UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	X : : :	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, Plaintiffs, v. BEECHWOOD RE LTD., et al., Defendants.	X : : : : : : : : : : : : : : : : : : X	Civil Action No. 1:18-cv-12018

THE RECEIVER'S OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT OF SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, THE BEECHWOOD PARTIES AND PB INVESTMENTS HOLDINGS, LTD.

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Melanie L. Cyganowski, the duly appointed receiver for the above-captioned Platinum entities (the "**Receiver**"), respectfully opposes the motions for summary judgment filed by SHIP, the Beechwood Defendants and PBIH[1].

PRELIMINARY STATEMENT

The movants are not entitled to summary judgment. To the contrary, the record confirms, as the Receiver originally alleged, that a transaction that benefited Platinum principal Mark Nordlicht, his cohorts, Beechwood, SHIP, and PBIH, at the same time that it victimized PPCO, by saddling the already crumbling fund with non-performing assets and a blanket lien on all of its good assets (precluding a distribution by the Receiver to investors), was fraudulent. In short, SHIP benefited from the challenged transaction by escaping a regulatory takeover. Beechwood benefited by keeping its client (SHIP) alive and happy. Nordlicht and the non-PPCO Platinum entities benefited from their access to institutional capital. But, all of this was to the detriment of PPCO, which was left with the blanket liens and overvalued assets that Nordlicht and Beechwood knew would be a "stranglehold" on PPCO, all at a time, that SHIP knew Platinum was failing.

At the heart of the challenged multi-tranche transaction was Nordlicht, who abandoned his duties to PPCO in favor of his other (and conflicting) economic interests (in other Platinum entities and Beechwood). Simply, Nordlicht and his cohorts perpetrated a fraud involving the saddling of PPCO with bad assets and liens in favor of Beechwood and SHIP. As a result, he, and others, are the subject of criminal prosecution and an SEC enforcement action for fraud. Those actions have

[1] "**SHIP**" means Senior Health Insurance Company of Pennsylvania, a long term care insurance company in runoff; the "**Beechwood Defendants**" or "**Beechwood**" mean, individually and collectively, Beechwood Bermuda, Ltd. ("**BBL**"), Beechwood Bermuda International, Ltd. ("**BBIL**"), and BAM Administrative Services LLC ("**BAM Administrative**"); "**PBIH**" means PB Investment Holdings, Ltd.; and "**PPCO**" means Platinum Partners Credit Opportunities Master Fund L.P.

resulted in convictions (subject to post-trial rulings and a pending appeal) as well as multiple guilty pleas. As pertinent here, Nordlicht's misconduct includes his fraudulent saddling of PPCO with failing assets for which it paid full price in a single, multi-tranche transaction, using funds from loans it was forced to take, secured by liens PPCO was forced to convey on all of its and its subsidiaries assets, in favor of SHIP and Beechwood.

At the time of the challenged transaction, Nordlicht's Platinum empire was being strangled by, among other things, falling oil and gas prices, and increasing requests for redemptions by investors. SOF 45, 220(i), (iv), 231[2] To surmount this challenge, Nordlicht and his partners created Beechwood as a reinsurance company in order to shore up the Platinum enterprise by attracting previously unavailable institutional investment funds. SOF 4-6 SHIP, a long-term care insurance company already under regulatory oversight, which needed to increase its reserves, was attracted to Beechwood's significantly above-market guaranteed rates of return. SOF 28, 86, 89 SHIP's CEO, Brian Wegner, had a personal stake in SHIP's business relationship with Beechwood (having procured Beechwood's investment in a personal business of his), and was therefore incentivized to keep others at SHIP, including its Board, from learning the closeness of the Beechwood-Platinum relationship, about which, as more fully discussed below, the evidence indicates Wegner knew. SOF 93, 96, 132, 211, 215 If others at SHIP found out about these ties, Beechwood would surely not be viewed as an appropriate investment advisor to manage insurance funds, but rather, would be seen for what it was, a vehicle unduly influenced by Nordlicht and company to direct institutional investment in certain Platinum-related assets, whose goal was to prop up the failing Platinum empire, thereby risking Wegner's personal business with Beechwood.

[2] Citations to "**<u>SOF</u>**" are to *Receiver's Counter-Statement of Material Facts Pursuant to Local Rule 56.1*". Capitalized terms not defined herein have the meanings ascribed to them in the SOF.

