UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF THE RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA ON THE ISSUES OF AGENCY AND IMPUTATION

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Melanie L. Cyganowski, the duly appointed receiver for the above-captioned plaintiffs (the "**Receiver**"), respectfully submits this Memorandum of Law in support of her motion for partial summary judgment against defendant Senior Health Insurance Company of Pennsylvania ("**SHIP**") on the issues of agency and imputation (the "**Motion**").

PRELIMINARY STATEMENT

The Receiver is entitled to partial summary judgment because the undisputed facts demonstrate that, as a matter of law, the Beechwood Advisers (defined below) were SHIP's agents, and therefore, their knowledge of the fraudulent nature of the transactions (as well as Beechwood's relationship to Platinum) and actions must be imputed to SHIP. This principal-agent relationship is unambiguously evinced by the governing documents, and has been ratified by SHIP's actions in pursuing the fruits of the transactions entered into by its agents, thus precluding SHIP from now disavowing its agents' knowledge and actions.

A determination that the Beechwood Advisers were SHIP's agents bears directly on the Receiver's claims for constructive and actual fraudulent conveyance under the New York Debtor & Creditor Law (the "**DCL**"), seeking to avoid transfers by Platinum Partners Credit Opportunities Master Fund LP ("**PPCO MF**") to SHIP and certain other Defendants (collectively with SHIP, the "**DCL Defendants**"), and to recover from those Defendants for unjust enrichment.

The Receiver's claims arise out of a series of transactions that were designed to enrich, and in fact did enrich, the DCL Defendants by tens of millions of dollars at PPCO MF's expense, leaving PPCO MF burdened by worthless assets and with all of its assets encumbered by SHIP's liens.[1] Specifically, these "**PPCO Loan Transactions**" consisted of the DCL Defendants'

[1] The Receiver's claim for declaratory judgment against SHIP is not at issue on this Motion.

disposition of approximately $67 million of underperforming notes issued by three distressed companies (Desert Hawk Gold Corp., LC Energy Holdings LLC and Northstar GOM Holdings Group LLC ("**Northstar**")) by means of a purchase of these notes by PPCO MF and a related entity at face value. PPCO MF's purchase of these notes was financed by $67 million of a $69 million loan from the DCL Defendants to PPCO MF, secured by an all-asset lien against PPCO MF's and its subsidiaries' assets. SHIP participated in the PPCO Loan Transactions through its investment managers and agents, the Beechwood Advisers, which SHIP had retained under three investment management agreements (collectively, the "**IMAs**") with (i) Beechwood Bermuda International Ltd. ("**BBIL**"), (ii) Beechwood Reinsurance Ltd. ("**BRe**") and (iii) B Asset Manager LP ("**BAM**," and collectively with BBIL and BRe, the "**Beechwood Advisers**").[2] (SOF ¶¶ 20-80) This Court has already ruled that the IMAs are enforceable.[3]

The language of the IMAs establishes that the three requirements of an agency relationship are met, namely, (1) manifestation by the principal that the agent shall act for it, (2) the agent's acceptance of the undertaking, and (3) the parties' understanding that the principal is to be in control of the undertaking.

The first two elements are satisfied because SHIP and the Beechwood Advisers executed the IMAs, in which SHIP authorized the Beechwood Advisers to act as SHIP's agents "with full power and authority [for SHIP] and on [SHIP's] behalf to buy, sell and otherwise deal in securities and other property and contracts relating to same for the Account…" (SOF ¶ 23)

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[2] BBIL, BRe and BAM, together with their affiliates, including BAM Administrative Services, LLC ("**BAM Administrative**") are referred to collectively as "**Beechwood**."

[3] *E.g.*, *In re Platinum-Beechwood Litig.*, 390 F. Supp. 3d 483, 494 (S.D.N.Y. 2019), *reconsideration denied*, 2019 WL 3759171 (S.D.N.Y. July 23, 2019); *In re Platinum-Beechwood Litig.*, 2019 WL 4562415, at *1-2 (S.D.N.Y. Sept. 10, 2019); *In re Platinum-Beechwood Litig.*, 2019 WL 5206245, at *4 (S.D.N.Y. Sept. 12, 2019).

The third element, regarding the parties' understanding that SHIP was to be in control of the undertaking, is also satisfied as a matter of law because the unambiguous language of the IMAs gave SHIP the right to control the Beechwood Advisers' actions under the IMAs by limiting the Beechwood Advisers' discretion. For example, the IMAs: (i) established parameters for the investments made on behalf of SHIP and for the custodial accounts established under those agreements, (ii) provided for SHIP's rate of return, and (iii) addressed regulatory concerns. (SOF ¶¶ 26-29, 40-41) Consequently, applying New York law to the unambiguous language of the IMAs, the Beechwood Advisers entered into the PPCO Loan Transactions on behalf of SHIP as its agents, and thus, the Beechwood Advisers' acts and knowledge are presumptively imputed to SHIP.

While SHIP may seek to disavow imputation of its agents' (the Beechwood Advisers') knowledge by invoking the adverse interest doctrine, this narrow doctrine is unavailable to SHIP because, by filing a proof of claim with the Receiver seeking to recover $34.5 million of allegedly senior secured debt, SHIP is seeking to enjoy the fruits of the PPCO Loan Transactions which those very agents (the Beechwood Advisers) implemented on SHIP's behalf. Thus, while, SHIP's pleadings assert that Beechwood was a bad actor, SHIP is simultaneously seeking to avail itself of the benefits of the very transactions it tries to disavow. However, New York law is clear: A principal may not disavow an act of an agent while simultaneously taking advantage of the benefits of the fraudulently procured bargain. For this reason alone, SHIP is not entitled to the liens the Receiver seeks to avoid once it is established at trial that the liens were procured through fraud.

