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

DEFENDANT SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTORY STATEMENT

The PPCO Receiver's remaining claims against SHIP for fraudulent conveyance, unjust enrichment, and declaratory judgment center on two secured loan transactions that occurred in December 2015 and March 2016. Notwithstanding the undisputed facts that SHIP funded those loans with cash and assets in excess of [$43 million] and that SHIP has not been paid one penny of the balance owed under those loans, the First Amended Complaint ("FAC") seeks to set those loans and the related liens aside on the grounds that SHIP orchestrated them as part of a fraudulent scheme to enrich itself to the detriment of PPCO and its equity holders (who are mischaracterized as creditors). Discovery confirms that there is no merit to those claims. The evidence adduced in discovery decisively demonstrates not only that these loans were negotiated by Beechwood that directed funding out of SHIP's Beechwood controlled investment accounts without SHIP's knowledge or involvement, but also that there was nothing fraudulent about those transactions. For these reasons and myriad others, SHIP is entitled to summary judgment, and the FAC should be dismissed in its entirety with prejudice.

More specifically, the fraudulent conveyance claims against SHIP in Counts 8-17 are defective because, with respect to both the December 2015 and March 2016 loan transactions, (1) the Receiver lacks standing to pursue fraudulent conveyance claims because she does not represent any creditor of a transferor; (2) SHIP was a good-faith transferee for fair consideration that lacked knowledge of any alleged underlying fraud; (3) PPCO Master Fund was not insolvent or left with unreasonably small capital; and (4) insufficient evidence exists of an actual intent to defraud present and future creditors on the part of the transferor, PPCO Master Fund. The Receiver's unjust enrichment claim in Count 18 fails because SHIP was harmed rather than enriched, PPCO Master Fund benefited from the transactions, and no injustice exists to justify relief. Finally, the

declaratory judgment claim in Count 19 mischaracterizes and misconstrues the nature and continuing effect of the security agreements executed in SHIP's favor, which remain enforceable.

STATEMENT OF FACTS

A. The Parties

1. SHIP

SHIP is a Pennsylvania-domiciled long-term care insurance company with its principal place of business in Carmel, Indiana. Local Civil Rule 56.1 Statement of Material Facts ("SMF") ¶ 1. At the time the transactions occurred, SHIP was owned and overseen by a charitable trust, Senior Health Care Oversight Trust, which was formed in or about 2008 in conjunction with the Pennsylvania Department of Insurance specifically for the purpose of managing the solvent run-off of SHIP's long-term care insurance business.[1] SMF ¶¶ 2-3. As described more fully below and in the accompanying SMF, SHIP fell victim to the fraudulent investment schemes perpetrated by Platinum and Beechwood. In an effort to recover the hundreds of millions of dollars it lost as a result of those schemes, SHIP brought suit against Beechwood and its principals on July 24, 2018 (No. 18-cv-6658) and asserted cross-claims and third-party claims in the present action for, among other things, aiding and abetting fraud and fiduciary duty against numerous Platinum- and Beechwood-connected defendants.[2]

2. Platinum Partners and the PPCO Funds

Platinum Partners was an affiliated group of funds founded by Mark Nordlicht, Murray

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[1] On January 29, 2020, SHIP was placed into rehabilitation at the request of the Pennsylvania Insurance Commissioner, who has been appointed as rehabilitator. SMF ¶ 2 n.2. Under the Order of Rehabilitation, the Commissioner is charged with the duty to safeguard and to marshal SHIP's assets for the benefit of its approximately 51,000 elderly policyholders who rely on the long-term care insurance policies issued by SHIP. *Id*.

[2] SHIP has since resolved its claims against numerous parties, as reflected in the various stipulations of voluntary dismissal that have been filed on the case docket.

Huberfeld, and David Bodner (collectively, the "Platinum Founders") in 2003 with the formation of Platinum Partners Value Arbitrage Fund, L.P. and its related funds (collectively, "PPVA"). SMF ¶ 4. In or about October 2005, Platinum Partners Credit Opportunities Master Fund LP ("PPCO Master Fund") was organized as the flagship fund of a family of funds (collectively, the "PPCO Funds") and marketed as a single-strategy hedge fund primarily focused on the origination of "short and medium term, high yield, debt secured by collateral, and/or equity investments." SMF ¶ 5.

The PPCO Funds were organized in a "Master-Feeder" structure, whereby investors initially contributed capital to an intermediate "feeder fund" that then contributed the investors' capital to PPCO Master Fund. SMF ¶ 6. Each such feeder fund was set up for a different class of investors:

- Platinum Partners Credit Opportunities Fund LLC ("PPCO Fund LLC") was organized for investors based in the United States and contributed investors' capital directly to PPCO Master Fund in exchange for limited partnership interests in PPCO Master Fund;

- Platinum Partners Credit Opportunities Fund (TE) LLC ("PPCO Fund (TE)") was organized for tax-exempt investors based in the United States; and

- Platinum Partners Credit Opportunities Fund International Ltd. and Platinum Partners Credit Opportunities Fund International (A) Ltd. (collectively, the "International Funds") were organized for investors based outside of the United States.

See SMF ¶ 7.

PPCO Fund (TE) and the International Funds contributed assets provided by investors to Platinum Partners Credit Opportunities Fund (BL) LLC (the "PPCO Blocker Fund," or the "Blocker Fund"), which was set up for tax purposes as an onshore intermediary between PPCO Fund (TE) LLC and the International Funds, on the one hand, and PPCO Master Fund, on the other. SMF ¶ 8. The Blocker Fund then contributed those assets to PPCO Master Fund in

exchange for limited partnership interests in the Master Fund. SMF ¶¶ 8-9. The Receiver's Rule 30(b)(6) designee, Trey Rogers, described the limited partnership interests held by PPCO Fund LLC and the Blocker Fund as "equity" in PPCO Master Fund. SMF ¶ 9.

PPCO Master Fund invested the capital it received from PPCO Fund LLC and the Blocker Fund in assets spanning numerous industries, including, as relevant here, oil and gas companies and metals and mining companies. SMF ¶ 10. Between 2005 and 2015, the PPCO Funds reported positive full-year returns of no less than 7.87% and as high as 18.95% on an annual basis. SMF ¶ 13. PPCO Master Fund generally held its investments in separate limited liability companies that were organized solely for that purpose (the "PPCO Subsidiaries"). SMF ¶ 11.[3]

3. The PPCO Receiver

On October 16, 2017, Melanie L. Cyganowski (the "Receiver") was appointed as receiver for PPCO Master Fund and certain related entities pursuant to an order entered in *Sec. & Exch. Comm'n v. Platinum Mgmt. (NY) LLC, et al.*, No. 16-cv-6848 (E.D.N.Y.), on October 16, 2017 (the "Receivership Order").[4] SMF ¶ 18. The Receivership Order authorizes the Receiver to pursue claims on behalf of the "Receivership Entities," defined as Platinum Credit Management, L.P., PPCO Master Fund, PPCO Fund (TE), PPCO Fund LLC , PPCO Fund (BL) LLC, Platinum Liquid Opportunity Management (NY) LLC, and Platinum Partners Liquid Opportunity Fund (USA) L.P. SMF ¶ 19. While the Receivership Order does not include either of the above-described

[3] A limited set of the PPCO Subsidiaries also had subsidiaries of their own, as reflected in the organizational chart at BW-SHIP-00138306. SMF ¶ 12. For purposes of this motion, the term "PPCO Subsidiaries" is limited to the direct subsidiaries of PPCO Master Fund, which appear as white boxes in the organizational chart. *Id.*

[4] Initially, Bart Schwartz was appointed as receiver on December 19, 2016. *See Sec. & Exch. Comm'n v. Platinum Mgmt. (NY) LLC, et al.*, No. 16-cv-6848, ECF No. 6 (E.D.N.Y.). Mr. Schwartz resigned his position by letter dated June 23, 2017, which resignation became effective upon the Receiver's appointment. *Id.*, ECF No. 170.

International Funds within the definition of "Receivership Entities," the Receiver identifies them as such in the FAC and purports to assert claims on their behalf. SMF ¶ 20.[5] Under the terms of the Receivership Order, the only "Feeder Funds" that the Receiver represents are PPCO Fund LLC and PPCO Fund (TE). SMF ¶ 21. These two funds are collectively referred to as the "PPCO Feeder Funds" or the "Feeder Funds" for purposes of this motion.

The Receiver acknowledges that she stands in the shoes of the Receivership Entities and asserts claims to "recover and/or conserve Receivership Property." SMF ¶ 22. The Receivership Order defines "Receivership Property," in relevant part, to mean the "property interests of the Receivership Entities …." SMF ¶ 23.

B. Platinum Insiders Form Beechwood, and SHIP Is Fraudulently Induced to Enter Into the Beechwood IMAs

In or about 2013, several Platinum insiders, including the Platinum Founders and David Levy, joined with Mark Feuer and Scott Taylor to establish a collection of corporate entities doing business under the trade name "Beechwood." SMF ¶ 26. Beechwood was a family of reinsurance companies, investment managers, administrative companies, and holding companies organized for the purpose of gaining access to hundreds of millions of dollars in insurance assets, much of which ultimately would be funneled into Platinum Partners investments. SMF ¶ 27.

Beechwood was owned and controlled by the Platinum Founders and Levy, with Taylor and Feuer respectively serving as President and CEO of Beechwood. SMF ¶ 29. The ownership interests of the Platinum Founders in Beechwood were held in various entities with generic names such as Beechwood Re Investments, LLC and Beechwood Trust Nos. 1-20. *Id.* Feuer and Taylor also held ownership interests in Beechwood through trusts bearing their respective last names.