By 2015, regulatory pressures on SHIP became too great, owing to its need to increase its "RBC" (a critical measure of the risk of an insurer's capital), so as to avoid regulatory intervention, which would result in Wegner losing his CEO position, Beechwood losing its important investor, and the Nordlicht contingent losing their vital institutional capital. Accordingly, Wegner, on behalf of SHIP, and with Beechwood's help, implemented a $50 million roundtrip surplus note transaction, and subsequently put into motion the challenged transaction. The transaction also increased the collateral SHIP could look to in order to support its risky Platinum investments, a move which Beechwood knew, from communications between its CEO and Nordlicht, were not in PPCO's best interests. SOF 156, 222, 224 The transaction yielded PBIH a $2.1 million payment. SOF 197 The transaction also resulted in SHIP and Beechwood obtaining liens on all of PPCO's (and its subsidiaries') assets in exchange for PPCO being saddled with worthless or nearly worthless assets - - meaning the exchange drained significant value from PPCO and was not for fair consideration. SOF 222 Those liens should be set aside.

The motions do not establish SHIP's and Beechwood's entitlement to keep the liens in place, or PBIH's to keep the $2.1 million. Rather, based on the substantial evidence adduced in discovery, the Receiver will demonstrate at trial:

(i) PPCO entered the PPCO Loan transaction with the intent to hinder, defraud or delay creditors (Nordlicht knew *inter alia*, that Platinum could not pay redemptions, continue to make interest payments for borrowers, and that more liens on PPCO's assets would harm PPCO) (SOF 46, 220(iv), 231);

(ii) PPCO did not receive, and SHIP/Beechwood did not give, fair consideration for the transfers made in the PPCO Loan Transaction (SOF 122);

(iii) the close relationship between Beechwood and Platinum, as conceded by SHIP and known by both SHIP and Beechwood (SOF 132);

(iv) PPCO lost $18 million in value from the transaction (SOF 221, 222);

(v) SHIP's lack of good faith SOF 232-234; and

(vi) PPCO's insolvency SOF 226-227.

As far as SHIP is concerned, it saw salvation in Beechwood, and so SHIP entered into investment management agreements ("**IMAs**") with Beechwood to obtain a "good rate of return" from "higher risk." SOF 91 SHIP's money then went into poorly performing Platinum-related assets. When SHIP wanted out of these investments, Wegner's friends at Beechwood obliged, and with Nordlicht, orchestrated the multi-tranche PPCO Loan Transaction (defined below) to placate this important source of institutional funding, leaving PPCO holding the proverbial "bag" in the form of all asset liens which now prevent the Receiver from making distributions to investors and creditors. It is clear that Wegner, SHIP's CEO, kept information from SHIP's Board regarding Beechwood's ties to Platinum, the extent of SHIP's investment in Platinum-related assets, and Wegner's questionable strategies to stave off further regulatory oversight and control. SOF 101, 103-105, 210-216 Not surprisingly, Wegner maintained his relationship with Beechwood's CEO Feuer via numerous phone calls rather than by e-mail, defeating SHIP's constant pointing to the lack of email-based proof of Wegner's actions. SOF 234

SHIP's strategy is curious – to demonstate good-faith it relies on the testimony of Wegner who was fired for dishonesty. SOF 96 Wegner's lack of credibility alone is sufficient to preclude an award of summary judgment, but there are more issues of material fact. ***First***, while SHIP's witnesses, testifying pursuant to separation agreements, claim the Beechwood-Platinum relationship was hidden, SHIP's officers had been introduced at Platinum's offices to Nordlicht and Huberfeld (who each held ownership interests and positions at both Platinum and Beechwood). SOF 84-92 Additionally, SHIP was made aware that certain Beechwood executives, including its chief investment officer ("**CIO**"), had come from Platinum, and SHIP received and acknowledged letter agreements signed by Nordlicht on behalf of Beechwood-named entities, while he still ran

Platinum. SOF 93, 94, 95, 110, 132 ***Second***, despite SHIP's protestations, SHIP knew it was invested in Platinum-related assets because it possessed numerous third-party reports specifying Platinum's involvement in many of SHIP's investments. SOF 132 ***Third***, while SHIP disclaims involvement with the PPCO Loan Transaction, Beechwood's CIO's understood that the idea to reduce SHIP's exposure to Platinum in January 2016 came from SHIP, the transaction occurred at a time SHIP's board was discussing reductions of unrated assets, and Beechwood's CEO's was unable to rule out that he had discussed the transaction or a divesiture plan with SHIP in advance. SOF 8, 153, 154, 155

Even absent direct involvement in the transactions, SHIP is bound by the actions of its agent, Beechwood. *See*, Receiver's "**Agency Motion**". And, that agent (Beechwood) knew from Nordlicht that liens were "strangling" PPCO, yet the transaction challenged here *increased* the liens encumbering PPCO's assets. SOF 156 Moreover, SHIP's legal arguments fail, including its attempt to challenge the Receiver's standing to maintain fraudulent conveyance claims seeking avoidance of transfers made by PPCO, including purported liens against PPCO's subsidiaries under the New York Debtor & Creditor Law (the "**DCL**"), as well as claims for unjust enrichment and declaratory judgment against SHIP. The standing argument fails because PPCO Blocker Fund and PPCO Onshore Fund are direct PPCO creditors with contractual creditor rights consistent with applicable caselaw. SHIP's attempt to eliminate the Receiver's DCL claims also fails because the very badges of fraud articulated by SHIP's own expert permeate the challenged PPCO Loan Transaction. Tellingly, (i) that expert was *not* asked to examine the very transaction challenged by the Receiver[3]; and (ii) even SHIP acknowledges the existence of at least one badge of fraud

