated to dismiss claims asserted by bankruptcy trustees for failure to comply with Rule 9(b). *See In re Tribune Co. Fraudulent Conveyance Litig.*, No. 11-md-2296 (DLC), 2019 WL 294807, at *9, *33 (S.D.N.Y. Jan. 23, 2019) (applying Rule 9(b) and dismissing trustee's fraudulent transfer claims); *In re Anderson*, No. 15-br-30458 (AMN), 2018 WL 3197746, at *5, *10 (D. Conn. June 26, 2018) (same). Whatever the contours of the Receiver's proposed "relaxed pleading standard," it does not apply here in a proceeding related to an SEC receivership (as opposed to a bankruptcy proceeding). The Receiver's contention that her claims concern "matters peculiarly within" *SHIP and Fuzion's knowledge*, Receiver Opp. at 7, also is demonstrably false. Leaving aside the absence of any well-pled factual allegation to support that claim, the FAC's relevant allegations all directly involve the PPCO Funds. The Receiver, who stands in the PPCO Funds' shoes and has had access to Platinum's corporate records for years, *see* FAC ¶¶ 22-24, cannot claim an information deficit justifying departure from the requirements of Rule 9(b). SHIP and Fuzion are the outsiders.

B. The Receiver Concedes the Legal Insufficiency of Allegations Against Fuzion

Without legal justification, the Receiver's opposition doubles down on her effort to lump Fuzion and SHIP together, repeatedly referring to them as the "SHIP Defendants" throughout. *See, e.g.*, Receiver Opp. at 6, 24-25. Consistent with the FAC's paltry allegations as to Fuzion,

the Receiver's opposition asserts inadequately that SHIP was "advised by Fuzion …." *Id.* at 40 n.13, 46 n.16. The Receiver does not explain the nature of such advice or how it logically connects to any of her claims. The Receiver does not specify any action that Fuzion allegedly took that could plausibly give rise to the serious claims of misconduct the Receiver asserts against Fuzion here, including claims for securities fraud and participation in a racketeering conspiracy. The Receiver cannot cure that pleading defect by treating SHIP and Fuzion as identical, without any factual basis to do so. *See, e.g.*, *Patrico v. Voya Fin., Inc.*, No. 16-cv-7070 (LGS), 2017 WL 2684065, at *5 (S.D.N.Y. June 20, 2017) (dismissing claims against affiliated entities where complaint only as to one, but did "not allege any specific relevant conduct by the" others).

C. The Receiver's Securities Fraud Claim Against SHIP and Fuzion Is Irretrievably Defective and Time-Barred

1. The FAC's Allegations Do Not Give Rise to the Required "Strong Inference" of Scienter, Nor Do They Establish That SHIP or Fuzion Was the "Maker" of Any Alleged Misstatement, Implied or Otherwise

In arguing that her scienter allegations satisfy the PSLRA's strict pleading requirements, the Receiver misinterprets the holding in *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 191 (2d Cir. 2008), and misstates SHIP's discussion of that case. The Second Circuit held in that case that, to establish scienter as to a corporate defendant, a plaintiff must plead facts that "create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scienter." *Id.* at 195. That does not necessarily mean—and SHIP never argued—"that the Receiver's allegations must impute facts to specific, named executives" always in all cases. Receiver Opp. at 29. The allegations must, however, "still establish that *someone* whose intent could be imputed to the corporate defendants acted with scienter." *Schwab v. E*TRADE Fin. Corp.*, 258 F. Supp. 3d 418, 435 (S.D.N.Y. 2017) (emphasis in original). The FAC's allegations—based on two discrete loan transactions entered by

Beechwood as SHIP's discretionary adviser—plainly fail that requirement. The Court should also reject the Receiver's attempt to map the "dramatic" example discussed in *Dynex*, 531 F.3d at 196, to the facts alleged here, particularly because the Second Circuit has never "elaborated on when" a plaintiff can plead scienter "without being able to name the individuals who concocted and disseminated the fraud." *Sfiraiala v. Deutsche Bank Aktiengesellschaft*, 729 F. App'x 55, 58 n.1 (2d Cir. 2018) (quoting *Dynex*, 531 F.3d at 195). The circumstances presented here cannot be what the Second Circuit had in mind when it left the door ajar to such a possibility.

The Receiver also distorts reality to claim that her scienter allegations amount to "more than just hoping to transact business for 'financial reasons' …." Receiver Opp. at 28. In truth, the Receiver's scienter allegations are far removed from the challenged loans and focus entirely on SHIP's allegedly precarious financial position to contend that it compelled SHIP to enter into a business relationship with Beechwood and, later, to commit fraud. FAC ¶¶ 114-26, 159-61, 164. With respect to Fuzion, the Receiver's allegations get straight to the point: "Fuzion was highly dependent on SHIP for its financial survival …." *Id.* ¶ 160. Courts routinely find generic profit-motive allegations such as these insufficient to support a strong inference of scienter. *Schwab*, 258 F. Supp. 3d at 435; *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 573 (S.D.N.Y. 2014).