[5] In fact, the Receiver withdrew a prior request to expand the scope of the receivership to include those entities on August 15, 2017. *See Sec. & Exch. Comm'n v. Platinum Mgmt. (NY) LLC, et al.*, No. 16-CV-6848, ECF Nos. 112, 240 (E.D.N.Y.).

SMF ¶ 30. Beechwood's management team principally consisted of individuals who, at one point or another, were employed by or otherwise affiliated with Platinum. *Id.*

Between May 2014 and January 2015, SHIP executed investment management agreements (the "IMAs") with Beechwood Bermuda International Ltd. ("BBIL"), Beechwood Re ltd. ("Beechwood Re"), and B Asset Manager LP ("BAM," and collectively with BBIL and Beechwood Re, the "Beechwood Advisors" or "Beechwood"). SMF ¶ 31. Under the IMAs, SHIP transferred to Beechwood a total of $270 million in cash for investment. SMF ¶ 34. The IMAs also granted Beechwood authority [REDACTED]" SMF ¶ 32. In light of its broad discretionary authority, Beechwood did not present proposed investments to SHIP for SHIP's approval before making those investments. SMF ¶ 33.

SHIP was not aware of the substantial connections between Beechwood and Platinum Partners at the time the IMAs were made or that the transactions at issue in this case occurred. SMF ¶¶ 36-37. SHIP only became aware of these connections in July 2016 (following the June 2016 arrest of Platinum Founder Huberfeld on federal bribery charges) through press reports that Beechwood representatives immediately attempted to downplay, assuring SHIP that Beechwood was taking "[REDACTED]." SMF ¶ 38.

C. The December 2015 and March 2016 Loan Transactions

1. The December 2015 Loan Transaction

On December 22, 2015, Platinum personnel were informed that Mark Nordlicht had negotiated a $15.5 million demand draw loan to PPCO Master Fund from Beechwood. SMF ¶ 40. On the same day, Beechwood's general counsel, Christian Thomas, sent draft documents to Platinum's general counsel, Suzanne Horowitz, setting forth the terms of the loan negotiated by

Nordlicht. SMF ¶ 41. As reflected in the draft promissory note attached to that e-mail, the loan was to be funded by SHIP out of investment accounts controlled by Beechwood as SHIP's investment manager. *Id.* Over the next day, Platinum and Beechwood traded revised drafts of the loan documents, with Ms. Horowitz providing comments to the draft documents on behalf of Platinum. SMF ¶ 42.

On December 23, 2015, Beechwood, acting on SHIP's behalf as its agent, executed a Delayed Draw Demand Note that permitted PPCO Master Fund to draw a maximum of $15.5 million from SHIP (the "December 2015 SHIP Note"). SMF ¶ 43. The note carried a 7% annual interest rate. *Id.* To secure PPCO Master Fund's promise to pay, PPCO Master Fund and the PPCO Subsidiaries granted to SHIP a security interest in all of their assets (the "Master Security Agreement"). SMF ¶ 45. The PPCO Subsidiaries also executed a guarantee of repayment in the event of a default by PPCO Master Fund. SMF ¶ 47.

On December 22, 2015, Platinum personnel were informed that Mark Nordlicht had negotiated a $15.5 million demand draw loan to PPCO Master Fund from Beechwood. SMF ¶ 40. On the same day, Beechwood's general counsel, Christian Thomas, sent draft documents to Platinum's general counsel, Suzanne Horowitz, setting forth the terms of the loan negotiated by Nordlicht. SMF ¶ 41. As reflected in the draft promissory note attached to that e-mail, the loan was to be funded by SHIP out of investment accounts controlled by Beechwood as SHIP's investment manager. *Id.* Over the next day, Platinum and Beechwood traded revised drafts of the loan documents, with Ms. Horowitz providing comments to the draft documents on behalf of Platinum. SMF ¶ 42.

On December 30, 2015, PPCO Master Fund drew an additional $5 million under the December 2015 SHIP Note, which also was funded with cash from SHIP's IMA accounts. SMF

¶ 54. PPCO Master Fund used those loan proceeds to repay a $5 million debt of LC Energy Operations LLC—a wholly owned subsidiary of PPCO Master Fund—owed under Secured Term Notes originally issued on June 3, 2014 to BRe WNIC 2013 LTC Primary, BRe WNIC 2013 LTC Sub, BRe BCLIC Primary, and BRe BCLIC Sub (the "WNIC/BCLIC Trusts"). SMF ¶ 55. The WNIC/BCLIC Trusts have no relation to SHIP. *Id.* The LC Energy debt carried an 18% annual interest rate and was fully guaranteed by PPCO Master Fund. SMF ¶¶ 56-57.

The December 2015 SHIP Note was later amended and restated in January 2016 to increase the maximum amount available for withdrawal to $18.5 million (the "January 2016 A&R SHIP Note"). SMF ¶ 60. PPCO Master Fund then immediately drew an additional $2 million under the Note which was funded by the transfer of cash from SHIP's IMA account directly into a PPCO Master Fund bank account. SMF ¶ 61. The Receiver has been unable to account for the whereabouts of this additional $2 million. SMF ¶ 62. PPCO Master Fund and the PPCO Subsidiaries also reaffirmed and ratified the December 23, 2015 Master Security Agreement and Subsidiary Guaranty in connection with this follow-on transaction. SMF ¶ 63.

It is undisputed that SHIP itself had no knowledge of the December 2015 SHIP Note, the January 2016 A&R SHIP Note, or any related transactions at or about the time they occurred. SMF ¶ 88. PPCO Master Fund did not repay any of the $16.2 million in cash drawn from SHIP's accounts under the December 2015 SHIP Note and the January 2016 A&R SHIP Note. SMF ¶ 68.

2. The March 2016 Loan Transaction

In or about February 2016, Platinum and Beechwood opened negotiations on a new loan transaction that they dubbed the "PPCO Restructuring," beginning with the exchange of various iterations of a term sheet between Dhruv Narain, on behalf of Beechwood, and David Steinberg, on behalf of Platinum. SMF ¶ 64. At the end of the month and continuing into March 2016, Platinum general counsel Suzanne Horowitz and Beechwood general counsel Christian Thomas

participated in the negotiations, with assistance from Beechwood's outside counsel at Loeb and Loeb. SMF ¶ 65. Mr. Steinberg, who played a lead role in the negotiations, testified that the purpose of the proposed transaction was to "reduce[] interests rates … [,] defer[] interest payments, and [] free[] up Agera from its encumbrances." SMF ¶ 66. "Agera" referred to retail energy company Agera Energy LLC, in which PPCO Master Fund held an equity interest through its 45% equity interest in Principal Growth Strategies, LLC ("PGS"); PPVA held the remaining 55% interest in PGS. SMF ¶ 67. At the time, PPCO Master Fund's equity interest was encumbered by a pledge of that interest (the "Agera Pledge") as security for the indebtedness of Northstar GOM Holdings, Inc. ("Northstar"), a PPVA investment. *Id.*

Ultimately, Beechwood, again acting under the SHIP IMAs, executed a transaction on March 21, 2016, whereby the January 2016 A&R SHIP Note was rolled into a new Second Amended and Restated Secured Term Note in the principal amount of approximately $43 million (the "March 2016 SHIP Note"). SMF ¶ 68.[6] In exchange for an approximately $26.8 million increase in the principal amount previously owed to SHIP under the January 2016 A&R SHIP Note, Beechwood caused SHIP to loan an additional $25.7 million, paid in cash and assets, to PPCO Master Fund. SMF ¶ 69. The cash component of that consideration totaled approximately $9.9 million, while the asset component comprised of a $15.8 million debt owed by Northstar for which SHIP previously had paid cash in September 2014. SMF ¶ 70. PPCO Master Fund's acquisition of the Northstar debt enabled it to release the Agera Pledge. SMF ¶ 73. As security for PPCO Master Fund's promise to pay under the March 2016 SHIP Note, PPCO Master Fund reaffirmed and ratified the security interests granted in December 2015 and January 2016 and

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[6] The March 2016 SHIP Note ultimately was rolled into a Note Purchase Agreement (the "NPA"), which also covered Secured Term Notes issued by PPCO Master Fund in favor of BCLIC and WNIC with an aggregate face value of approximately $26.2 million. SMF ¶ 81.

granted SHIP a security interest in the equity of the PPCO Subsidiaries, while the PPCO Subsidiaries executed a Subsidiary Guaranty to guarantee repayment of the note in the event of a default by PPCO Master Fund. SMF ¶ 77.

As with the December 2015 and January 2016 loan transactions, SHIP was unaware of the March 2016 loan transaction or any related transactions at or about the time they occurred. SMF ¶ 88. The March 2016 SHIP Note has not been repaid. SMF ¶ 87.

D. The Receiver's Claims Against SHIP

The Receiver's remaining claims against SHIP are all designed to void SHIP's security interest in PPCO Master Fund's assets and the guarantees executed by the PPCO Subsidiaries. The Receiver has asserted claims for: (i) actual fraudulent conveyance under N.Y.D.C.L. §§ 276 and 278 (Counts 9 and 14); (ii) constructive fraudulent conveyance under N.Y.D.C.L. §§ 273-275, 277, and 278 (Counts 8, 10-13, and 15-17); (iii) unjust enrichment (Count 18); and (iv) a declaration that SHIP's security interest does not attach to the assets of the PPCO Subsidiaries (Count 19). The Receiver purports to assert her claims for fraudulent conveyance on behalf of the PPCO Feeder Funds and the PPCO Blocker Fund, which entities she contends are creditors of PPCO Master Fund. The Receiver asserts the unjust enrichment and declaratory judgment claims on behalf of all of the Receivership Entities.[7]

LEGAL STANDARD

"Summary judgment should be granted '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.'" *Walker*

[7] This Court's October 7, 2019 Opinion previously dismissed all of the Receiver's other claims asserted against SHIP and former defendant Fuzion Analytics, Inc.: Counts 1-3 (RICO), Count 4 (violation of Section 10(b) of the Exchange Act), and Counts 6-7 (aiding and abetting fraud and breach of fiduciary duty). *See In re Platinum-Beechwood Litig.*, No. 18-cv-6658 (JSR), 2019 WL 4934967 (S.D.N.Y. Oct. 7, 2019).

v. City of New York, 621 F. App'x 74, 75 (2d Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). "A fact is material if it might affect the outcome of the suit under governing law." *LBBW Luxemburg S.A. v. Wells Fargo Sec., LLC*, 744 F. App'x 710, 711-12 (2d Cir. 2018) (internal quotations omitted). Where the non-moving party bears the burden of proof on a particular claim or issue, "it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim." *CILP Assocs., L.P. v. PriceWaterhouse Coopers, LLP*, 735 F.3d 114, 123 (2d Cir. 2013). Once the moving party satisfies its burden, the non-moving party must "come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Id.* The non-moving party "may not merely rest on the allegations or denials of his pleading; rather his response … must set forth 'specific facts' demonstrating that there is 'a genuine issue for trial.'" *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009) (quoting Fed. R. Civ. P. 56(e)). Stated differently, "[a] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010).