[3] The Receiver reserves her right to, at the appropriate juncture, challenge this Court's acceptance of SHIP's witness as an expert, either through a *Daubert* motion or otherwise.

relating thereto, namely the close Beechwood and Platinum relationship. SHIP MOL 35. In addition, there are issues of fact as to whether PPCO received "fair equivalent" value (the Receiver's expert says it did not),[4] whether PPCO was insolvent, and whether the transactions were made and incurred "with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors" as set forth in DCL § 276. Finally, issues abound as to SHIP's and BAM Administrative's lack of good faith. For example, Beechwood's CEO knew from Nordlicht (who held both management and ownership positions at PPCO, PPVA and Beechwood), that liens on PPCO's assets were harmful to its financial health and viability, yet Beechwood participated in transactions on behalf of SHIP that *increased* the extent of liens on PPCO's assets (and those of its subsidiaries that received *no* consideration or benefit from the transactions). SOF 156, 222, 224 Thus, disputed issues of material fact exist as to SHIP's bad faith based on its agent's knowledge and conduct. Nor is SHIP entitled to summary judgment on the Receiver's claims for unjust enrichment and declaratory judgment.

As to Beechwood's motion, as a threshold matter, Beechwood failed to submit a Rule 56.1 statement as required, the Receiver has been prejudiced as a result, and Beechwood's motion should therefore be denied. Beechwood's attempted incorporation by reference of certain section of the SHIP MOL does not change that result. Regardless of its procedural shortcomings, Beechwood's adoption of certain sections of SHIP's MOL does not provide a sufficient factual

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[4] *See* expert witness report of David W. Prager (the "**Prager Report**") finding no "fair equivalent" because the value (in money and debt) that PPCO transferred exceeded the value of the notes which it received in those transactions by $18.2 million (at the mid-range value referred to in the Prager Report. The notes PPCO received were issued by Desert Hawk Gold Corp. ("**Desert Hawk**"), LC Energy Holdings LLC ("**LC Energy**") and Northstar GOM Holdings Group LLC ("**Northstar**"). During his deposition, Mr. Prager adopted the conclusions in the Prager Report and stated that he did not want to make any changes to it. SOF 226-227

predicate to obtain dismissal of the Receiver's claims for aiding and abetting fraud, and aiding and abetting breach of fiduciary duty, causes of action previously upheld by this Court as sufficiently pled. Summary judgment for Beechwood is precluded because: (i) SHIP does not dispute the improper and fraudulent acts undertaken by Beechwood; and (ii) the evidentiary record highlights, at *minimum*, Beechwood's awareness of evidence supporting the Receiver's claims, such as: (a) overlapping financial and management interests in both Platinum and Beechwood; (b) the detrimental effect liens against all of PPCO's assets would have on the fund; (c) the fact that PPCO was paying interest on behalf of borrowers, demonstrating the overly inflated values that had been assigned to those assets; (d) Nordlicht's regular overriding of his staff's asset valuations so as to achieve desired returns; and (e) Platinum's growing insolvency (demonstrated by Feuer telling SHIP that Platinum was a "motivated seller who much needs the money"). SOF 155

PBIH is not entitled to summary judgment because: (i) issues of fact exist as to whether the knowledge of fraudulent activities or breaches of fiduciary duties held by two of its three directors (Feuer and Taylor) should be imputed to the entity (it should); (ii) PBIH received approximately $2 million in the transactions at issue, thereby rendering substantial assistance in the underlying violation; (iii) contrary to PBIH's claim in its motion, there is substantial and extensive evidence of Nordlicht's wrongdoing (for example, allowing liens to be placed on all of PPCO's assets and those of its subsidiaries even though he told Beechwood that doing so was harmful to PPCO's financial health) SOF 156; and (iv) the Receiver's claims are not barred by *in pari delicto* and the *Wagoner* rule because, as the Prager Report shows, the PPCO Funds were disadvantaged by the March 2016 transaction involving Northstar.

For these reasons, and those more fully set forth herein, the motions should be denied.