Further, the adverse interest doctrine is generally reserved for cases such as looting or embezzlement by an agent which has *totally* abandoned its principal's interest and acted *entirely*

for its own or another's benefit. By contrast, if the principal derived *any* benefit from a transaction, the adverse interest doctrine is inapplicable. Here, the undisputed fact that SHIP is asserting a $34.5 million secured claim in PPCO MF's receivership, based upon the secured notes and liens issued by PPCO MF in the PPCO Loan Transactions, demonstrates as a matter of law that SHIP received a benefit (the liens) in the PPCO Loan Transactions. Accordingly, the adverse interest doctrine is inapplicable and unavailable to SHIP. (SOF ¶¶ 84-91)

Moreover, black letter law and the undisputed facts here make the adverse interest doctrine inapplicable because the Beechwood Advisers did not totally abandon SHIP's interests in causing it to enter into the PPCO Loan Transactions. To the contrary, the undisputed facts demonstrate that those transactions were implemented *for* both SHIP's and the Beechwood Advisers' benefit. Specifically, the unambiguous provisions of the BRe IMA and the BBIL IMA permitted BBIL and BRe, respectively, to retain investment returns above a guaranteed investment return of 5.85% as a "Performance Fee," and the unambiguous provisions of the BAM IMA permitted BAM to retain a "Performance Fee" that was calculated in a slightly different manner. (SOF ¶¶ 32-34) Additionally, through the PPCO Loan Transactions, the Beechwood Advisers sought to rid SHIP of underperforming loans by swapping that bad debt for first lien debt in PPCO MF and its related entities. (SOF ¶¶ 42-83) Thus, by the very nature of the PPCO Loan Transactions, Beechwood cannot be found to have totally abandoned SHIP's interests. Rather, it was acting for the mutual benefit of itself and SHIP.

In sum, the undisputed facts, including the unambiguous language of the IMAs, entitle the Receiver to partial summary judgment in her favor that:

(a) as a matter of law, the Beechwood Advisers were SHIP's agents, and

(b) therefore, the Beechwood Advisers' knowledge, including of the Platinum-Beechwood relationship, intent, bad faith and actions concerning the PPCO Loan Transactions are imputed to SHIP.

FACTS

A complete recitation of the facts underlying the Motion is set forth in the *Receiver's Statement of Undisputed Material Facts Pursuant to Local Rule 56.1* (the "**SOF**"),[4] filed contemporaneously herewith.[5] However, the salient, undisputed facts set forth herein demonstrate that:

(a) as a matter of law, the Beechwood Advisers were SHIP's agents and

(b) the Beechwood Advisers' knowledge, including of the Platinum-Beechwood relationship, intent, bad faith and actions concerning the PPCO Loan Transactions are imputed to SHIP.

On May 22, 2014, June 13, 2014, and January 15, 2015, respectively, SHIP entered into the IMAs with BBIL, BRe and BAM. (SOF ¶¶ 21-23) Under the plain and ambiguous terms of the IMAs, SHIP appointed BBIL, BRe and BAM as its agents, with broad discretionary authority to invest assets on SHIP's behalf. (SOF ¶ 31)

[4] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the SOF.

[5] The facts are taken from certain pleadings in these consolidated proceedings, the FAC, the SHIP Answer, SHIP's Second Amended Complaint and Demand for Trial by Jury against the Beechwood Parties, SHIP's Proof of Claim filed in the Receivership Action, numerous documents attached thereto, certain other documents, as well as the deposition testimony of the following individuals: SHIP's expert witness Timothy Hart, SHIP's 30(b)(6) witness Barry Staldine, SHIP's 30(b)(6) witness John Robison, Paul Lorentz, Mark Feuer, Julianne Bowler, Brian Wegner and Dhruv Narain. Copies of the excerpts of the deposition transcripts of John Robison, Paul Lorentz, Mark Feuer, Julianne Bowler, Brian Wegner and Dhruv Narain are respectively annexed to the accompanying declaration of Erik B. Weinick as Exhibits 5-13.

In Section 1 of the IMAs,[6] SHIP appointed BBIL, BRe and BAM "as investment adviser and manager with the power and authority subject at all times to the fiduciary duties imposed upon it by reason of its appointment to invest and manage the Assets…" (SOF ¶ 25)

In Section 23 of the IMAs, SHIP "authorize[d] the Adviser to act as the Client's with full power and authority for the Client and on the Client's behalf to buy, sell and otherwise deal in securities and other property and contracts relating to same for the Account…" (SOF ¶ 31)

By signing the IMAs, Beechwood accepted the undertakings therein, and did in fact undertake to invest assets for SHIP under the terms of the IMAs. (SOF ¶¶ 38-41) Undisputed deposition testimony supports this conclusion, including the following:

- Timothy Hart, SHIP's expert, admitted that Beechwood was "more than a conduit [for SHIP]. They [Beechwood] were their agent and fiduciary for making investments." (SOF ¶ 39, *citing* Hart-SHIP Expert Tr., 118:8-16)

- John Robison, former Chief Investment Officer of SHIP (and one of SHIP's 30(b)(6) witnesses), described Beechwood as an "outside manager who had discretionary authority" to manage SHIP's assets. (SOF ¶ 39, *citing* Robison-SHIP 30(b)(6) Tr., 12:7-8, 132:4-10)

- Barry Staldine, president and CEO of SHIP (and one of SHIP's 30(b)(6) witnesses), described Beechwood's authority under the IMAs as "full discretionary authority on what their [SHIP's] investments would be." (SOF ¶ 39, *citing* Staldine-SHIP 30(b)(6) Tr., 10:8-9, 53:21-54:3, 56:22-24)

- Brian Wegner, former board member and CEO of SHIP, testified that SHIP was provided with a list of investments that Beechwood made on SHIP's behalf. (SOF ¶ 39, *citing* Wegner Tr., 26:20-21, 384:13-16)

- Mark Feuer, former CEO of Beechwood, testified that Beechwood acted on behalf of its clients in "some capacity." (SOF ¶ 39, *citing* Feuer Tr., 266:13-17, 382:3-17)