ARGUMENT

I. SHIP Is Entitled to Summary Judgment on the Receiver's Fraudulent Conveyance Claims (Counts 8-17).

The Receiver's fraudulent conveyance claims are fatally deficient as a matter of law for four distinct reasons. *First*, as a threshold matter, the Receiver lacks standing to assert those claims because she does not represent any creditor of a transferor in connection with the December 2015 and March 2016 transactions—a fundamental requirement of any fraudulent conveyance claim, including those asserted by an SEC-appointed receiver. *Second*, the evidence adduced during discovery conclusively establishes that SHIP was a good-faith transferee for value that lacked knowledge of any alleged underlying fraud. That incontrovertible fact constitutes an absolute

defense to all of the Receiver's fraudulent conveyance claims vis-à-vis SHIP. *Third*, the Receiver's constructive fraudulent conveyance claims (Counts 8, 10-13, and 15-17) are subject to dismissal in any event because PPCO Master Fund was neither insolvent before or after the December 2015 and March 2016 transactions nor left with unreasonably small capital following either transaction. The Receiver's own expert has conceded as much, admitting that his solvency analysis is based on an assumption, which assumption is legally indefensible; when that assumption is properly disregarded, his conclusion of insolvency evaporates. *Fourth*, the Receiver's actual fraudulent conveyance claims (Counts 9 and 14) fail because the Receiver has not adduced any evidence that the December 2015 and March 2016 transactions were executed with an actual intent to defraud any creditors.[8]

A. The Receiver Lacks Standing to Assert the Fraudulent Conveyance Claims.

1. The PPCO Feeder Funds and the PPCO Blocker Fund Are Not "Creditors" of PPCO Master Fund.

Under New York law, "[i]t is well settled that in order to set aside a fraudulent conveyance, one must be a *creditor* of the transferor; those who are not injured by the transfer lack standing to challenge it." *Eberhard v. Marcu*, 530 F.3d 122, 129 (2d Cir. 2008) (emphasis added). The New York Debtor & Creditor Law "makes this requirement explicit." *Id.*; *see also* N.Y.D.C.L. § 278(1) ("Where a conveyance is fraudulent *as to a creditor*, such *creditor* … may assert a fraudulent conveyance claim." (emphasis added)); *Lippe v. Bairnco Corp.*, 225 B.R. 846, 857 (S.D.N.Y. 1998) ("[O]nly creditors of the transferor are entitled to assert claims under the [NYDCL] for

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[8] Separately, Counts 8-19 of the FAC should be dismissed to the extent that the Receiver purports to assert them on behalf of the International Funds. As noted in the Statement of Facts above, neither of the International Funds is included in the definition of "Receivership Entities." SMF ¶¶ 20-21. As the Receiver only "stands in the shoes of the person for whom [she] has been appointed," *Armstrong v. McAlpin*, 699 F.2d 79, 89 (2d Cir. 1983), she lacks authority to assert claims on behalf of the International Funds, which plainly fall outside the scope of her mandate under the Receivership Order.

fraudulent conveyances.").

The Second Circuit specified in *Eberhard* that this straightforward principle applies equally in the context of a receivership, holding that "a receiver's standing to bring a fraudulent conveyance will turn on whether he represents the transferor only or also represents a creditor of the transferor." 530 F.3d at 133. Because the receiver in that case did not represent any creditor of the transferor, the court concluded that he lacked standing to assert a claim for fraudulent conveyance under New York law. *Id.* at 135. This Court also has recognized this principle in the present case, noting that the Receiver's fraudulent conveyance claims are "brought on behalf of the PPCO Feeder Funds and PPCO Blocker Fund," which the FAC alleges to be "creditors to the transferor PPCO Master Fund." *In re Platinum-Beechwood Litig.*, No. 18-cv-6658 (JSR), 2019 WL 4934967, at *34 n.12 (S.D.N.Y. Oct. 7, 2019); *see also Barnet v. Drawbridge Special Opportunities Fund LP*, No. 14-cv-1376 (PKC), 2014 WL 4393320, at *15-16 (S.D.N.Y. Sept. 5, 2014) (following *Eberhard* and denying standing where liquidators were not "representatives of any creditors of the estate"). Fundamentally, a court-appointed receiver lacks standing to pursue fraudulent conveyance claims unless the receiver represents a *creditor* of the transferor.[9]

The NYDCL defines "creditor" to mean "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent." N.Y.D.C.L. § 270. Courts uniformly have held that equity holders do not satisfy this definition. In rejecting on standing

[9] To the extent that the Receiver attempts to argue that her appointment transformed PPCO Master Fund from a transferor to a creditor, such a contention would contradict the well-settled principle that a receiver "stands in the shoes of the corporation and can assert *only those claims which the corporation could have asserted.*'" *Eberhard*, 530 F.3d at 132 (quoting *Lank v. N.Y. Stock Exch.*, 548 F.2d 61, 67 (2d Cir. 1977) (emphasis added)). While the Receiver stands in PPCO Master Fund's shoes, she is not permitted to change them. The *Eberhard* Court emphasized that even if the receivership in that case had included the relevant corporate entities, the receiver still was required to "establish[] creditor status" as to those entities to assert fraudulent conveyance claims on their behalf. *Id.* at 134 n.11. The Receiver cannot make such a showing here.

grounds a preferred shareholder's attempt to assert claims under the NYDCL, the Delaware Court of Chancery noted that "the cases presented to the court appear almost unanimous in support of the conclusion that the preferred shares in this case are not debt, but equity, and therefore that [the plaintiff] *lacks standing to bring any claims as a creditor*." *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broad. Corp.*, 906 A.2d 218, 223-24 (Del. Ch. 2006) (emphasis added).

Equity holders may qualify as creditors of the transferor only if—separate and apart from their status as equity holders—they are "tort creditors … by virtue of their claims against the defrauding defendant[]." *Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 428 (S.D.N.Y. 2006); *In re Bayou Grp., LLC*, 439 B.R. 284, 297-98 (S.D.N.Y. 2010) (allowing claims by equity holders solely "by virtue of their tort claims for fraudulent inducement, rescission and damages"); *cf. In re Lehman Bros. Holdings Inc.*, 855 F.3d 459, 469 (2d Cir. 2017) (Under the Bankruptcy Code, "[t]hose with 'claims' against a debtor are 'creditors,' and those with 'equity securities' of the debtor are 'equity security holders.' Thus, an interest in an equity security is distinct from a claim to a right to payment or an equitable remedy."); *In re Hedge-Investments Assocs., Inc.*, 84 F.3d 1267, 1272 (10th Cir. 1996) ("[L]imited partners' interests do not constitute 'claims' as defined under [11 U.S.C. § 101(5)]. They are equity security holders. … Simply put, an equity interest is not a claim against the debtor." (quoting *In re Pine Lake Village Apt. Co.*, 21 B.R. 478, 480 (Bankr. S.D.N.Y. 1982)).[10]

There is no genuine dispute that the PPCO Feeder Funds and the PPCO Blocker Fund are mere equity holders in PPCO Master Fund and not creditors, as admitted by the testimony of the Receiver's own Rule 30(b)(6) witness and current chief financial officer, Trey Rogers. The Feeder

[10] Because courts generally use like terms in the NYDCL and the Bankruptcy Code "interchangeably," the Court may consider federal interpretations of the difference between an equity holder and a creditor under the Bankruptcy Code. *See, e.g.*, *In re Applied Theory Corp.*, 323 B.R. 838, 840-41 (Bankr. S.D.N.Y. 2005), *aff'd*, 330 B.R. 362 (S.D.N.Y. 2005).

Funds and the Blocker Fund hold only limited partnership interests in PPCO Master Fund, which Mr. Rogers characterized as "equity" interests. SMF ¶ 9. As a matter of law, those funds' status as equity holders does not confer standing to assert the fraudulent conveyance claims the Receiver seeks to assert here. *E.g.*, *Harbinger Capital Partners Master Fund I, Ltd.*, 906 A.2d at 223-24.

Nor can the Receiver present evidence sufficient to establish that the Feeder Funds and the Blocker Fund possessed or had asserted some claim against PPCO Master Fund "at the time of the transfer[s]" in question—*i.e.*, the December 2015 loan transaction and the March 2016 loan transaction. *In re Bayou Grp., LLC*, 439 B.R. at 298. The absence of such evidence is hardly surprising, as the Feeder Funds and the Blocker Fund were part and parcel of the fraudulent scheme alleged by the Receiver and thus cannot possibly possess any cause of action against the Master Fund in their own right. *See, e.g.*, *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464, 912 N.Y.S.2d 508, 517 (2010) ("The doctrine of *in pari delicto* mandates that the courts will not intercede to resolve a dispute between two wrongdoers."). Relatedly, and in any event, the Feeder Funds and the Blocker Fund effectively consented to the December 2015 and March 2016 transactions because Mark Nordlicht—who controlled those entities—was the architect of and executed the transactions on behalf of PPCO Master Fund and the PPCO Subsidiaries. SMF ¶¶ 14-16.[11]

2. The Receiver Lacks Standing to Challenge Transactions Involving the PPCO Subsidiaries Because She Does Not Represent a Creditor of Those Entities.