<u>FACTS</u>

A complete recitation of the facts relied upon by the Receiver in opposition to the motions

is set forth in the SOF, as well as in the Receiver's responses to the Rule 56.1 statements filed by SHIP and by PBIH, the Declaration of Trey Rogers ("**Rogers Dec**."), and the Declaration of Erik Weinick ("**Weinick Dec**.").[5] Briefly, however, the salient, undisputed facts include:

A. The Parties

As a result of a civil enforcement action brought by the SEC, and with the consent of the defendants thereto, including Nordlicht, at all times since July 6, 2017, Melanie L. Cyganowski (the "**Receiver**") has been the duly appointed receiver for PPCO, Platinum Partners Credit Opportunities Fund (TE) LLC ("**PPCO TE**"), Platinum Partners Credit Opportunities Fund LLC ("**PPCO Fund**"), Platinum Partners Credit Opportunities Fund International Ltd. ("**PPCO Fund International**"), Platinum Partners Credit Opportunities Fund International (A) Ltd. ("**PPCO Fund International A**"), and Platinum Partners Credit Opportunities Fund (BL) LLC ("**PPCO Blocker Fund**," and, together with PPCO, PPCO TE, PPCO Fund, PPCO Fund International, and PPCO Fund International A, collectively, the "**Receivership Entities**"). (Docket entry on July 6, 2017 in *United States Securities and Exchange Commission et al v. Platinum Management (NY) LLC, et al*., 16-cv-6848 (E.D.N.Y.) (the "**Receivership Action**"). SOF 15-21

The "**Beechwood Entities**" are: Beechwood Re Ltd. ("**Beechwood Re**"); B Asset Manager LP ("**BAM**"); B Asset Manager II LP ("**BAM II**"); Beechwood Bermuda International Ltd. ("**BBIL**"); BAM Administrative Services LLC ("**BAM Administrative**"). For a complete description of these entities, *see* SOF 32

BRe BCLIC Primary, BRe BCLIC Sub, BRe WNIC 2013 LTC Primary and BRe WNIC 2013 LTC Sub are, and at all material times hereinafter mentioned were, insurance trusts organized, managed by BAM Administrative. SOF 32

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[5] Because Beechwood has not filed a Rule 56.1 statement, the Receiver has not filed a response.

Moshe M. Feuer a/k/a Mark Feuer ("**Feuer**"), is, and at all material times hereinafter mentioned was, Beechwood's CEO. SOF 33

Scott A. Taylor ("**Taylor**") is, and at all material times hereinafter mentioned was, Beechwood's President, SOF 33

Mark Nordlicht ("**Nordlicht**") was at all material times hereinafter mentioned, the Managing Member and Chief Investment Officer of PPCO Portfolio Manager SOF 33

SHIP was at all material times hereinafter mentioned an insurance company. As of September 11, 2019, SHIP was "a long-term care insurer in run-off." SOF 28-31

PBIH is the successor-in-interest to Beechwood Bermuda Investment Holdings Ltd., a Beechwood Entity. SOF 32

B. Structure

On or about June 3, 2011, PPCO, as "General Partner," PPCO Blocker Fund and PPCO Onshore Fund, as "Limited Partner[s]," and two of the PPCO Feeder Funds, entered into the Third Amended and Restated Limited Partnership Agreement of Platinum Partners Credit Opportunities Master Fund, LP (the "**LPA**"). The LPA, among other things, governs withdrawals by a "Limited Partner." SOF 36-40, 41-47 Consistent with the provisions of the LPA, PPCO's, PPCO Blocker Fund's and PPCO Onshore Fund's books and records – including their financial statements – confirm that PPCO Blocker Fund and PPCO Onshore Fund were both creditors of PPCO as of December 23, 2015 (in a total amount of $16,864,220), March 21, 2016 (in a total amount of $1,172,840), and as of March 31, 2016 (in a total amount of $24,803,381.95). SOF 41-47

C. The PPCO Loan Transaction

In a "marriage of convenience" between Nordlicht's alleged need to get "stranglehold" and interest relief, and SHIP's need to move away from unrated assets in its investment portfolio, between December 23, 2015 and March 21, 2016, PPCO entered into a multi-tranche transaction

(the "**PPCO Loan Transaction**"), in which PPCO borrowed approximately $69 million from SHIP in order to purchase from SHIP underperforming notes issued by three distressed companies (Desert Hawk, LC Energy and Northstar).[6] SOF 156, 221, 222 The notes were worth only a fraction of the face value at which they were purchased by PPCO. SHIP's loan to PPCO was secured by an all-asset lien against PPCO's and its subsidiaries' assets granted in favor of BAM Administrative (as agent for SHIP). SOF 221, 222