Perhaps most devastating to the Receiver's scienter allegations is her entreaty to the Court to consider "[t]he full flavor of [her] allegations …." Receiver Opp. at 28. SHIP and Fuzion encourage the Court to do so, as the Receiver's own allegations explicitly identify SHIP as a *victim* of the fraudulent scheme, not a perpetrator. *See, e.g.*, FAC ¶¶ 5, 168-70. Considered in combination with the foregoing, that fact overwhelmingly cuts against *any* inference of scienter, let alone an inference that is "cogent and *at least as compelling as* any opposing inference of

nonfraudulent intent." *In re PetroChina Co. Ltd. Sec. Litig.*, 120 F. Supp. 3d 340, 363 (S.D.N.Y. 2015) (internal quotation marks omitted; emphasis in original).

The Receiver's scattershot arguments regarding misrepresentations (or lack thereof) that SHIP or Fuzion allegedly made also do not pass muster. Unable to identify in the FAC any direct misrepresentation made by SHIP, the Receiver shifts to an "implied misrepresentation" theory. *See* Opp. at 26-27. The Receiver supports that theory with a half-baked analysis of the case law, forgetting that "Rule 10b-5 requires an actual *statement*, one that is either 'untrue' outright or 'misleading' by virtue of what it omits to state." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239 (2d Cir. 2016) (emphasis in original). One year after its decision in *VanCook v. SEC*, 653 F.3d 130 (2d Cir. 2011), the Second Circuit hastened to clarify that its holding was based "on [] *explicit* and implied misrepresentations …." *Capital Mgmt. Select Fund Ltd. v. Bennett*, 680 F.3d 214, 230 (2d Cir. 2012) (emphasis added). Fundamentally, a cognizable claim under Rule 10b-5 must always be tied to some explicit statement, which the Receiver fails to do as to SHIP.

Finally, even if the Receiver could proceed on an "implied misrepresentation" theory, the Receiver cannot carry her burden to establish that SHIP was the "maker" of any such implied misrepresentation. As explained in SHIP's opening brief, the "maker" of a statement is limited to "the person or entity with ultimate authority over the [mis]statement, including its content and whether and how to communicate it." *Janus Capital Grp., Inc. v. First Deriv. Traders*, 564 U.S. 135, 144, 131 S. Ct. 2296, 2303 (2011). Here, that person or entity was not SHIP—it was Beechwood. According to the Receiver, Beechwood retained "authority to invest SHIP's funds as it saw fit," FAC ¶ 167, and the Receiver repeatedly acknowledges that each of the transactions on which her Section 10(b) claim is based were consummated by Beechwood "as agent for [] SHIP." *Id.* ¶¶ 224, 228, 230, 233, 235. *None* of the conduct relevant to the Receiver's "implied

misrepresentation" theory was even undertaken by SHIP. These allegations do not establish that SHIP was the "maker" of any statement, explicit or implied. *See Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 155 (2d Cir. 2010) ("secondary actor" may be held liable only "based on that actor's own articulated statement, or on statements … that have been explicitly adopted").[4]

2. The Receiver Concedes That the Two-Year Statute of Limitations Has Run

The Receiver admits that her claim against SHIP and Fuzion was filed outside the applicable two-year statute of limitations and seeks a life-line in equitable tolling doctrines that do not apply. "A receiver stands in the shoes of the person for whom [s]he has been appointed," and a statute of limitations defense that "might have been interposed against persons represented by a receiver may be interposed against the receiver." *Armstrong v. McAlpin*, 699 F.2d 79, 89 (2d Cir. 1983). The statute thus began to run on the date that the *PPCO Funds* discovered the facts underlying the claim for securities fraud that the Receiver wishes to assert here. The Receiver cannot dispute that such date occurred more than two years prior to the institution of this action.

The equitable tolling "doctrines of adverse domination and equitable estoppel," Receiver Opp. at 30, likewise do not apply, as the Supreme Court has established that "equitable tolling does not apply to the statute of limitations in securities fraud cases." *de la Fuente v. DCI Telecommc'ns, Inc.*, 259 F. Supp. 2d 250, 263 (S.D.N.Y. 2003) (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilberston*, 501 U.S. 350, 364, 111 S. Ct. 2773 (1991)); *see, e.g., In re Sterling Foster & Co. Sec. Litig.*, 222 F. Supp. 2d 216, 255 (S.D.N.Y. 2002) (rejecting argument

[4] The Receiver's confused argument concerning the scope of Beechwood's discretionary authority, Receiver Opp. at 29-30, does not avoid dismissal. As noted above, the Receiver's own allegations establish "that Beechwood had sole investment authority in the accounts for SHIP …." *Id.* at 29; FAC ¶ 167. In any event, it is the Receiver's burden to plead that SHIP was a "maker" of a statement under the standard set forth in *Janus*, and she has not done so here.