Notwithstanding that discretionary authority, under the IMAs, BBIL, BRe and BAM were ultimately under the control of SHIP, and obligated to comply with SHIP's investment

[6] The quoted language is from the BBIL and BRe IMAs. The language of the BAM IMA varies slightly; however, it is not substantively different from that of the BBIL and BRe IMAs. (SOF at 6 n. 1).

policies. (SOF ¶¶ 26-29, 40-41) Specifically, Section 3(a) in the IMAs provides that the Beechwood Advisers' investment authority is "[s]ubject to the general investment policy, guidelines and restrictions established by the Client [SHIP] with respect to the Account" and Section 3(b) provides that "[t]he Adviser shall make its investment decisions consistent with the general investment policy, guidelines and restrictions as described on Exhibit A, but otherwise shall have sole and exclusive authority and discretion to manage and control the Assets of the Account." (SOF ¶ 27) The IMAs further state that the "Adviser [BBIL, BRe or BAM] shall have no obligation to determine whether the investment guidelines are appropriate for the Client [SHIP] and shall not be responsible or liable for the selection of or revisions to such policy, guidelines and/or restrictions." (SOF ¶ 28)

Section 2(a) of each IMA required the appointment of a "custodian that maintains a separate account for the Client under the Client's name … to take and have possession of the securities, cash, and other property held in the Account" and provided that "any … Custodian utilized by the Client must be approved by the Adviser, such approval not to be unreasonably withheld," and that "Custodian must meet the NAIC SVO requirements." (SOF ¶ 26)

Section 7 of each IMA provides that "[a]ny value of the Assets in the Account pursuant to this Agreement … shall be made by or at the direction of the Adviser in accordance with the Adviser's valuation policy" and that "[t]he Adviser shall conduct quarterly reconciliations with the Custodian to verify the valuation of the Assets in the Account." (SOF ¶ 29)

Consistent with the language of the IMAs, the undisputed deposition testimony confirms that there were "caveats" to the Beechwood Advisers' discretion under the IMAs:

- "[T]he Beechwood people agreed to follow those [SHIP's] investment policies." (SOF ¶ 40, *citing* Hart-SHIP Expert Tr., 30:3-6)

- Beechwood's investments were required to meet the "regulatory concerns" of the Department of Insurance (SHIP's regulator). (SOF ¶ 40, *citing* Staldine-SHIP 30(b)(6) Tr., 54:4-23)

- Paul Lorentz, former Chief Financial Officer of SHIP, was appointed to ensure that Beechwood satisfied the Department's "regulatory concerns." (SOF ¶ 40, Staldine-SHIP 30(b)(6) Tr., 54:4-23)

- SHIP's investment policy set restrictions on the investments that Beechwood could make on SHIP's behalf, including the types of debt in which Beechwood could invest SHIP assets. (SOF ¶ 40, *citing* Robison-SHIP 30(b)(6) Tr., 87:12-25, Narain Tr., 585:24-586:3)

- SHIP did in fact monitor Beechwood's investments and knew which assets had been invested by Beechwood on its behalf. (SOF ¶ 40, *citing* Feuer Tr. at 359:14-17, Wegner Tr. at 384:13-16, Bowler Tr. at 82:17-19 ("They [Beechwood] were reporting to the board what their buys and sells were, just like Conning [SHIP's other investment manager] quarterly reports their buys and sells."))

In accordance with their appointment under the IMAs, the three Beechwood Advisers acted as agents for SHIP at all times from the inception of the IMAs through at least November 2016. (SOF ¶ 38) In late 2015 and March 2016, the Beechwood Advisers – acting within the scope of the IMAs – caused SHIP to enter into the PPCO Loan Transactions by executing many of the agreements underlying the PPCO Loan Transactions. (SOF ¶¶ 74-83, 86) The signature blocks of those documents confirm that the Beechwood Advisers executed those documents as SHIP's agent. (SOF ¶¶ 74-83) The documents they executed as SHIP's agents included, among other agreements:

- a "Delayed Draw Demand Note" dated December 23, 2015 (the "**Delayed Draw Demand Note**") issued by PPCO MF and executed by BAM on behalf of SHIP, in the principal amount of $15,500,000.00, which also stated that BAM Administrative, for the benefit of SHIP, had been granted a "security interest" by PPCO MF and its direct and indirect subsidiaries in certain of their assets as more fully described in a "Master Security Agreement" dated as of December 23, 2015, and that the outstanding obligations under the Delayed Draw Demand Note were "guaranteed" by those subsidiaries as more fully described in a "Subsidiary Guaranty" dated as of December 23, 2015 (SOF ¶ 46);

- an "Amended and Restated Delayed Draw Demand Note" dated as of January 20, 2016 ("**A&R Delayed Draw Demand Note**") issued by PPCO MF and executed by BAM on behalf of SHIP, in the principal amount of $18,500,000.00, which also stated that BAM Administrative, for the benefit of SHIP, had been granted a "security interest" by PPCO MF and its direct and indirect subsidiaries in certain of their assets as more fully described in a "Master Security Agreement" dated as of January 20, 2016, and that the outstanding obligations under the A&R Delayed Draw Demand Note were "guaranteed" by those subsidiaries as more fully described in a "Subsidiary Guaranty" dated as of January 20, 2016 (SOF ¶ 49);

- a "Note Purchase Agreement" ("**NPA**") dated as of March 21, 2016, in which PPCO MF sold five secured term notes issued by PPCO MF to five "Purchasers" (including SHIP), including a "Second Amended and Restated Secured Term Note" issued by PPCO MF to SHIP in the amount of $42,963,949.04, purportedly secured by perfected security interests in PPCO MF's assets under an "Amended and Restated Master Security Agreement" (the "**A&R MSA**") and supported by a "Subsidiary Guaranty" (SOF ¶¶ 50-63, 80);

- an "Assignment Agreement" ("**Tri-Party Northstar PPCO Assignment Agreement**") dated as of March 21, 2016, executed by BAM on behalf of SHIP in which SHIP assigned its interest in notes issued by Northstar having a principal value of $10,800,000 to PPCO MF for a purchase price of $11,000,600.00 (including principal and accrued interest) (SOF ¶ 65); and

- an "Assignment Agreement" dated as of March 21, 2016 ("**SHIP-PPVA Northstar Assignment Agreement**"), executed by BAM on behalf of SHIP in which SHIP assigned its interest in notes issued by Northstar having a principal value of $20,200,000 to PPVA Oil & Gas LLC for a purchase price of $21,323,344.44 (including principal and accrued interest) (SOF ¶ 64).