As set forth in the Prager Report, there was no independent business reason for the PPCO Loan and it provided no benefit to PPCO. Instead, the PPCO Loan Transaction transferred significant value away from PPCO and as knowingly allowed by Nordlicht, impaired the ability of PPCO's creditors to collect on their claims. In other words, following the PPCO Loan Transaction, PPCO was not adequately capitalized to survive a demand by investors for prompt repayment of their investments (via Rescission Claims), as SHIP and Beechwood were granted liens on substantially all of the assets of PPCO.[7] As the counterparty to these transactions, SHIP and Beechwood benefitted to the same extent that PPCO was harmed. Prager also concluded that PPCO did not receive the fair equivalent value it exchanged in the transactions, and that following the transactions the value of PPCO's assets was most likely less than its liabilities. SOF 222

D. Platinum's Creation of Beechwood

The reinsurance companies known collectively as Beechwood were created by Nordlicht, who at the time ran the hedge funds known collectively as Platinum Partners, with Murray

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[6] Ironically, Nordlicht's point person on the deal, described it "like one of those prearranged marriages where I was put into a situation where the outcome was already determined prior to my involvement, and [Nordlicht] was just sending me basically like usher the transaction to its conclusion." At his deposition, he also questioned whether the deal was actually in Platinum's best interest. SOF 156

[7] The Rescission Claims are tort claims that would have been made had PPCO investors been aware of Nordlicht's false valuations and entry into a deal that favored his other economic interests.

Huberfeld and Bodner as co-principal investors, and with David Levy ("**Levy**") as Platinum's Co-CIO. SOF 66 While to the outside world Platinum appeared to be "strong, darlings of Wall Street," in reality it was weak, suffering from severe liquidity problems owing to mounting investor redemptions in the face of a dramatic downturn in its heavy investments in the oil and gas industry. SOF 93, 155, 220(iv) In 2012, Nordlicht, together with reinsurance and investment veterans Feuer and Taylor, and along with Levy (who became Beechwood's first CIO) began creating Beechwood, and did so specifically for the purpose of providing institutional money as the answer to Platinum's need for capital. SOF 4, 67

From the beginning, while Beechwood's percentage ownership was comprised of 37% held in family trusts of Feuer, Taylor and Levy, 63% was held in trusts controlled by family members of Platinum's principals: Nordlicht, Huberfeld and Bodner.[8] SOF 70, 102

SHIP, spun off from CNO in 2008, had a long term care block of business in run-off, which had billions of dollars of institutional capital to invest. It also had a for-profit affiliate known as Fuzion Analytics ("**Fuzion**") that was run by the same personnel who had administered CNO's claims before the spin-off. It was engaged by Beechwood to administer claims in connection with CNO's ceded block of business pursuant to CNO's reinsurance agreement with Beechwood. That is how SHIP learned of Beechwood and its above market returns. SOF 30, 86

E. SHIP's Bond with Beechwood

SHIP planned to realize a higher yield through the IMAs, which guaranteed a return of 5.85%, far greater than the 2% returns SHIP had been realizing from its other investments.

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[8] A very small percentage of Beechwood ownership was given to Kerry Propper ("**Propper**"), an investment consultant who in 2012 introduced and walked through with Nordlicht, Feuer and Taylor the idea that ultimately became Beechwood. Propper was granted the ownership interest only after Propper learned that he was intentionally cut out of his own idea, that Beechwood was created behind his back, and only after he confronted Nordlicht. SOF 70

Wegner, who negotiated for SHIP, considered his deal with Beechwood "an achievement." Indeed, SHIP's 30(b)(6) witness (and CEO after Wegner) Barry Staldine, admitted that SHIP was "happy with" the "good rate of return," which it viewed as a "nice return" captured from "higher risk." SOF 89-91

At the same time that SHIP began enjoying higher returns, Wegner was realizing personal achievements from Beechwood. Specifically, Feuer engaged Wegner in discussions concerning the prospect of Wegner becoming a member of Beechwood's board of directors. Even more significantly, Feuer then solidified the bond by arranging for a generous investment by Beechwood into Wegner's start-up, family business, which, as Feuer stated in an email, was comprised of $250,000 of "friend money" and which could probably be increased to $250,000 more if it was needed – as to which Wegner wrote: "It's nice to have friends like that."[9] SOF 97 Thus, from the outset, Wegner had a personal stake in maintaining SHIP's relationship with Beechwood.