The Receiver likewise does not have standing to assert fraudulent conveyance claims in connection with transfers made by the PPCO Subsidiaries because, again, it is undisputed that the

[11] Any argument that the Feeder Funds and the Blocker Fund can assert claims possessed by their investors fails for two fundamental reasons. First, the Receiver has not produced any evidence at all to suggest that any investor in the Feeder Funds or the Blocker Fund has asserted a tort claim or possesses such a claim. Second, and perhaps more important, to allow the Receiver to proceed on such a theory would effectively permit the Receiver to assert claims directly on behalf of investors, whom she does not represent.

Receiver does not represent a creditor of the PPCO Subsidiaries. *Eberhard*, 530 F.3d at 132 ("receivers have standing to pursue fraudulently conveyed assets *only* when one of the entities in the receivership is a creditor of the transferor." (emphasis added)). The PPCO Subsidiaries are not identified as Receivership Entities in the Receivership Order, SMF ¶ 20, and they entered into the Master Security Agreement and December 2015 and March 2016 Subsidiary Guaranties *on their own behalves*. SMF ¶¶ 46, 48, 79. Those particular transactions can be challenged only by a creditor of the PPCO Subsidiaries. Because the Receiver does not represent any such creditor, she lacks standing to challenge the transactions as they relate to the PPCO Subsidiaries. *See, e.g.*, *Martes v. USLIFE Corp.*, 927 F. Supp. 146, 148 (S.D.N.Y. 1996) (granting summary judgment on standing grounds where plaintiff was a creditor only of the subsidiary and not of the defendant parent company that allegedly made the fraudulent conveyance).

In ruling on motions to dismiss the fraudulent conveyance claims made by other parties, this Court previously allowed those claims to proceed on the basis that they were asserted "on behalf of the receivership entities, not the PPCO Subsidiaries," and on the understanding that the guarantees and security interests granted by the PPCO Subsidiaries fell within the Receivership Order's definition of "Receivership Property." *See In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *34. The Court's ruling, however, was based on allegations that provided an inaccurate account of PPCO Master Fund's property interest in the PPCO Subsidiaries. PPCO Master Fund's interest in the PPCO Subsidiaries is that of an equity holder, with the PPCO Subsidiaries themselves each holding assets in relation to a specific investment. SMF ¶ 11. In other words, PPCO Master Fund is not, and never has been, a direct owner of the property held by the PPCO Subsidiaries. Because the Receivership Order defines "Receivership Property" to include only the "property interests of the Receivership Entities," it cannot extend to property

interests directly held by the PPCO Subsidiaries, which are not Receivership Entities. SMF ¶ 23. The Receivership Order thus does not permit the Receiver to circumvent the fundamental requirement that she represent a creditor of the PPCO Subsidiaries to assert a claim concerning an allegedly fraudulent conveyance of property belonging to those entities.

B. The Fraudulent Conveyance Claims Should Be Dismissed Because SHIP Was a Transferee for Fair Consideration Without Knowledge of Any Fraud.

Beyond incurable standing defects, the Receiver's claims in Counts 8-17 should be dismissed because the December 2015 and March 2016 transactions were supported by fair consideration and SHIP had no knowledge whatsoever of any underlying fraud. N.Y.D.C.L. § 278(1) provides a complete defense to any fraudulent conveyance claim where it is shown that the defendant was "a 'purchaser for fair consideration without knowledge of the fraud at the time of the purchase.'" *In re Direct Access Partners, LLC*, 602 B.R. 495, 548 (Bankr. S.D.N.Y. 2019) (quoting N.Y.D.C.L. § 278(1)); *see also In re CNB Int'l, Inc.*, 440 B.R. 31, 41-42 (W.D.N.Y. 2010) ("[A] purchaser for fair consideration who takes without knowledge of the fraud has a complete defense to a creditor's attempt to have the conveyance set aside."). "This defense applies even if the [plaintiff] contends that a transfer is intentionally fraudulent pursuant to section 276 …." *Direct Access Partners*, 602 B.R. at 548.

1. SHIP Had No Knowledge of Any Alleged Fraud.

The carve-out in N.Y.D.C.L. § 278(1) exists to protect "innocent creditors or purchasers for value who have received the debtor's property without awareness of any fraudulent scheme." *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 544-45 (S.D.N.Y. 2007) (quoting *HBE Leasing Corp. v. Frank ("HBE Leasing I")*, 48 F.3d 623, 636 (2d Cir. 1995)) (granting summary judgment fraudulent conveyance claim where transferee "could not have been aware of any alleged defrauding of Chemtex since [the transferee] was utterly unaware of Chemtex's

existence"). Here, the incontrovertible evidence shows that there was no fraud in connection with the December 2015 and March 2016 transactions, and in any event, SHIP had no notice of or involvement in those specific transactions.

The flawed central theory of the Receiver's case against SHIP, as set forth in the FAC, is that SHIP "actively negotiated and consummated" the December 2015 and March 2016 Transactions. FAC ¶¶ 237, 254. In fact, the Receiver goes so far as to allege that SHIP and Fuzion "directed Beechwood, as their agent, to enter into several transactions with PPCO Master Fund knowing that the transactions were not arms-length commercial deals being restructured by unconflicted officers, but rather transactions designed to extricate themselves and their affiliates from investments which had become toxic." FAC ¶ 11 (emphasis in original). That theory never should have been advanced because, at least as to SHIP and Fuzion, the Receiver never had any factual support for it. That unsubstantiated theory disintegrated further under scrutiny during discovery, as evidenced by the following:

- Brian Wegner, SHIP's CEO at the time of the transactions, testified that he had never even seen the documents evidencing the December 2015 and March 2016 transactions before. SMF ¶ 88(a).

- Paul Lorentz, SHIP's CFO at the time of the transactions, similarly testified that he had never seen the documents evidencing the December 2015 and March 2016 Transactions before and was not involved in any contemporaneous communications concerning those transactions. SMF ¶ 88(b).

- John Robison, SHIP's Rule 30(b)(6) designee, testified that he was unaware of any information to suggest that anyone at SHIP had knowledge of the transactions at or around the time of their execution. SMF ¶ 88(c).

- Beechwood's Rule 30(b)(6) witness, Christian Thomas, testified that he did not "believe SHIP approved" the December 2015 Transactions documents and was unaware of any communications between SHIP and Beechwood concerning the March 2016 transaction. SMF ¶ 88(d).

- Mark Feuer, Beechwood's CEO at the time of the December 2015 and March 2016 transactions, testified that the transactions were executed at Platinum's behest and that he was unaware of any communications between anyone at SHIP and anyone

at Beechwood "requesting in any shape or fashion diversification out of the [Platinum] assets that were purchased with regard to our relationship." SMF ¶ 88(e).

- Both of the Receiver's Rule 30(b)(6) designees testified that they could not identify a single piece of evidence even suggesting that anyone at SHIP was aware of either transaction, despite having access to "10 million documents" that the Receiver's counsel "did a very thorough job of vetting." SMF ¶ 88(f).

- Documentary evidence shows that no individual from SHIP was included on any contemporaneous e-mail communications concerning the transactions. SMF ¶ 88(g).

- Beechwood, not SHIP, executed the transaction documents, in its capacity as SHIP's investment advisor. SMF ¶¶ 43, 68.

This undisputed evidence conclusively establishes that SHIP did not even know that the transactions were taking place and that no basis ever existed to allege that SHIP "directed" or "actively negotiated and consummated" the transactions or knew that they were being undertaken for an allegedly fraudulent purpose. The Receiver manufactured such allegations out of thin air and, even after discovery has conclusively refuted her claims, has done nothing to withdraw her entirely unsupportable allegations or the claims against SHIP premised on those allegations.

The Receiver's own testimony likewise forecloses any argument that Beechwood's knowledge regarding the loan transactions at issue may be imputed to SHIP simply because Beechwood served as SHIP's investment advisor. This Court previously has recognized that, as SHIP's discretionary investment advisor, Beechwood "owed [SHIP] a fiduciary duty of the highest good faith and fair dealing." *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 524 (S.D.N.Y. 2018) (quoting *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 80 A.D.3d 293, 306, 915 N.Y.S.2d 7, 16 (1st Dep't 2010)). The Receiver's Rule 30(b)(6) designee repeatedly testified, however, that Beechwood's execution of the December 2015 and March 2016 transactions "was inherently a breach of [Beechwood's] fiduciary duty because [Beechwood was] on both sides of transactions" and thus was operating under a conflict of interest of which

Beechwood's principals were fully aware. SMF ¶ 89. He also testified that Beechwood's conduct in securing SHIP's $270 million commitment under the IMAs was designed to "sustain[] and support the fraud" in which PPCO was engaged "because, absent those funds, Platinum probably would have gone out of business …." *Id.* Former Beechwood CEO Mark Feuer also admitted that the December 2015 and March 2016 transactions were done at Nordlicht's request and for *PPCO Master Fund's* benefit, not SHIP's. SMF ¶ 88(e). Other documentary evidence confirms that the transactions were PPCO Master Fund's brainchild. SMF ¶ 40.