On July 24, 2018, SHIP commenced an action in this Court against the Beechwood Advisers and several of their related persons and entities, as well as Beechwood principals, Mark Feuer, Scott Taylor, David Levy and Dhurv Narain, seeking to hold the defendants liable for, among other things, alleged fraud in connection with the exercise of the Beechwood Advisers' powers under the IMAs (the "**SHIP-Beechwood Complaint**").[7] (SOF ¶ 90) On December 28, 2018, SHIP filed its Second Amended Complaint and Demand for Trial by Jury in the SHIP-

[7] *Senior Health Insurance Company of Pennsylvania v. Beechwood Re Ltd., et al.*, 18-cv-06658 (S.D.N.Y., filed July 24, 2018).

Beechwood Action (the "**SHIP Second Amended Complaint**"). (SOF ¶ 91) Notwithstanding its allegations of massive and pervasive fraud, rather than seeking rescission of the IMAs, SHIP sought to enforce the IMAs as "contractually binding" agreements in their action against Beechwood. (SOF ¶ 91)

On March 29, 2019, with full knowledge of everything it had previously averred in the SHIP-Beechwood Complaint and the SHIP Second Amended Complaint, SHIP filed a proof of claim (the "**Proof of Claim**") in the PPCO MF Receivership seeking to enforce a secured claim in the amount of approximately $34.5 million against PPCO MF and 36 of its subsidiaries or affiliates based upon the PPCO Loan Transactions, including, among other agreements, the Delayed Draw Demand Note, the A&R Delayed Draw Demand Note and the NPA, which had been entered into and directed[8] by the Beechwood Advisers in accordance with the agency established under the IMAs. (SOF ¶¶ 85-89)

The Proof of Claim attaches no less than 21 documents executed by or addressed to either the Beechwood Advisers or BAM Administrative pursuant to its appointment by BAM as administrative or collateral agent for SHIP, including, for example, the following documents signed by BAM on behalf of SHIP:

- the Delayed Draw Demand Note dated as of December 23, 2015, issued by PPCO MF in the principal amount of $15,500,000.00, in favor of SHIP, which was also executed by BAM on behalf of SHIP;

- the A&R Delayed Draw Demand Note dated as of January 20, 2016 issued by PPCO MF in the principal amount of $18,500,000.00, in favor of SHIP, which was also executed by BAM on behalf of SHIP;

[8] On or about March 21, 2016, the Beechwood Advisers executed an "Agency Agreement" on behalf of SHIP, in which SHIP appointed another Beechwood entity, BAM Administrative, to act on SHIP's behalf, and BAM Administrative entered into certain of the agreements on behalf of SHIP in connection with the PPCO Loan Transactions. (SOF ¶ 57)

- the assignment agreements in which SHIP assigned to PPCO MF and a related entity assigned notes issued by Northstar at a price of more than $32 million (Northstar Assignment Agreements, SOF ¶¶ 64-65, 86).

- the $70 million NPA dated as of March 21, 2016, requiring the issuance of a five secured notes in the total amount of nearly $70 million, the A&R MSA, under which SHIP claims that PPCO MF gave SHIP a security interest covering all of PPCO MF's and its subsidiaries' assets, and a subsidiary guaranty.

(SOF ¶¶ 76, 80, 86)

Schedule 2 to SHIP's Proof of Claim states as follows:

> Senior Health Insurance Company of Pennsylvania ("**SHIP**") has perfected security interests in the Collateral described in the Master Security Agreement dated December 23, 2015, and in the Collateral described in the Amended and Restated Master Security Agreement dated March 21, 2016, which Collateral descriptions are set forth below.

(SOF at ¶ 87-89)

Schedule 4 of SHIP's Proof of Claim further states:

> **Basis for Perfection:**
>
> SHIP's security interests that were granted by Platinum Partners Credit Opportunities Master Fund, LP ("**PPCO**") in the Collateral described in the Master Security Agreement dated December 23, 2015, and in the Collateral described in the Amended and Restated Master Security Agreement dated March 21, 2016, are perfected by the Uniform Commercial Code Financing Statement naming Platinum Partners Credit Opportunities Master Fund, LP, as the Debtor, and BAM Administrative Services LLC, as Agent… which covers all "assets and all personal property of the Debtor, whether now owned and/or hereafter acquired" (the "**PPCO Financing Statement**").
>
> In addition, SHIP's security interests that were granted by the following thirty-five (35) subsidiaries of PPCO (the "Initial Subsidiary Guarantors") in the Collateral described in the Master Security Agreement dated December 23, 2015, were perfected by the filing of the Uniform Commercial Code Financing Statements filed with the Delaware Secretary of State on December 28, 2015, which cover "all assets and all personal property of the Debtor, whether now owned and/or hereafter acquired"…

(SOF ¶ 88)

ARGUMENT

"Under the Federal Rules of Civil Procedure, summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *In re Platinum-Beechwood Litig.*, 390 F. Supp. 3d 483, 492 (S.D.N.Y. 2019), *reconsideration denied*, 2019 WL 3759171 (S.D.N.Y. July 23, 2019) (*quoting* Fed. R. Civ. P. 56(a)). "Where parties on a summary judgment motion do not dispute a dispositive material fact, and merely disagree as to the consequence of that undisputed fact under the law, a question of law is presented for the court's interpretation and the court could not be on firmer ground in granting summary judgment as a matter of law." *MSF Holding Ltd. v. Fiduciary Trust Co. Int'l*, 435 F. Supp. 2d 285, 305 (S.D.N.Y. 2006).