Discovery has confirmed that Wegner interfered with certain due diligence efforts that may have highlighted the Beechwood-Platinum relationship. This demonstrates that at *minimum*, Wegner, and hence SHIP, was aware of that relationship. More specifically, Protiviti, SHIP's in-house auditing team, drafted a due diligence report in early 2015 which specifically flagged an information deficiency concerning Beechwood's ownership. Wegner actively concealed this from SHIP's Oversight Trustees. SOF 103-105 Another third party, known as Vanbridge, tried later in 2015 to obtain Beechwood's ownership information directly from Beechwood's Scott Taylor, only to have Wegner interfere by signaling to Taylor that such information was not necessary – and as a result, it was not given. SOF 212-216

[9] Wegner testified he came to learn that the source of those funds came from CNO's reinsurance trust being invested by Beechwood. SOF 98

F. The Circular Surplus Note Scheme to Increase SHIP's RBC

When SHIP was in financial dire straits, the unscrupulous Beechwood was more than happy to assist, making Wegner SHIP's hero. More specifically, by late 2014 to early 2015, SHIP was in danger of falling below its required regulatory RBC percentage.[10] This put SHIP in danger of having to endure the "negative event" of having to answer to its regulator, the Pennsylvania Department of Insurance, with a company action plan. SOF 135 This was a pivotal moment for SHIP because SHIP's regulator had the statutory authority to seek a Court order to shut down SHIP and to appoint a rehabilitator to take over its affairs. Clearly, such action would end Wegner's tenure as CEO (along with the attendant benefits to his family business), discontinue SHIP's investments with Beechwood and stop the flow of institutional capital to the Nordlicht group.[11]

Beechwood played into SHIP's RBC strengthening plan by agreeing to enter into a certain surplus note transaction for $50 million (the "**Surplus Note**"), which constituted a "big increase" to SHIP's RBC percentage, and thereby removed SHIP from such regulatory concern. SOF 138 The plan involved SHIP borrowing $50 million from an entity that Beechwood created, called Beechwood Re Investments LLC ("**BRILLC**"), evidenced by the Surplus Note dated February 20, 2015. This immediately improved SHIP's RBC. SOF 138

When Beechwood was first approached by Wegner about abetting this circular transaction, Beechwood was not in a financial position to be of help. In fact, Feuer responded by saying, "Brian we love you but we don't have $50 million to loan you." SHIP then arranged to get

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[10] RBC is used by insurance regulators to gauge solvency, as per the NAIC's model RBC law. Most insurance companies need to stay above the mandatory control level of 200 percent, but because SHIP was in run-off its regulator permitted a reduced RBC percentage of 100. SHIP was in run-off because of the problems in the long-term care industry, resulting in its regulator appointing certain industry experts to serve as a Board of Trustees (the "**Trustees**") to oversee SHIP's business and to serve on its Board of Directors. SOF 30, 134-135

[11] On January 29, 2020, SHIP was placed in rehabilitation. SOF 31

Beechwood the money – from SHIP itself. With that, Beechwood played along. SOF 139 As more fully discussed below, this evidence strongly suggests Beechwood was more than willing to placate SHIP's needs so as to keep the source of institutional capital flowing.

Although SHIP had to obtain regulatory approval for the Surplus Note, it concealed from its regulators the details that the source of the $50 million loan investment proceeds came not from Beechwood, but rather from SHIP itself, in a circular transaction whereby SHIP effectively raised its RBC ratio by improperly investing in itself.[12] More specifically, account statements demonstrate that on February 18, 2015, SHIP wired $60 million into its first IMA account, which was being invested by the Beechwood investment advisor BBIL, and then the *next* day, February 19, 2015, SHIP had another wire sent from that same account in the amount of $50 million to BRILLC, which then used those funds to purchase the Surplus Note.[13] Wegner highlighted the pivotal nature of this transaction when he said that Beechwood "literally saved the company when they gave us the 50 million surplus note." SOF 145

G. <u>SHIP's Knowledge of Platinum</u>

Although it claims to have not learned of any connections between Platinum and

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[12] SHIP sent two letters to its regulator, the Pennsylvania Department of Insurance, on the same day, January 30, 2015, one seeking approval of the Surplus Note to be purchased by BRILLC (the "Surplus Note Letter,"), the other for the purpose of discussing SHIP's third IMA with Beechwood guaranteed by BRILLC and describing its intention to recharacterize the first two IMAs as loans (the "**<u>IMA Letter</u>**,"). While each letter discusses the purchase of the Surplus Note by BRILLC, and while the IMA Letter claimed that no improper "circular transaction" would take place, neither letter describes the actual details of the wiring of funds within a day from SHIP to BBIL to BRILL back to SHIP together with the corresponding note instruments evidencing the borrowing of those funds. Further, Lorentz acknowledged he failed to do so. SOF 142-143

[13] Corresponding note instruments further demonstrate that on February 19, 2015, BRILLC borrowed $50 million from BBIL (1st IMA investment advisor) evidenced by a note and security agreement dated that day. The next day, February 20, 2015, SHIP executed the Surplus Note in favor of BRILLC in exchange for $50 million. As such, Beechwood cooperated in a circular transaction and afforded SHIP the opportunity to improperly invest in itself. SOF 111, 141-143