"that the statute of limitations should be tolled based on fraudulent concealment"). This may explain why the Receiver does not cite to any case in which a court tolled the statute of limitations applicable to a Section 10(b) claim on the grounds of adverse domination or equitable estoppel. In fact, the cases on which the Receiver relies applied those doctrines under *state* law. *See Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 934 (7th Cir. 2012) (applying adverse domination doctrine as developed under Illinois law); *Meridien Int'l Bank Ltd. v. Gov't of Rep. of Liberia*, 23 F. Supp. 2d 439, 445-46 (S.D.N.Y. 1998) ("[S]tate law of equitable tolling should govern the state claims and federal law of equitable tolling should govern the federal claims.").[5]

D. The RICO Amendment Bars the Receiver's RICO Claims

In arguing that dismissal of its RICO claims pursuant to the RICO Amendment would be premature because the Court has not yet sustained the Receiver's securities fraud claim against any defendant, the Receiver does not cite any legal authority, and her position contravenes this Court's prior rulings and Second Circuit precedent. As the Court has noted, the RICO Amendment applies when "the conduct giving rise to [the alleged] predicate offenses amounts to securities fraud," regardless of how those predicates are styled in the complaint. SHIP MTD Op. at 23 n.3.; *see also* PPVA MTD Op. at 15. That a plaintiff has not stated a securities fraud claim is irrelevant

[5] Even if the adverse domination doctrine could be invoked in the context of a Section 10(b) claim, it cannot toll claims against SHIP or Fuzion because the doctrine permits tolling only "as to the *controlling* wrongdoers during the period of their domination and control." *Armstrong*, 699 F.2d at 87 (emphasis added); *Sousa v. BP Oil, Inc.*, No. 83-cv-4046 (DPW), 1995 WL 842003, at *9 (D. Mass. Sept. 12, 1995), *aff'd*, 98 F.3d 1357 (Fed. Cir. 1996) ("It appears clear the doctrine is inapplicable in an action other than one against a person 'dominating' the corporation."). The FAC does not allege that SHIP or Fuzion controlled or dominated the PPCO Funds. As for equitable estoppel, that doctrine may apply, if at all, "only where the plaintiff can show that egregious wrongdoing by a defendant prevented the plaintiff from bringing suit on a claim of which the plaintiff was aware." *Conklin v. Jeffrey A. Maidenbaum, Esq.*, 2013 WL 4083279, at *5 (S.D.N.Y. Aug. 13, 2013) (internal quotation marks omitted). The FAC nowhere alleges that the PPCO Funds were aware of their purported securities fraud claim against SHIP and Fuzion, but delayed in asserting it on the basis of anything SHIP or Fuzion said or did.

to whether the RICO Amendment applies. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 278 (2d Cir. 2011) ("[W]hen Congress stated that 'no person' could bring a civil RICO action alleging conduct that would have been actionable as securities fraud, it meant just that. It did not mean 'no person except one who has no other actionable securities fraud claim.'").

The Receiver's separate argument that the alleged predicate offenses do not fit within the RICO Amendment's scope also does not warrant serious consideration. The Receiver's RICO allegations rely directly on securities transactions as the basis for her claim. *See* FAC ¶¶ 221-58, 283(iii)-(iv). The Receiver's focus on the predicate acts alleged in FAC ¶ 283(i)-(ii) cannot save her claim, because "[i]f even one predicate act alleges breaches of duty coincident with securities transactions then the whole scheme is subject to the [RICO Amendment]." *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 645 (S.D.N.Y. 2017). The PPVA MTD Opinion also forecloses the Receiver's reliance on the question left open in the SHIP MTD Opinion, as the Court held "that the RICO Amendment bars plaintiffs' RICO claim, even to the extent that the claim relies on alleged misstatements of PPVA's NAV." PPVA MTD Op. at 15.

E. The Receiver's Aiding and Abetting Claims Should Be Dismissed

The Receiver's claims for aiding and abetting fraud and breach of fiduciary duty, both premised on the same transactions described in FAC ¶¶ 208-58, do not satisfy applicable pleading requirements.[6] Nothing in the Receiver's opposition alters that conclusion.