POINT I

THE BEECHWOOD ADVISERS WERE SHIP'S AGENTS AS A MATTER OF LAW

It follows directly from the unambiguous provisions of the IMAs that each of the Beechwood Advisers were SHIP's agents as a matter of law. The record developed during depositions confirms that there are no triable issues of fact on this issue. Accordingly, the Receiver is entitled to summary judgment determining that the Beechwood Advisers were SHIP's agents as a matter of law.

Under New York law, agency is created upon the existence of the following elements: (1) manifestation by the principal that the agent shall act for it; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking. *Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A.*, 347 F.3d 448, 462 (2d Cir. 2003) (*citing* Restatement (Second) of Agency §§ 15, 26). Essential to the agency relationship is the notion that the principal maintain the right to control the agent. *Khodeir v. Sayyed*, 348 F.

Supp. 3d 330, 345 (S.D.N.Y. 2018).

When the material facts from which agency is to be inferred are not in dispute, and only one conclusion can be drawn from the facts in the case, agency is a question of law for the court. *Cohen v. Utica First Ins. Co.*, 436 F Supp 2d 517, 527 (E.D.N.Y. 2006). *See also Samba Enterprises, LLC v. iMesh, Inc.*, 2009 WL 705537, at *7 (S.D.N.Y. Mar. 19, 2009) (granting summary judgment that agency relationship existed, reasoning that, "because there is only one reasonable conclusion that can be drawn from the facts, the Court can resolve the question of agency as a matter of law."). Here, the undisputed facts establish each element of the Beechwood Advisers/SHIP agency relationship.

SHIP admits in its Amended Answer that it "entered into the three investment management agreements with BBIL, BRe, and BAM I, respectively." (SOF ¶ 20) (*citing* Cons. Dkt. No. 605, ¶ 162) It is beyond cavil that an investment advisory relationship providing the advisor with discretion is an agency relationship:

> The so-called Sonnenschein defendants… argue that CSG's knowledge cannot be "imputed" to them because CSG was not their "agent" with "control" over their investment decisions. ***It is a hard argument to make given the undisputed facts that each of these defendants was an investment advisory client of CSG, that as such CSG was indeed their agent for purposes of performing due diligence and making investment recommendations, and that all these defendants followed CSG's recommendation to redeem. An agency relationship is contractually defined by its own terms.*** The fact that a CSG client did not control the methods of CSG's due diligence or that CSG did not control its clients' ultimate decisions does not change the fact that CSG was contractually and in fact its clients' agent for the purposes of performing due diligence and recommending redemption or investment.

In re Bayou Group, LLC, 396 B.R. 810, 873 (Bankr. S.D.N.Y. 2008) (emphasis added), *aff'd in part, rev'd in part*, 439 B.R. 284 (S.D.N.Y. 2010).[9] *See also Jones v. Dana*, 2006 WL 1153358,

[9] Notably, on appeal, the Sonnenschein defendants *abandoned* the argument that CSG was not their agent. *In re Bayou Group, LLC*, 439 B.R. 284, 317 n. 31 (S.D.N.Y. 2010).

at *28 (S.D.N.Y. May 2, 2006) ("Dana, as Plaintiff's investment advisor *and agent*, owed fiduciary duties to Plaintiff at all times material herein.") (emphasis added).

Moreover, the unambiguous language of the IMAs plainly manifests SHIP's and the Beechwood Advisers' intent that BBIL, BRe and BAM would act on SHIP's behalf. Section 23 of each IMA, entitled "Agency Appointment," unambiguously identifies the Beechwood Advisers "as the Client's agent with full power and authority for the Client and on the Client's behalf to buy, sell and otherwise deal in securities and other property and contracts relating to same for the Account." (SOF ¶ 31) Where, as here, the parties' contract unambiguously provides for an agency relationship with discretion, courts find an agency relationship. *See Samba Enterprises, LLC v. iMesh, Inc.*, 2009 WL 705537 at *7-8 (granting summary judgment that agency relationship existed where plaintiff was identified as an "agent" with discretionary authority, even though agreement stated that it was an independent contractor). *See also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2014 WL 4966072, at *27 (E.D.N.Y. Oct. 3, 2014) ("Actual agency is created by 'written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.'").

By signing the IMAs, the Beechwood Advisers accepted this undertaking, and did in fact undertake to invest assets for SHIP. Moreover, the undisputed deposition testimony of numerous individuals affiliated with SHIP as well as Beechwood – including Timothy Hart (SHIP's expert), John Robison, (former Chief Investment Officer of SHIP and one of SHIP's 30(b)(6) witnesses), Barry Staldine, (president and CEO of SHIP and another 30(b)(6) witness of SHIP), Brian Wegner, (a former board member and CEO of SHIP) – supports this conclusion. (SOF ¶ 39, *citing* Hart-SHIP Expert Tr., 118:8-16; SOF ¶ 39, *citing* Robison-SHIP 30(b)(6) Tr., 132:4-

10; SOF ¶ 39, *citing* Staldine-SHIP 30(b)(6) Tr., 53:21-54:3; SOF ¶ 39, *citing* Wegner Tr., 384:13-16; SOF ¶ 39, *citing* Feuer Tr., 382:3-17)

The third and final element of an agency relationship is the understanding of the parties that the principal is to be in control of the undertaking. To establish "control," the issue is not whether the principal actually exercised control, but merely whether the principal reserved the right to control the agent. *Khodeir v. Sayyed*, 348 F. Supp. 3d 330, 341, 345 (S.D.N.Y. 2018) (granting summary judgment that agency relationship existed where principal "had the legal right to control its management, even if he made little use of that right," and explaining that "it is well-established that '[i]t is not essential that [the principal make] use of [the right to control],' or even that a principal's 'efforts to control [be] effective'"); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2014 WL 4966072 at *27 ("so long as the principal has the right to control the agent, its failure to exercise that right will not disprove the existence of an agency relationship"). Moreover, "agency law unquestionably permits a principal to delegate the power to act on its behalf to another party and to give that party some discretion." *United States v. Wells Fargo & Co.*, 943 F.3d 588, 599 (2d Cir. 2019) (*citing* Restatement [Third] of Agency § 2.02 (2006) ("If a principal states the agent's authority in terms that contemplate that the agent will use substantial discretion to determine the particulars, it is ordinarily reasonable for the agent to believe that following usage and custom will be acceptable to the principal.")).