Beechwood until August of 2016, the evidence shows otherwise, including that SHIP knew of the Beechwood-Platinum relationship prior to the commencement of the PPCO Loan Transaction: (i) Nordlicht signed the side letter to the third IMA on behalf of BRILLC, which was also signed by SHIP, demonstrating its knowledge of the relationship between Beechwood and Platinum's Nordlicht (SOF 110; (ii) Nordlicht signed the Pledge Agreement dated February 19, 2015 for N Management as Manager of BRILLC, as well as "Sole Member" of BRILLC, which as discussed *supra* was executed in connection with SHIP's circular Surplus Note scheme (SOF 111, 141-143; (iii) by May of 2015 SHIP had reports from Duff & Phelps, the financial analysts engaged to value SHIP's unrated investments with Beechwood, which described Desert Hawk as issuing $10 million worth of senior secured notes from DMRJ group, a wholly owned subsidiary of Platinum's fund known as Platinum Partners Value Arbitrage ("**PPVA**") guaranteed by its managing member, Mark Nordlicht SOF 220, 225[14]; and (iv) in July of 2015, SHIP had a copy of a document entitled "Participation Agreement (Desert Hawk Gold Corp.)" which is signed by Levy on behalf of DMRJ Group, defined as the "Grantor," and Desert Hawk defined as the "Borrower", Feuer on behalf of Beechwood Re and Nordlicht for PPVA. SOF 132(vi).

H. Wegner Lied to Protect the SHIP-Beechwood Relationship

Further evidence of SHIP's knowledge of the relationship arises from the fact that Wegner

[14] SHIP also received numerous reports from Duff & Phelps that put SHIP on notice of the plethora of Platinum-related assets being held in SHIP's IMAs: (i) SHIP's 30(b) (6) witness John Robison testified that the Duff & Phelps Report dated March 31, 2015, as to which Lorentz as CFO had responsibility to review, includes numerous specific references to the relationship between Platinum and the assets being held in the IMAs, including: Monstant Partners; NYSYRL Capital; ALS Capital Ventures; Credit Strategies LLC; Northstar; Principal Growth Strategies; PPCO; Agera; New Bradley House Ltd. SOF 132(iv); and (ii) Lorentz also acknowledged that SHIP received the June 24, 2015 Duff & Phelps report that describes Platinum's relationship with the following assets held by SHIP: ALS; Desert Hawk; Golden Gate Oil; Implant Science; Kennedy RH Holdings; Monstant Partners; NYSYRL Capital; Northstar; PGS; PPCO; and Agera. The report also identifies Nordlicht as a managing member. SOF 220-225.

lied to hide his knowledge of the Platinum-Beechwood relationship. For example, he: (i) tried to cover-up at his deposition what SHIP knew about the entity known as Platinum at the time that SHIP entered into the first IMA in 2014; (ii) tried to suggest he had Protiviti undertake a due diligence review of Beechwood prior to entering into the IMAs, before the truth forced his admission that he did not do a "deep dive;" (iii) concealed from SHIP's Trustees a draft report generated in early 2015 by Protiviti that identified deficiencies in Wegner's due diligence review of Beechwood's ownership; and (iv) interfered with an effort by another third party, Vanbridge, in mid-2015 to carry out a due diligence review of Beechwood's ownership. SOF 212-216 This evidence strongly suggests that Wegner in fact knew that there was an uncomfortably close relationship between Beechwood and Platinum to hide.

1. Wegner Lied to Distance Himself From Knowledge of Platinum

Wegner lied at his deposition about what SHIP knew about Platinum before entering into the IMAs in 2014. Specifically, a Beechwood investment strategy document that was sent to and received by SHIP in April 2014 identifying Beechwood's CIO, David Levy, as having previously been CIO of PPVA was shown to Wegner at his deposition. In response, Wegner claimed that any relationship between Beechwood's Levy and Platinum would not have raised any flags because of a simple reason: "We never heard of Platinum before." SOF 93 But that is contradicted by SHIP's 30(b) (6) witness Barry Staldine who testified that it was widely known that "Platinum Partner funds were pretty strong, darlings of Wall Street," and that SHIP saw Levy's experience with Platinum as a positive in 2014 because "Platinum was a respected firm." SOF 93 Also, Wegner wrote in an October 3, 2016 email that *back in 2013* it was then known by SHIP that "Platinum was a respected hedge fund at that time." SOF 93 In addition, in October 2013 SHIP had in its possession, a document entitled "Beechwood Re Background Information," which describes Levy as having been the Deputy CIO of PPVA, CIO of PPVE (Black Elk) and Director and Controller

of Desert Hawk and Glacial Energy (Agera), which were Platinum-related entities. SOF 94