Imputation from Beechwood to SHIP is foreclosed because, as the Receiver emphatically has proclaimed, Beechwood's actions in connection with the December 2015 and March 2016 transactions amounted to a breach of fiduciary duties indisputably owed to SHIP, *see* SMF ¶ 89—an unsurprising conclusion, given that Beechwood's actions were taken with only Beechwood and PPCO Master Fund's interests in mind, not SHIP's. *See* Restatement (Third) of Agency § 5.04 (2006) ("[W]hen an agent takes action in dealing with third parties, intending solely to benefit the agent or other person, the agent's action breaches the agent's most basic duty to the principal."). Worse, the authority that SHIP granted to Beechwood as SHIP's investment advisor was the product of a fraudulent scheme concocted and perpetrated against SHIP by Beechwood and Platinum. New York law holds that "the presumption that knowledge acquired by an agent while acting in the scope of his or her authority is imputed to the principal does not apply when the principal is the victim of a fraud perpetrated by the agent." *Abele Tractor & Equip. Co. v. Balfour*, 133 A.D.3d 1171, 1172 n.1, 20 N.Y.S.3d 697, 700 n.1 (3d Dep't 2015). The Receiver accordingly cannot impute Beechwood's knowledge to SHIP, and her contrary attempt in the FAC to place SHIP in a position of active direction lacks any factual support.

2. The December 2015 and March 2016 Loan Transactions Were Supported by Fair Consideration.

SHIP also satisfies the second requirement of N.Y.D.C.L. § 278(1), *i.e.*, that it provided "fair consideration" in connection with the December 2015 and March 2016 transactions. A transaction is supported by "fair consideration" if the following elements are present: "(1) the recipient of the debtor's property must either (a) convey property in exchange or (b) discharge an antecedent debt in exchange; and (2) such exchange must be a 'fair equivalent' of the property received; and (3) such exchange must be in 'good faith.'" *In re Sharp Int'l Corp.*, 403 F.3d 43, 53-54 (2d Cir. 2005) (quoting *HBE Leasing Corp. v. Frank ("HBE Leasing II")*, 61 F.3d 1054, 1058-59 (2d Cir. 1995)) (cleaned up); *see also* N.Y.D.C.L. § 272 (defining "fair consideration").

a. The Receiver's Expert Concedes that the March 2016 Loan Transaction Was Supported by Fair Equivalent Value.

A showing of fair equivalent value "does not require dollar-for-dollar equivalence; consideration can be fair even if it is less than the value of the transferred property, as long as it is an amount that is not 'disproportionately small' as compared to the value of the transferred property." *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 377 (S.D.N.Y. 2003). "In determining whether the value received by one party is so disproportionately small as to constitute a lack of fair consideration, the 'court need not strive for mathematical precision'…." *In re Old Carco LLC*, 509 F. App'x 77, 78 (2d Cir. 2013) (quoting *Rubin v. Mfrs. Hanover Tr. Co.*, 661 F.2d 979, 994 (2d Cir. 1981)).[12] Applying this standard, Judge Cote granted summary judgment in favor of the defendant where the subject property was conveyed for $3 million, but the plaintiffs' expert contended that the value of the property was $3.45 million—a difference in value of 15%. *Knopf*

[12] Though the Second Circuit was construing the term "reasonably equivalent value" under the Bankruptcy Code, that term has "substantially the same meaning" as "fair consideration" under N.Y.D.C.L. § 272. *E.g.*, *In re Akanmu*, 502 B.R. 124, 131 (Bankr. E.D.N.Y. 2013).

v. Phillips, 16-cv-6601 (DLC), 2017 WL 6561163, at *9 (S.D.N.Y. Dec. 22, 2017), *vacated in part on other grounds*, 2018 WL 1320267 (S.D.N.Y. Feb. 1, 2018). Judge Cote's analysis maps neatly to the facts here and compels the conclusion that SHIP provided fair consideration.

Beechwood caused SHIP to loan $25.7 million in fresh cash and assets ($9.9 million in cash, $15.8 million in Northstar debt) to PPCO Master Fund on top of over $16 million in cash that SHIP previously loaned to PPCO Master Fund under the December 2015 SHIP Note and January 2016 A&R SHIP Note. SMF ¶¶ 69-70. PPCO Master Fund's acquisition of the Northstar debt effectuated the release of the Agera Pledge, thereby rendering PPCO Master Fund's equity interest in Agera unencumbered. SMF ¶ 73. In exchange, PPCO Master Fund promised to repay an additional $26.8 million in principal under the March 2016 SHIP Note. SMF ¶ 69. PPCO Master Fund also granted SHIP a security interest in the equity of the PPCO Subsidiaries, while the PPCO Subsidiaries executed a Subsidiary Guaranty that guaranteed repayment of the March 2016 SHIP Note if PPCO Master Fund defaulted. SMF ¶¶ 77-79.

The Receiver's expert, David Prager, analyzed the value exchanged by the parties in his November 14, 2019 report. As a threshold matter, Mr. Prager's analysis of these transactions fails because he improperly conflates the March 2016 SHIP Note transaction by which PPCO Master Fund borrowed money with the use of that money, focusing on several other transactions that did not involve SHIP, on the ground that the loans were part of an overarching fraudulent scheme connected to those transactions. To justify collapsing transactions in this manner, the Receiver must establish that SHIP had "actual or constructive knowledge of the [fraudulent] scheme." *HBE Leasing II*, 61 F.3d at 1062; *see also In re M. Fabrikant & Sons, Inc.*, 480 B.R. 480, 487-90 (S.D.N.Y. 2012) (Sullivan, J.) (refusing to collapse transactions where debtor allegedly reconveyed loan proceeds to affiliates because complaint "fail[ed] to plausibly allege that the

[lenders] were aware … that Debtors would reconvey the loan proceeds to the Affiliates for less than reasonably equivalent value"); *In re Dreier LLP*, 453 B.R. 499, 513 (Bankr. S.D.N.Y. 2011) ("While Wachovia may have had reason to question Marc's honesty and the accounting for and source of all of the funds used by him and Dreier LLP, this does not add up to actual or constructive knowledge" of the fraudulent scheme.). As explained above, the evidence establishes that SHIP had no such knowledge, and accordingly no basis exists to look beyond what SHIP actually transferred and received. Mr. Prager's analysis also fails to account for the nearly $10 million in cash provided by SHIP as a source of value in the transactions. These fundamental analytical errors place the reliability of Mr. Prager's analysis in serious doubt.[13]

Even ignoring these errors, the conclusion that Mr. Prager reaches eviscerates the Receiver's case. According to his report, [redacted]. SMF ¶ 85. Mr. Prager's report acknowledges, however, [redacted]. SMF ¶ 86. As Mr. Prager acknowledged at his deposition, his low-end figure of $47 million equates to 89% of the purported value that PPCO Master Fund transferred. *Id.* On the high end, that percentage balloons to 96%. *Id.* As a matter of law, therefore, PPCO Master Fund received fair equivalent value in connection with the March 2016 Transactions even when those transactions are viewed in the aggregate. *Knopf*, 2017 WL 6561163, at *9 ("Even crediting the [plaintiffs'] $3.45 million appraisal of [the property], … the $3 million paid by [the defendant] is not disproportionately small." (internal quotations omitted)).

[13] SHIP reserves the right to seek to exclude Mr. Prager's report and testimony at the appropriate time.

More to the point, when the transactions are viewed—as they must be—solely from the perspective of what SHIP transferred and received, the value that PPCO Master Fund received from SHIP was unquestionably the fair equivalent of the value that it transferred. As noted above, SHIP transferred a total of $25.7 million in cash and assets in exchange for an increase in the principal amount owed to SHIP of $26.8 million. SMF ¶ 76. Because the transfer of the Northstar debt to PPCO Master Fund effectuated a release of the Agera Pledge, that debt is valued at its face amount, as Mr. Prager's own report recognizes. SMF ¶¶ 74-75. As a result, the cash and assets transferred to PPCO Master Fund represent approximately 96% of the $26.8 million increase in the face value of March 2016 SHIP Note—plainly fair equivalent value.

b. SHIP Gave Fair Equivalent Value in Connection With the December 2015 Loan Transaction.

The Receiver's analysis of the value transferred and received by SHIP in the December 2015 loan transaction similarly defies economic reality and runs afoul of well-settled law. As with the March 2016 transactions, the Receiver and her expert seek to treat multiple transactions as one without any legal basis to do so. *HBE Leasing II*, 61 F.3d at 1062; *In re M. Fabrikant & Sons, Inc.*, 480 B.R. at 487-90. And once again, the Receiver and her expert ignore that cash was transferred out of SHIP's accounts in connection with the transactions. These analytical failures compel entry of summary judgment in SHIP's favor.

Under the December 2015 SHIP Note, PPCO Master Fund drew approximately $14.2 million in cash from SHIP. SMF ¶¶ 58. In exchange for those funds, SHIP received PPCO Master Fund's promise to pay under the note, the security interest in the assets of PPCO Master Fund and its subsidiaries previously granted under the Master Security Agreement, and the Subsidiary Guaranty. SMF ¶¶ 45-48. As the Receiver's own expert testified at his deposition, cash is worth its face value. SMF ¶ 59. Given that self-evident admission, SHIP indisputably transferred $14.2

million in value in connection with this transaction. The Receiver's expert, in turn, [REDACTED]

[REDACTED]

[REDACTED]. SMF ¶ 74. The value transferred by SHIP and the value transferred by PPCO Master Fund accordingly are in perfect one-to-one correspondence.

Yet, the Receiver asks the Court to look beyond what SHIP transferred and received and consider what PPCO Master Fund chose to do with the $14.2 million in cash *after* it demanded those funds. Even if the Court were to indulge that improper request, the result remains the same. Preliminarily, it bears emphasis that the Receiver's case is premised in large part on the theory that SHIP held an interest in the assets acquired by PPCO Master Fund with SHIP's money. FAC ¶ 230. The evidence is to the contrary. PPCO Master Fund used the first $9.2 million in SHIP's cash to acquire participation interests in debt owed by Desert Hawk (a PPVA-controlled entity) to DMRJ Group I LLC (another PPVA-controlled entity). At the time, SHIP did not hold any interest in Desert Hawk. SMF ¶ 53.