Here, while SHIP retained the Beechwood Advisers to act as its agents and granted them discretionary authority as its investment managers, under the applicable provisions of the IMAs, SHIP retained the right to control the undertaking. In this regard:

- Section 3(a) of the IMAs provides that the Beechwood Advisers' investment authority is "[s]ubject to the general investment policy, guidelines and restrictions established by the Client [SHIP] with respect to the Account." (SOF ¶ 27)

- Section 3(b) provides that "[t]he Adviser shall make its investment decisions consistent with the general investment policy, guidelines and restrictions as described on Exhibit A, but otherwise shall have sole and exclusive authority and discretion to manage and control the Assets of the Account." (SOF ¶ 28)

- Section 3(b) further provides that the "Adviser [BBIL, BRe or BAM] shall have no obligation to determine whether the investment guidelines are appropriate for the Client [SHIP] and shall not be responsible or liable for the selection of or revisions to such policy, guidelines and/or restrictions." (SOF ¶ 28)

- Section 2(a) requires the use of a "Custodian" and provides that "any … Custodian utilized by the Client must be approved by the Adviser, such approval not to be unreasonably withheld," and that "Custodian must meet the NAIC SVO requirements." (SOF ¶ 26)

- Section 7 provides that "[a]ny value of the Assets in the Account pursuant to this Agreement … shall be made by or at the direction of the Adviser in accordance with the Adviser's valuation policy" and requires the "Adviser … [to] conduct quarterly reconciliations with the Custodian to verify the valuation of the Assets in the Account." (SOF ¶ 29)

Moreover, the undisputed deposition testimony of Hart, Staldine, Lorentz, Narain, Feuer, Wegner and Bowler summarized at pages 7-8 above confirms that there were certain "caveats" to the Beechwood Advisers' discretion under the IMAs. (SOF ¶ 40, *citing* Hart-SHIP Expert Tr. at 30:3-6, SOF ¶ 40, *citing* Staldine-SHIP 30(b)(6) Tr. at 54:4-23, SOF ¶ 40, *citing* Robison-SHIP 30(b)(6) Tr. at 87:12-25, Narain Tr., 585:24-586:3; SOF ¶ 40, *citing* Feuer Tr. at 359:14-17, Wegner Tr. at 384:13-16, Bowler Tr. at 82:17-19)

The unambiguous language of the IMAs thus demonstrates, and the undisputed deposition testimony confirms, that there are no triable issues of fact as to whether SHIP had the legal right to control the Beechwood Advisers' compliance with SHIP's investment policies. Consequently, any assertion by SHIP that it did not retain any control over the Beechwood Advisers' investment decisions, the selection of a custodian, or valuations, or that the IMAs left SHIP at the mercy of the Beechwood Advisers, would not raise a triable issue of material fact.

In sum, the undisputed facts establish, as a matter of law, that: (1) SHIP authorized the Beechwood Advisers to act as its agents; (2) the Beechwood Advisers accepted the role as SHIP's agents pursuant to the IMAs; and (3) SHIP maintained the right to control the Beechwood Advisers' investment activities. The Court should thus grant partial summary judgment that the Beechwood Advisers were SHIP's agents.

POINT II

THE BEECHWOOD ADVISERS' KNOWLEDGE AND CONDUCT ARE IMPUTED TO SHIP AS A MATTER OF LAW

SHIP's agents' knowledge and actions are imputed to SHIP as their principal because (a) SHIP may not repudiate its agents' knowledge while seeking to enforce the fruits of the fraudulent transactions and (b) the agents did not abandon SHIP's interests entirely, and so the adverse interest exception does not apply.

Under New York law, the acts of agents and the knowledge they acquire while acting within the scope of their authority, are presumptively imputed to their principals.[10] *See In re Adler, Coleman Clearing Corp.*, 263 B.R. 406, 453 (S.D.N.Y. 2001). Indeed, "[a] principal is

[10] Because SHIP is an alleged transferee, if it is determined that Beechwood was SHIP's agent and that the Beechwood's knowledge is to be imputed to SHIP in that role, then Beechwood's alleged knowledge, intent and/or lack of good faith in that role may be relevant to at least three issues. First, DCL § 278(1) provides, in pertinent part, that "[w]here a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person ***except a purchaser*** for fair consideration ***without knowledge of the fraud at the time of the purchase***, or one who has derived title immediately or mediately from such a purchaser, … [h]ave the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim …." DCL § 278(1) (emphasis added). Second, DCL § 278(2) provides that "[a] purchaser who ***without actual fraudulent intent*** has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment." DCL § 278(2) (emphasis added). Third, DCL §§ 273-277 and 278(1) and 278(2) each refer to "***fair consideration***," which, as used in those sections, requires "***good faith***" of the transferee. *See* DCL § 272(a), (b). Consequently, Beechwood's state of mind is relevant to at least three issues concerning the Receiver's claims under the DCL: (1) whether SHIP was a purchaser "***without knowledge of the fraud at the time of the purchase***," (2) whether SHIP was "***without actual fraudulent intent***," and (3) whether SHIP was in "***good faith***."

liable for the frauds and misrepresentations of his agent within the scope of the authority or employment of the agent, even though he had no knowledge thereof and intended no fraud." *In re Adler, Coleman Clearing Corp.*, 277 B.R. 520, 560 (Bankr. S.D.N.Y. 2002) (citations omitted).