The Receiver does not allege that SHIP or Fuzion had *actual knowledge* of any alleged violation. The Receiver asserts, without any supporting detail, that SHIP was "aware of the deep ties binding Beechwood and Platinum," and then leaps to the conclusion that SHIP and Fuzion

[6] Because both claims are premised on the same factual allegations, the Receiver's argument that her claim for aiding and abetting breach of fiduciary duty is not subject to Rule 9(b) is meritless.

actually *knew* of the fraud being perpetrated. These conclusory allegations are insufficient to survive a motion to dismiss. *Banco Industrial de Venezuela, C.A. v. CDW Direct, L.L.C.*, 888 F. Supp. 2d 508, 514 (S.D.N.Y. 2012). The Receiver's opposition also does not address at all SHIP and Fuzion's argument that constructive knowledge of the breach or fraudulent scheme is "legally insufficient" to support an aiding and abetting claim. *Kaufman v. Cohen*, 307 A.D.2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dep't 2003). The "burden of demonstrating actual knowledge … [is] a heavy one," and allegations that a defendant "should have known" do not establish aiding and abetting liability. *Banco Industrial*, 888 F. Supp. 2d at 514; *see also In re Refco Sec. Litig.*, 759 F. Supp. 2d 301, 224 (S.D.N.Y. 2010) (constructive knowledge is insufficient).[7]

Here, the Receiver relies on actions taken *on behalf of* SHIP by various Beechwood entities, as SHIP's fiduciary exercising discretionary authority, and not by SHIP itself. No actions by SHIP or Fuzion themselves are alleged. It is not even established that SHIP knew of the loan transactions before they occurred. The Receiver admits as much throughout the FAC and in her opposition, stating that the "SHIP Defendants, through Beechwood, negotiated, …." Receiver Opp. at 39 n.12. Every allegation in section VI.G of the FAC is described with some iteration of "[Beechwood Entity], as agent for SHIP." Preliminarily, the FAC's allegations elsewhere establish that Beechwood was "act[ing] adversely to [SHIP]," which bars imputation of Beechwood's knowledge to SHIP. *Restatement (Third) of Agency* § 5.04 (2006).[8] But even if this

[7] The Receiver's argument that actual knowledge may be "pled and proven through circumstantial evidence," Receiver Opp. at 42, is a red herring. As explained below, the Receiver does not plead any circumstantial evidence suggesting that SHIP or Fuzion had actual knowledge of any underlying fraudulent scheme, but instead attempts to establish constructive knowledge through Beechwood's conduct as SHIP's agent. As recognized even in the case law on which the Receiver relies, however, "constructive knowledge alone cannot support a claim for aiding and abetting fraud …." *Silvercreek Mgmt., Inc. v. Citigroup, Inc.*, 346 F. Supp. 3d 473, 487 (S.D.N.Y. 2018).

[8] Imputation to Fuzion fails for the further reason that Beechwood was only SHIP's agent.

imputation theory were viable, it would only establish SHIP's mere *constructive*—not actual—knowledge of the alleged fraud, which is not sufficient. *Silvercreek*, 346 F. Supp. 3d at 487.

F. The Receiver Cannot Maintain a Claim for Unjust Enrichment Against SHIP

The FAC does not allege how SHIP was enriched. For this reason alone, the claim should be dismissed. The Receiver's opposition contends that SHIP was enriched because it "received assets, liens and obligations from [PPCO]." Receiver Opp. at 66. Yet the Receiver does not detail how SHIP, which provided consideration for the loans, allegedly was enriched. This Court already held that an unjust enrichment claim that is impermissibly general or does not specify the benefit conferred on the defendant cannot stand. *See Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 533 (S.D.N.Y. 2018) (dismissing claim where allegations were "entirely conclusory"). The claim also is duplicative of the relief sought in the Receiver's fraudulent conveyance claims and cannot be pled in the alternative. PPVA MTD Op. at 43-44 ("As this Court has explained previously, an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim."). Finally, the Receiver asserts this claim *only* to the extent that the Court determines that the identified transactions were not voidable. But if that were the case, the transactions would be valid and thus SHIP could not have been unjustly enriched. *See Estrada v. Dugow*, No. 15-cv-3189, 2016 WL 1298993 (S.D.N.Y. Mar. 31, 2016) (dismissing claim based on fraudulent conveyances "where plaintiff failed to make a claim for fraudulent conveyance"). The Receiver alleges that SHIP loaned [PPCO] approximately $43 million. SHIP agrees to reverse the transactions if PPCO Master Fund returns the $43 million.

CONCLUSION

For all these reasons, SHIP and Fuzion respectfully submit that these seven causes of action, the Investor Claims, should be dismissed as against Fuzion and SHIP.

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