Because SHIP held no interest in Desert Hawk as of December 2015, SHIP was neither a transferee nor a beneficiary with respect to PPCO Master Fund's acquisition of the Desert Hawk participation interests. As a matter of law, SHIP cannot be liable for that conveyance because the NYDCL "d[oes] not either explicitly or implicitly, create a creditor's remedy for money damages against parties who, like defendant here, were neither transferees of the assets nor beneficiaries of the conveyance." *Fed. Deposit Ins. Corp. v. Porco*, 75 N.Y.2d 840, 842, 552 N.Y.S.2d, 910, 911 (1990); *see also Villoldo v. BNP Paribas S.A.*, No. 15 Civ. 496, 2015 WL 13145807, at *3 (S.D.N.Y. July 21, 2015) (dismissing claim where plaintiff conclusorily alleged that defendants "were beneficiaries of the challenged conveyances"); *Brenner v. Philips, Appel & Walden, Inc.*, No. 93 Civ. 7838 (JFK), 1997 WL 33471053, at *5 (S.D.N.Y. July 22, 1997) ("[I]t is well-settled

under New York law that a cause of action for fraudulent conveyance does not lie against a party who is neither a transferee nor a beneficiary of an allegedly fraudulent conveyance."). Consequently, the Receiver's contentions concerning Desert Hawk's value are irrelevant.

As for the $5 million in SHIP's cash that PPCO Master Fund used to pay off the LC Energy debt, there can be no dispute that PPCO Master Fund realized substantial value as a result of that transaction. LC Energy was a wholly owned subsidiary of PPCO Master Fund. SMF ¶ 55. Moreover, the LC Energy debt was in default and the lender was inquiring about the maturity date. SMF ¶ 56. By contrast, the December 2015 SHIP Note carried a 7% annual interest rate and extended the repayment obligation. SMF ¶ 43. Through this transaction, the PPCO Master Fund avoided default on an existing $5 million loan which it had guaranteed and refinanced the loan at a significantly lower interest rate. *Cf. Banco de La Republica de Colombia v. Bank of New York Mellon*, No. 10 Civ. 536 (AKH), 2013 WL 3871419, at *6 (S.D.N.Y. July 26, 2013) ("[W]here a wholly-owned subsidiary issues securities that are exclusively guaranteed by the parent, investors look to the financial status of the parent company that guaranteed the debt to evaluate the likelihood of payment …." (internal quotations omitted)). As a result, "the net effect of the transaction on [PPCO Master Fund's] estate is demonstrably insignificant, for [it] has received … the discharge of a debt worth approximately as much as … the obligation [it] has incurred." *Rubin*, 661 F.2d at 992; *see also In re Wilkinson*, 196 F. App'x 337, 343 (6th Cir. 2006) (citing *Rubin*, concluding debtor received fair value for payment made to third party in exchange for debt reduction). PPCO Master Fund thus received fair value in exchange for the extinguishment of the LC Energy debt.

c. SHIP Was a Good Faith Transferee.

Where "a transferee has given equivalent value in exchange for the debtor's property, the statutory requirement of 'good faith' is satisfied if the transferee acted without either actual or constructive knowledge of any fraudulent scheme." *HBE Leasing I*, 48 F.3d at 636; *see also*

Chemtex, LLC, 490 F. Supp. 2d at 545 ("As to the good faith requirement, 'under section 278, the focus is on the good faith of the *transferee* as opposed to the transferor.'" (quoting *FDIC v. Malin*, 802 F.2d 12, 19 (2d Cir. 1986))). For the reasons explained above, this element is satisfied because SHIP had no knowledge of any alleged fraudulent scheme. *See supra* Part I.B.1.

C. The Receiver's Constructive Fraudulent Conveyance Claims Fail for the Separate and Independent Reason That PPCO Master Fund Was Solvent and Had Adequate Capital at All Relevant Times (Counts 8, 10-13, 15-17).

The Receiver's constructive fraudulent conveyance claims should be dismissed for the further reason that she has not adduced any evidence that PPCO Master Fund was insolvent or lacked adequate capital either before or after the December 2015 and March 2016 transactions.

This section proceeds in three parts. The first part addresses Counts 10, 12, 15, and 17, which assert claims under N.Y.D.C.L. §§ 273 and 277.[14] To sustain a claim under either of those provisions, the Receiver must establish that PPCO Master Fund was insolvent at the time or as a result of the subject transactions. She cannot; her expert's insolvency analysis rests on the legally unsupportable assumption that investors in PPCO Master Fund could have asserted "Rescission Claims" at the time of the transactions, even though no investor actually had done so. The second part addresses Counts 11 and 16, which arise under N.Y.D.C.L. § 274. That statute requires a showing that the subject transactions left PPCO Master Fund with unreasonably small capital. The undisputed evidence conclusively defeats any such contention. Finally, the third part addresses Counts 8 and 13, which assert claims for violation of N.Y.D.C.L. § 275. That provision similarly requires a showing that PPCO Master Fund intended to become unable to pay its debts as a result of the December 2015 and March 2016 Transactions. The evidence shows, however, that PPCO Master Fund intended precisely the opposite: the purpose of the transactions was to ensure that

[14] These statutes respectively govern conveyances by insolvent persons and conveyances of partnership property when the partnership is either insolvent or rendered insolvent.

PPCO Master Fund could continue operating and paying its debts.

1. The Receiver's Analysis of PPCO Master Fund's Balance Sheet Hinges on a Legally Unsupportable Assumption (Counts 10, 12, 15, 17).

To sustain Counts 10, 12, 15, and 17 for constructive fraudulent conveyance under N.Y.D.C.L. §§ 273 and 277, the Receiver bears the burden of establishing that at the time of the December 2015 and March 2016 transactions: (i) PPCO Master Fund either was insolvent or was rendered insolvent as a result of the transactions; and (ii) the transactions were not supported by fair consideration. *See, e.g.*, *Mills v. Everest Reins. Co.*, 623 F. Supp. 2d 447, 451 (S.D.N.Y. 2009) ("In an action to recover a fraudulent conveyance, the plaintiff bears the burden of demonstrating both insolvency and a lack of fair consideration."). For the reasons already explained above, SHIP provided fair consideration in connection with the December 2015 and March 2016 transactions; the Receiver thus has not satisfied the second element. As to insolvency, the Receiver contends that PPCO Master Fund was insolvent based on an unsupported assumption that "non-insider" investors in PPCO Master Fund could have asserted fraud claims at the time of those transactions that were worth more than $200 million. With that improper assumption removed, as is required by New York law, the Receiver's insolvency analysis collapses.

Under New York law, "[a] person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." N.Y.D.C.L. § 271(1). This has been described as a "balance sheet test." *E.g.*, *In re Chin*, 492 B.R. 117, 127 (Bankr. E.D.N.Y. 2013). Critically, "[t]he operative reference point for determining insolvency is the time at which the transfer took place." *In re Trinsum Grp., Inc.*, 460 B.R. 379, 392 (Bankr. S.D.N.Y. 2011). The N.Y.D.C.L. defines a "debt" as "any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." N.Y.D.C.L. § 270. Under well-settled New York law, however,

the "mere existence of a contingent debt, without more, is insufficient to support a finding that such a debt represented a 'probable liability' within the meaning of Debtor and Creditor Law § 271." *State Island Sav. Bank v. Reddington*, 260 A.D.2d 365, 366, 687 N.Y.S.2d 707, 709 (2d Dep't 1999). For a liability to be "probable" under the statute, "some evidence must be proffered as to the probability, *at the time of the challenged conveyance*, that a contingent liability will be imposed and, if so, in what amount." *Id.* (emphasis added).

The Third Department has held that a contingent liability based on a tort claim is not sufficiently probable *at least* until an action has been commenced; before then, such liabilities are purely speculative. *Shelly v. Doe*, 249 A.D.2d 756, 757, 671 N.Y.S.2d 803, 805-06 (3d Dep't 1998). Judge Daniels recently took the analysis a step further, finding that even debts alleged in previously instituted, but not-yet-successful, litigation were "not probable liabilities" for purposes of determining solvency. *Ray v. Ray*, No. 18 Civ. 7035 (GBD), 2019 WL 1649981, at *8 (S.D.N.Y. Mar. 28, 2019). That decision followed the rationale set forth in *Lippe v. Bairnco*, where Judge Chin granted summary judgment in favor of the transferee based on a finding that then-unadjudicated tort claims for personal injuries were not probable liabilities for purposes of the balance sheet test. 249 F. Supp. 2d at 380.

Here, the Receiver's contention that PPCO Master Fund was insolvent in December 2015 and March 2016 rests entirely on the insufficient assumption in the Prager Report—which the Receiver's counsel directed Mr. Prager to make—that "[REDACTED]" SMF ¶ 92 (emphasis added). The Receiver [REDACTED]. *Id.* [REDACTED]. SMF ¶ 93. Yet Mr.

Prager and the Receiver's own Rule 30(b)(6) witness both admitted that no such fraud claims had been asserted by any investor as of December 2015 or March 2016. SMF ¶ 96. Mr. Prager also acknowledged that without the Rescission Claims included as liabilities, his conclusion of insolvency necessarily disintegrates. SMF ¶ 97.