The Receiver anticipates that SHIP will attempt to rebut the presumption that the knowledge the Beechwood Advisers acquired while acting as SHIP's agents by relying on the "adverse interest exception." However, as demonstrated below, that exception is inapplicable here because: (a) SHIP cannot repudiate the Beechwood Advisers' knowledge of the true nature of the PPCO Loan Transactions while simultaneously seeking to enforce the liens obtained as a result of those transactions, and (b) the Beechwood Advisers did not abandon SHIP's interests.

The "adverse interest exception" is an exception to imputation of an agent's conduct and knowledge. "To come within the exception, the agent must have *totally abandoned* his principal's interests and be acting *entirely* for his own or another's purposes." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466, 938 N.E.2d 941, 952 (2010) (citations omitted). This exception "'cannot be invoked merely because [the agent] has a conflict of interest or because [the agent] is not acting primarily for his [or her] principal.'" *Id. See also Mancuso v. Douglas Elliman LLC*, 808 F. Supp. 2d 606, 631 (S.D.N.Y. 2011) (granting summary judgment that adverse interest doctrine was inapplicable, explaining that evidence of a conflict of interest or that an agent was "not acting *primarily* for [its] principal… does not suffice to invoke the adverse interest exception") (emphasis added).

As this Court recently held, New York law "'reserves this most narrow of exceptions 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.'" *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *27 (S.D.N.Y. Oct. 7, 2019) (quoting *Kirschner*, 15 N.Y.3d at 466-67, 938 N.E.2d at 952). Moreover, "the applicability of the adverse interest exception must be evaluated with respect to specific instances of alleged misconduct." *In re Platinum-Beechwood Litig.*, 2019 WL 2569653, at *7 (S.D.N.Y. Jun. 21, 2019).

Further, even where the adverse interest exception applies, New York agency law imputes an agent's knowledge to a principal who condones the acts of its agent by accepting the benefits of the acts. *In re Bennett Funding Group, Inc.*, 336 F.3d 94, 100 (2d Cir. 2003) ("New York law recognizes the well-established principle of ratification, which imputes an agent's conduct to a principal who 'condones those acts and accepts the benefits of them.'"); *In re Payroll Express Corp.*, 186 F.3d 196, 208 (2d Cir. 1999) ("A principal may not disavow an act of an agent while simultaneously taking advantage of the benefits of the fraudulently procured bargain.") (applying New Jersey law, which is not materially different from New York law on agency); *DGI-BNSF Corp. v. TRT LeaseCo, LLC*, 2019 WL 5781973, at *5 (S.D.N.Y. Nov. 6, 2019) ("TRT could still be held responsible if, having 'knowledge of all that ha[d] been done,' it accepted the benefits of the MSA, which was procured by the fraud."); *In re Vargas Realty Enterprises, Inc.*, 440 B.R. 224, 236 (S.D.N.Y. 2010) ("Indeed, rather than seize upon an opportunity to object to the CFA note and mortgage, Appellants took actions manifesting their intent to ratify the allegedly unauthorized transaction… [and] accepted the benefits of the transaction.").

Agency law prevents a principal from:

> denying knowledge possessed by its agent, where the transaction involved, has worked out to his material benefit. It is said that such a principal, even though ignorant and innocent, cannot receive the benefits of such a fraudulent transaction without

> adopting, as an incident thereto, the means used by the agent to produce the result.

Rocky Riv. Dev. Co. v. German-Am. Brewing Co., 193 A.D. 197, 201-02 (4th Dep't 1920). *See also In re Adler, Coleman Clearing Corp.*, 277 B.R. at 561 ("The principal cannot claim the fruits of the agent's acts and still repudiate what the agent knew.... Defendant, by his own admissions, could not have been less interested in [the details of the transaction]. He was interested only in obtaining the profit ... and he was perfectly content to leave the details as to how he obtained it to [his agent].") (citation omitted).

Underlying this "exception" to the adverse interest exception is the idea that a principal who retains the benefits of its agent's fraud "'cannot cleanly extract their own gems out of the mire.'" *In re Adler, Coleman Clearing Corp.*, 277 B.R. at 561 (*quoting In re Adler, Coleman Clearing Corp.*, 263 B.R. 406, 462 (S.D.N.Y. 2001) (involving fraudulent transfer claims under 11 U.S.C.§ 548). When a principal retains the fruits of its agent's fraud, it must, in fairness, be charged with the agent's knowledge. *See e.g., In re Rickel & Assoc., Inc.*, 272 B.R. 74, 95 (Bankr. S.D.N.Y. 2002) ("WAP cannot accept the benefits of the SSOL Warrants sale, and at the same time, avoid liability created by the alleged misrepresentations that induced it."); *Cathay Pac. Airways, Ltd. v. Fly and See Travel, Inc.*, 3 F. Supp. 2d 443, 455 (S.D.N.Y. 1998) ("Under New York agency law, the principal may not accept the fruits of the agent's fraud and then attempt to divorce himself from the agent by repudiating the agent and his knowledge.").

Moreover, in appropriate cases, courts have not hesitated to grant summary judgment that the adverse interest doctrine is inapplicable. *See Mancuso v. Douglas Elliman LLC*, 808 F. Supp. 2d 606, 631 (S.D.N.Y. 2011) (granting summary judgment that adverse interest doctrine was inapplicable, explaining that evidence of a conflict of interest or that an agent was "not acting primarily for its principal… does not suffice to invoke the adverse interest exception.");

Kirschner v. KPMG LLP, 15 N.Y.3d at 470, 938 N.E.2d at 941 (on certified question on summary judgment, refusing to expand the adverse interest exception to circumstances where the principal received short term benefits but suffered long term harm); *In re Payroll Express Corp.*, 186 F.3d 196, 208 (2d Cir. 1999) (affirming summary judgment against application of "adverse interest doctrine," where "[i]t [was] not possible, as the Trustee's argument suggest[ed], to excise the fraudulent statement from the transaction and retain the benefit of the remainder."). *Cf. In re Nigeria Charter Flights Contr. Litig.*, 520 F. Supp. 2d 447, 466 (E.D.N.Y. 2007) ("a question of fact exists as to whether World knew that Ritetime had sold tickets with 2004 return dates and flew passengers on the outbound legs of those flights in 2003, thus accepting the benefit of Ritetime's actions under circumstances indicating its own intent to adopt them").

A. SHIP Cannot Repudiate Beechwood's Knowledge of the True Nature of the PPCO Loan Transactions While Seeking to Enforce the Fruits of Those Transactions.

As a matter of law, SHIP cannot simultaneously seek to enforce the liens it claims to have received under the PPCO Loan Transactions from which it is currently seeking to benefit, while simultaneously disavowing imputation of Beechwood's knowledge in executing the transaction documents. *In re Bennett Funding Group, Inc.*, 336 F.3d at 100; *Payroll Express Corp.*, 186 F.3d at 208; *DGI-BNSF Corp.*, 2019 WL 5781973, at *5; *In re Vargas Realty Enterprises, Inc.*, 440 B.R. at 236; *In re Adler, Coleman Clearing Corp.*, 277 B.R. at 561; *In re Adler, Coleman Clearing Corp.*, 263 B.R. at 462.

Here, it is undisputed that SHIP filed its Proof of Claim on March 29, 2019, after filing its own complaint against Beechwood, with full knowledge of any fraud SHIP asserts Beechwood committed on it, and after having been served with the Receiver's original Complaint in this action, alleging that the PPCO Loan Transactions were fraudulent. (SOF ¶¶ 88-91) The Proof of Claim thus unambiguously demonstrates SHIP's intent to ***ratify*** and

enforce the PPCO Loan Transactions by, among other things, relying on and attaching no less than 21 documents executed by or addressed to either the Beechwood Advisers or BAM Administrative pursuant to its appointment by BAM to as administrative or collateral agent for SHIP. *See, e.g.*, Delayed Draw Demand Note, dated as of December 23, 2015 (SOF ¶¶ 46, 86); A&R Delayed Draw Demand Note, dated as of January 20, 2016; SHIP-PPVA Northstar Assignment Agreement, dated as of March 21, 2016 (SOF ¶ 64); Tri-Party Northstar PPCO Assignment Agreement, dated as of March 21, 2016 (SOF ¶ 65); NPA, dated as of March 21, 2016 (SOF ¶¶ 50-63, 86); Master Security Agreement, dated as of December 23, 2015 (SOF ¶ 76, 86); A&R MSA, dated as of March 21, 2016 (SOF ¶¶ 80, 86).

For these reasons, SHIP is barred, as a matter of law, from seeking to enforce the liens it claims to have received under the PPCO Loan Transactions (the benefits of the PPCO Loan Transactions), which the Beechwood Advisers caused PPCO MF to enter into pursuant to the agency established under the IMAs, while renouncing the Beechwood Advisers' knowledge, intent and/or lack of good faith with respect to those transactions. In other words, as the Beechwood Advisers' principal, SHIP cannot accept the benefits of transactions executed or directed by the Beechwood Advisers, while disavowing the Beechwood Advisers' wrongful actions and knowledge.[11] Accordingly, the Beechwood Advisers were and are SHIP's agents, and therefore SHIP is bound by the Beechwood Advisers' wrongful actions and knowledge, which the Receiver will establish at trial.

[11] Conversely, to the extent that SHIP is permitted to disavow Beechwood's actions and knowledge of the Restructuring Transactions, SHIP should not be permitted to retain the benefits of those transactions.

B. Because the Beechwood Advisers Did Not Abandon SHIP's Interests, SHIP Cannot Seek Refuge in the Adverse Interest Exception.

As discussed above, the adverse interest exception is the "most narrow of exceptions" and is reserved for those cases of outright theft or looting or embezzlement where the agent "totally abandoned" his principal's interests and acted "entirely for his own or another's purposes." *Kirschner v. KPMG LLP*, 15 N.Y.3d at 466, 938 N.E.2d at 952 (citation omitted). Here, the adverse interest exception is inapplicable to the Receiver's claims against SHIP because the undisputed facts establish that, at no point during the PPCO Loan Transactions, did Beechwood ***completely*** abandon SHIP's interests. For example, the undisputed facts establish that SHIP ***benefitted*** from the March 2016 portion of the PPCO Loan Transactions because it assigned $32 million of Northstar debt and received a $42,963,949.04 secured note from PPCO MF, secured by a lien against all of the assets of PPCO MF and its subsidiaries. (SOF ¶¶ 84-91). Importantly, because the unambiguous provisions of the IMAs provide that Beechwood Advisers are to receive a "Performance Fee" that depends upon investment returns, the Beechwood Advisers had an incentive to ensure that PPCO MF realized a benefit from the PPCO Loan Transactions. (SOF ¶¶ 32-34) Finally, by filing a proof of claim in the Receivership of PPCO MF, SHIP is currently seeking to avail itself of a $34.5 million secured claim that it obtained in the PPCO Loan Transactions, further confirming that it benefitted from those transactions. (SOF ¶¶ 85-89) Because the undisputed facts show that SHIP received a benefit in the PPCO Loan Transactions by, among other benefits, improving its position from owning secured debt issued by Northstar to owning debt secured by all of PPCO MF's assets, the adverse interest exception is inapplicable here. *Kirschner v. KPMG LLP*, 15 N.Y.3d at 466, 938 N.E.2d at 952; *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *27; *In re Bennett Funding Group, Inc.*, 336 F.3d at 100 (2d Cir. 2003).

CONCLUSION

For all the reasons set forth above, and in the accompanying Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 and the documents annexed to the Weinick Declaration, this Court should grant the Receiver partial summary judgment on the issues of agency and imputation.

Dated: New York, New York
February 14, 2020

Respectfully submitted,

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