The Receiver's so-called "Rescission Claims" thus fit squarely within the category of contingent liabilities that cannot be considered for purposes of assessing PPCO Master Fund's solvency at the time of the December 2015 and March 2016 transactions. The facts presented here describe more remote contingencies than the far more plaintiff-favorable facts in both *Ray* and *Lippe*, and both of those cases resulted in dismissal of the plaintiffs' claims. With the "Rescission Claims" properly stricken from the "Liabilities" portion of the balance sheet presented in Mr. Prager's report, PPCO Master Fund plainly was solvent at the time of the subject transactions. SMF ¶¶ 94-95, 97.

Separately, even if there were some valid basis to include a "Rescission Claims" calculation on PPCO Master Fund's balance sheet, the Receiver has not produced any evidence to support her calculation. . The Receiver's Rule 30(b)(6) designee also was unable to provide an explanation, vaguely referring to undisclosed "parameters" he was given by the Receiver to identify the alleged "non-insiders." SMF ¶ 99.

The only documentation provided by the Receiver with respect to the calculation of the

Rescission Claims is a spreadsheet setting forth [REDACTED] SMF ¶ 100. But nothing in that spreadsheet explains how the [REDACTED]. In essence, the Receiver asks SHIP and this Court to take it on faith that her calculation of the Rescission Claims is accurate and well supported. That is plainly insufficient to carry the Receiver's burden to establish PPCO Master Fund's insolvency at the time of the transactions. *See, e.g.*, *In re Iridium Operating LLC*, 373 B.R. 283, 352 (Bankr. S.D.N.Y. 2007) (plaintiff "failed to carry its burden of proving, by a preponderance of the evidence, that Iridium was insolvent or had unreasonably small capital at the time of the questioned transfers").[15]

2. No Evidence Exists That PPCO Master Fund Had Unreasonably Small Capital at the Time of the Transactions (Counts 11, 16).

The Receiver's constructive fraudulent conveyance claims under N.Y.D.C.L. § 274 (Counts 11 and 16) similarly require the Receiver to show that, in addition to lacking fair consideration, the subject transactions left PPCO Master Fund with "unreasonably small capital …." This requirement is satisfied if a transaction effectively leaves the transferor "with no capital, and a large amount of debt." *In re King Ctr. Corp.*, 573 B.R. 384, 402 (Bankr. E.D.N.Y. 2017) (quoting *Sharrer v. Sandlas*, 103 A.D.2d 873, 873, 477 N.Y.S.2d 897, 899 (3d Dep't 1984)). In determining whether a company has sufficient capital, courts consider the following factors: "the company's debt to equity ratio, its historical capital cushion, and the need for working capital

[15] Mr. Prager's opinion on PPCO Master Fund's solvency also conflicts with representations and warranties made by PPCO Master Fund in the transaction documents, which were vetted and negotiated by PPCO Master Fund's general counsel, Suzanne Horowitz. SMF ¶¶ 41-42, 65, 107. In addition, Joseph SanFilippo, PPCO Master Fund's chief financial officer at the time of the transactions, testified unequivocally that PPCO Master Fund was solvent and capable of paying its debts as of December 2015 and March 2016. SMF ¶¶ 101-108.

in the specific industry at issue, as well as whether the company's projections were reasonable and prudent when they were made." *In re Norstan Apparel Shops, Inc.*, 367 B.R. 68, 79 (Bankr. E.D.N.Y. 2007) (internal quotations omitted).

The Receiver has not adduced any evidence bearing upon any of these factors. In fact, the Receiver has staked the success of her constructive fraudulent conveyance claims solely on the balance-sheet test, which fails for the reasons stated above. In any event,

SMF ¶ 94. As a result, there is no genuine dispute of material fact that PPCO Master Fund possessed adequate capital at the time of the December 2015 and March 2016 transactions. Counts 11 and 16 accordingly should be dismissed on this additional basis.

3. No Evidence Exists That PPCO Master Fund Intended or Believed That It Would Incur Debts Beyond Its Ability to Pay (Counts 8, 13).

To sustain a claim under N.Y.D.C.L. § 275, the Receiver must show (i) a lack of fair consideration, and (ii) that PPCO Master Fund intended or believed that it would incur debts beyond its ability to pay. *See, e.g.*, *In re Sharp.*, 504 F.3d at 53.[16] As previously established, SHIP provided fair consideration in both the December 2015 and March 2016 transactions. These claims also fail because the Receiver has not proven that PPCO Master Fund intended to or believed that it would incur debts beyond its ability to pay at the time of those transactions.

To demonstrate liability under N.Y.D.C.L. § 275, the Receiver must come forward with "proof of the transferor's subjective intent or belief that it will incur debt that it cannot pay at maturity." *Innovative Custom Brands, Inc. v. Minor*, No. 15 Civ. 2955 (AJN), 2016 WL 308805,

[16] Contrary to the styling in the FAC, N.Y.D.C.L. § 275 is properly understood as a *constructive* fraudulent conveyance statute. *See In re Sharp*, 403 F.3d at 53 (setting out elements of claims for "constructively fraudulent" conveyances under N.Y.D.C.L. §§ 273-275).

at *3 (S.D.N.Y. Jan. 25, 2016) (internal quotations and citations omitted). "Courts have interpreted 'intends or believes' as 'awareness by the transferor that, as a result of the conveyance, he will not be able to pay present and future debts.'" *In re Chin*, 492 B.R. at 129 (citations omitted). To make such a showing, "the plaintiffs must prove that the transferor subjectively intended to become incapable of paying its obligations." *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 943 (S.D.N.Y. 1995) (granting judgment where plaintiffs "adduced no evidence of an actual belief by the defendants that [the transferor] would be unable to pay its debts"); *see In re Nirvana Rest. Inc.*, 337 B.R. 495, 509 (Bankr. S.D.N.Y. 2006) (same).

The Receiver has not adduced any evidence to suggest that PPCO Master Fund intended to become incapable of paying its debts as a result of the December 2015 and March 2016 transactions. Quite to the contrary, the only relevant evidence shows that the transactions were designed to ensure that PPCO Master Fund could continue paying its debts into the future. For example, the March 2016 loan transaction resulted in the release of the Agera Pledge, thereby removing a significant encumbrance on PPCO Master Fund's interest in Agera. SMF ¶¶ 73, 75. That transaction also resulted in an increase of the amount owed by PPVA to PPCO Master Fund under their interfund loan agreement, providing PPCO Master Fund with a significant source of value. SMF ¶¶ 82-83. Additionally, PPCO Master Fund extinguished high-interest, fully guaranteed LC Energy debt and allowed PPCO Master Fund effectively to refinance that debt at a significantly lower interest rate. SMF ¶¶ 43, 56-57. These undisputed facts refute any assertion that PPCO Master Fund intended or believed that these transactions would render it unable to pay its debts.

D. The Actual Fraudulent Conveyance Claims Also Separately Fail Because No Evidence Exists That the December 2015 and March 2016 Transactions Were Undertaken With an Intent to Defraud Creditors (Counts 9, 14).

The Receiver also cannot succeed on her actual fraudulent conveyance claims (Counts 9

and 14) because she has failed to show "actual intent … to hinder, delay, or defraud either present or future creditors" on the part of PPCO Master Fund with respect to the subject transactions. N.Y.D.C.L. § 276. In assessing whether a plaintiff has carried its burden to show actual intent, courts consider whether certain "badges of fraud" are present, including the following:

> (1) a close relationship among the parties to the transaction; (2) a secret and hasty transfer not in the usual course of business; (3) inadequacy of consideration; (4) the transferor's knowledge of the creditor's claim and the transferor's inability to pay it; (5) the use of dummies or fictitious parties; and (6) retention of control of property by the transferor after the conveyance.

MFS/Sun-Life Trust-High Yield Series, 910 F. Supp. at 935. Courts have emphasized "that the presence of one or more badges of fraud does not necessarily compel the conclusion that a conveyance is fraudulent." *A&M Global Mgmt. Corp. v. Northtown Urology Assocs., P.C.*, 115 A.D.3d 1283, 1288-89, 983 N.Y.S.2d 368, 375 (4th Dep't 2014); *see also NV Petrus SA v. LPG Trading Corp.*, No. 14-cv-3138 (NGG) (PK), 2016 WL 11469718, at *4 (E.D.N.Y. Aug. 22, 2016) ("Not all of these indicia must be present, but if these 'badges of fraud are absent from the questioned transactions, that absence will constitute evidence that there was no intent to defraud.'"). In *A&M Global*, for example, the Fourth Department held that, although "there was a close relationship between [the parties] in the transfer," the plaintiffs failed to establish that any other badges of fraud were present and accordingly granted judgment as a matter of law on the plaintiffs' claim. 115 A.D.3d at 1289, 983 N.Y.S.2d at 375. Finally, the plaintiff must establish "fraud with respect to the transaction that [the plaintiff] seeks to void," and may not rely on general allegations of fraudulent conduct. *In re Sharp*, 403 F.3d at 56.

The Receiver's case fails because it is premised on general allegations of a fraudulent scheme perpetrated by Platinum and Beechwood that allegedly was afoot in the years leading up to the December 2015 and March 2016 transactions, not on allegations that the transactions

themselves were fraudulent as to PPCO Master Fund's present and future creditors. The Receiver's decision to employ that tactic hardly comes as a surprise, as virtually none of the traditional badges of fraud are present with respect to the subject transactions.

First, for the reasons already explained, the consideration PPCO Master Fund received in the December 2015 and March 2016 transactions was fair consideration and not inadequate. *See supra* Part I.B.2. *Second*, the Receiver has not even alleged, much less established, that PPCO Master Fund retained control over any property that it transferred in either the December 2015 or March 2016 transactions. *Third*, the Receiver has presented no evidence that PPCO Master Fund was aware of any relevant creditor's claim—here, according to the Receiver, the PPCO Feeder Funds and the PPCO Blocker Fund—and that it was unable to pay it. *Fourth*, the Receiver does not allege that any fictitious parties were used in either of the two sets of transactions. *Fifth*, the Receiver cannot establish that the transactions were executed in a "secret and hasty" fashion; to the contrary, both sets of transactions involved meaningful negotiations between PPCO Master Fund and Beechwood. PPCO Master Fund's general counsel, Suzanne Horowitz, negotiated the transactions on PPCO Master Fund's behalf, with input from other Platinum employees, including David Steinberg. SMF ¶¶ 41-42, 65. Beechwood also was represented by both its general counsel, Christian Thomas, and its outside counsel at Loeb & Loeb. SMF ¶ 65. The only badge of fraud that arguably is present here is a close relationship between Beechwood and Platinum, but that single factor is not sufficient to establish actual intent to defraud PPCO Master Fund's present and future creditors. *See, e.g.*, *A&M Global Mgmt. Corp.*, 115 A.D.3d at 1289, 983 N.Y.S.2d at 375.

The Receiver thus cannot carry her burden to show that PPCO Master Fund entered into the December 2015 and March 2016 transactions with a specific and actual intent to defraud its creditors. Summary judgment should be granted in favor of SHIP on Counts 9 and 14.

II. The Receiver's Unjust Enrichment Claim Should Be Dismissed (Count 18).

To sustain a claim for unjust enrichment, a plaintiff must establish that: "(1) the defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Grynberg v. ENI S.P.A.*, 503 F. App'x 42, 43 (2d Cir. 2012) (quoting *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004)). The Receiver fails all three of these requirements. The claim also should be dismissed because the Receiver has not established a sufficient relationship between SHIP and the Receivership Entities and, in any event, the claim is barred by the doctrine of *in pari delicto*.

First, SHIP has not been enriched by the December 2015 and March 2016 transactions—it has been harmed. With respect to the December 2015 transaction, SHIP loaned PPCO over $14 million in cash in exchange for a promise to pay, a security interest, and a guarantee. To date, PPCO Master Fund has not repaid those funds, SHIP has been prevented from enforcing its security interest, and the guarantee has not been satisfied. SMF ¶¶ 68, 87. As for the March 2016 transaction, SHIP similarly transferred substantial cash and assets in exchange for a promise to pay that has never been fulfilled. SMF ¶ 87. SHIP indisputably was harmed by these transactions.

Second, PPCO Master Fund clearly benefited from the transactions. "As long as the transferor received a benefit … the transferee is not liable on an unjust enrichment claim." *In re Akanmu*, 502 B.R. at 138. As detailed above, PPCO Master Fund received substantial benefits as a result of the transaction, including the extinguishment of a subsidiary's high-interest debt, the acquisition of participation interests in the highly secured debt of Desert Hawk, the release of the Agera Pledge, and a valuable increase in the value of the loan between PPCO Master Fund and PPVA. The Receiver's unjust enrichment claim consequently fails as a matter of law. *In re APCO Merch. Servs., Inc.*, 585 B.R. 306, 321 (Bankr. E.D.N.Y. 2018) (unjust enrichment claim failed for same reason fraudulent conveyance claims failed, *i.e.*, defendants provided fair consideration and

thus transfers "were not made at the expense of debtor or its creditors."); *see Agerbrink v. Model Serv. LLC*, 155 F. Supp. 3d 448, 458 (S.D.N.Y. 2016) ("Simply claiming that the defendant received a benefit is insufficient to establish a cause of action for unjust enrichment.").

Third, no injustice exists requiring restitution. "An indispensable ingredient [of an unjust enrichment] claim is that between the two parties involved there must be an injustice." *Songbird Jet Ltd. v. Amax, Inc.*, 581 F. Supp. 912, 926 (S.D.N.Y. 1984). SHIP simply provided cash and assets in a fair exchange of value (at the time) that PPCO Master Fund used to further its own interests. Those exchanges became unfair to SHIP when SHIP was not repaid as promised. Injustice would result only if SHIP were required to pay restitution to the Receiver, who represents entities that caused direct and grievous harm to SHIP.

Fourth, an unjust enrichment "claim will not be supported if the connection between the parties is too attenuated." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 472 (2011). This requirement is not met where the parties "simply had no dealings with each other." *SPV Osus Ltd. v. UniCredit Bank Austria*, No. 18-cv-3497 (AJN), 2019 WL 1438163, at *14 (S.D.N.Y. Mar. 30, 2019) (quoting *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 517, 950 N.Y.S.2d 333, 337 (2012)). That is precisely the situation presented here: there is no evidence that SHIP had any direct dealings with any of the Receivership Entities. Beechwood executed the December 2015 and March 2016 transactions on SHIP's behalf and without SHIP's knowledge; SHIP had no direct dealings with PPCO Master Fund. As for the other Receivership Entities, there is no evidence that they had any dealings with SHIP, direct or otherwise.

Finally, the unjust enrichment claim also should be dismissed under the doctrine of *in pari delicto*. The Receiver admits that the Receivership Entities, through their principals at Platinum, were participants in a fraudulent scheme at the time of the December 2015 and March 2016

transactions. *See, e.g.*, FAC ¶ 2. Under these circumstances, the Receiver's unjust enrichment claim is "precluded under the doctrine of *in pari delicto*." *New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 145 A.D.3d 16, 23-28, 41 N.Y.S.3d 1, 7-10 (1st Dep't 2016) (dismissing all tort causes of action, including for unjust enrichment, where the "complaints … pleaded extensive wrongdoing on the part of the funds' management"); *see, e.g.*, *Cobalt Multifamily Inv'rs I, LLC v. Arden*, 857 F. Supp. 2d 349, 367 (S.D.N.Y. 2011) (denying receiver's summary judgment motion on unjust enrichment claim where fund principals "engaged in an unconscionable fraud upon the investing public").

III. The Receiver's Declaratory Judgment Claim Should Be Dismissed (Count 19).

The Receiver's final count seeks a "declaratory judgment that the BAM Asserted Liens do not attach to the assets of the MSA PPCO Subsidiaries." FAC ¶ 426. The Receiver rests her request for that relief on two principal grounds. First, the Receiver alleges that because the PPCO Subsidiaries did not "execute[] the Amended Security Agreement" that was executed in connection with the March 2016 transaction (the "March 2016 A&R MSA"), the security interest previously granted by the PPCO Subsidiaries under the December 2015 Master Security Agreement (and reaffirmed and ratified in January 2016) is ineffective. *Id.* Second, the Receiver asserts that because Schedule C of the March 2016 A&R MSA does not list certain information about PPCO Master Fund's equity holdings in the PPCO Subsidiaries, the security interest granted by PPCO Master Fund in those equity holdings is invalid. The Receiver is wrong on both scores.

First, the March 2016 A&R MSA does not alter the validity of the security interest previously granted by the PPCO Subsidiaries, but rather reaffirms those prior security interests. The agreement expressly states that the liens and security interests granted under the December 2015 Security Agreement shall continue with full force and effect, providing:

SMF ¶ 77 (emphasis added). Thus, the March 2016 A&R MSA expressly provided that any liens and security interests previously granted continued to remain "in full force and effect." *Id.* By its own terms, the purpose of the March 2016 A&R MSA was simply to grant *additional* security to SHIP, not to release security interests previously granted. That agreement could not possibly negate a security interest granted *by the PPCO Subsidiaries* for the straightforward reason that the PPCO Subsidiaries are not parties to the Amended Security Agreement. It would defy common sense to conclude that a contractual counterparty can be released from its obligations by way of a subsequent agreement to which it is not a party. In any event, the PPCO Subsidiaries expressly agreed, in the Subsidiary Guaranty executed the same day, that each of them " " SMF ¶ 79 (emphasis added). The security interests granted in December 2015 and reaffirmed and ratified in January 2016 accordingly remain valid and legally enforceable.

Second, in attacking the absence of certain pieces of information from Schedule C of the Amended Security Agreement, the Receiver apparently contends that the subject collateral—PPCO Master Fund's equity interests in the PPCO Subsidiaries—is insufficiently described. That contention is contrary to law. Under N.Y.U.C.C. § 9-108, a collateral description in a security agreement "is sufficient, whether or not it is specific, if it reasonably identifies what is described." "[C]ollateral is reasonably identified if it is 'objectively determinable.'" *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 91 (2d Cir. 2010) (citations omitted). Put differently,

a collateral description is sufficient if "a third party could determine what items of the debtor's collateral are subject to the creditor's security interest." *Rice v. Miller*, 21 Misc. 3d 573, 577, 864 N.Y.S.2d 255, 258 (Sup. Ct., Erie Cty. 2008) (internal quotations omitted). This standard has been described as "lenient." *In re Residential Capital, LLC*, 497 B.R. 403, 418 & n.8 (Bankr. S.D.N.Y. 2013) (general description of "Commercial Tort Claims … if and to the extent related to the Repo Loans" in exhibit to security agreement sufficient); *In re Bennet Funding Grp., Inc.*, 255 B.R. 616, 636 (N.D.N.Y. 2000) (similar standard for description of chattel paper "does not require the underlying documents to use serial numbers or the most exact and detailed descriptions to identify the" goods).

The description of the collateral in the Amended Security Agreement easily meets this test. The agreement identifies the [redacted] SMF ¶ 78. Any third party reviewing the Amended Security Agreement could easily determine from this description what collateral would be subject to SHIP's security interest: PPCO Master Fund's equity interests in the PPCO Subsidiaries. The Receiver's attempt to use the absence of additional identifying information such as the "Class" or "Number of Interests" is precisely the kind of overly demanding standard that courts have rejected. The Receiver cannot use PPCO Master Fund's failure to provide all of the information required in Schedule C as a basis to avoid the security interests that PPCO Master Fund so clearly granted.

CONCLUSION

For all these reasons, SHIP respectfully submits that summary judgment should be granted in its favor and Counts 8-19 of the FAC against SHIP should be dismissed with prejudice.

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