2. Wegner Lied about Protiviti's Diligence Review Prior to the IMAs

Wegner lied at his deposition that SHIP's internal auditing group, Protiviti, undertook a third party due diligence review for SHIP *prior to* entering into the IMAs. But, as it became evident during his deposition that he had no support to back up his assertion, Wegner backed off the claim, but not before further lying that Protiviti did not find anything to be concerned about Beechwood. Ultimately, Wegner admitted this third party due diligence review was never done before entering into the IMAs, and could not answer why. SOF 101, 105

Wegner's "I don't know" answer is especially suspect because Paul Lorentz[15], SHIP's CFO and Treasurer, had emailed Wegner that certain members of the Board will likely want to see "formal documentation of our due diligence" and specifically recommended that it be carried out by a third party. SOF 101 Thus, Wegner must have had a clear reason for his failure to undertake a "deep dive." Indeed, as set forth above, had such a fulsome review of Beechwood's ownership been properly carried out, it would have revealed that 63% of Beechwood's ownership was held in trusts controlled by family members of Platinum's principals. SOF 216

3. Wegner Lied Concerning Undermining of a Full Diligence Review

Wegner lied in connection with his efforts to undermine due diligence efforts that may have revealed the Beechwood-Platinum relationship to SHIP's Trustees. SOF 103-105

a. The Buried Draft Protiviti Report

In early 2015, at the time of the circular Surplus Note transaction, Wegner told the internal auditing team from Protiviti to begin a diligence review into Beechwood, because he reported to

[15] Lorentz was allowed to resign because he had a fiduciary obligation to bring certain information to SHIP's board and failed to do so, particularly with respect to due diligence of Beechwood. SOF 210

the Board that he would. As a result, Protiviti generated a draft report that specifically flagged the fact that by then (February 2015), Beechwood had *not* disclosed its ownership structure and that such disclosure should be "non-negotiable."[16] SOF 103 Specifically, the draft Protiviti report states: "Typical due diligence information about the counterparties, financial statements, ownership structures, biographies, and/or background checks of the principals, *were not made available to us for this review*." (*Id.*) (emphasis added) But rather than have Protiviti finalize the report and submit it to the Board, Wegner buried the report. SOF 104 In fact, SHIP's Board only found out about it *after* Wegner was terminated. (*Id.*)

After Wegner was terminated, SHIP wrote to its regulator that Wegner "had actually lied" about the facts concerning his relationship with Beechwood, specifically including "the investment from Beechwood in his family business. . ." SOF 211(i) SHIP further wrote that Wegner also failed to follow "a number of recommendations about the investments" from an outside law firm brought in by SHIP's general counsel in connection with drafting the IMAs with Beechwood. (*Id.*) Finally, the letter stated: "It was also discovered that Management had hired SHIP's Internal Auditor, Protiviti, to review the IMA process. The auditor identified numerous deficiencies in the IMA process, but these deficiencies were not disclosed to the Audit Committee." (*Id.*) Wegner's actions suggest he was actively interfering with the normal due diligence process, which further suggests he knew there was something to hide.

b. The Intervention into Vanbridge's Attempt to Learn of Beechwood's Ownership

SHIP and Beechwood had discussed the prospect of entering into a reinsurance agreement, which did not bear fruit. SOF 212 Accordingly, by October of 2015, SHIP began discussions with a consultancy known as Vanbridge, to pursue reinsurance prospects with other entities. (*Id.*) As

[16] This is a far cry from Wegner's previous assertion that Protiviti did not find *anything* to be concerned about Beechwood. SOF 103-105

part of that effort, Vanbridge sent an email to Beechwood personnel, including Taylor, and copying Wegner and other SHIP personnel, including an attached document entitled, "SHIP Due Diligence Request List For Beechwood," the purpose of which was to obtain information about Beechwood, including its ownership information. SOF 213-216 This email thread includes another email sent later that same day from Wegner to Taylor *only*, in which Wegner gave Taylor a clear signal that it is not he/SHIP looking to understand this information, but rather Vanbridge – implicitly suggesting that Beechwood need not provide fulsome information. Specifically, Wegner stated: "Scott: This list came from Vanbridge. If there's anything overbearing or difficult please let me know and we will adjust." (*Id.*) It is difficult to imagine any purpose for this email other than to intervene in the due diligence efforts that may uncover the uncomfortable relationship between Beechwood and its Platinum related owners, which in turn may disrupt the ongoing SHIP-Beechwood relationship and all of Wegner's achievements.

In the end, Wegner's intervention worked. In November of 2015 – prior to entering into the PPCO Loan Transaction -- the Board saw the final presentation from Vanbridge, and in the presentation it specifically stated that 37% of Beechwood was owned by family trusts of Feuer, Taylor and Levy and that the remaining 63% was owned by 19 trusts, *but did not include any information as to the ownership of those trusts being related to Platinum*. SOF 216 Obviously, no further information had been forthcoming from Beechwood – thanks to Wegner's intervention.

I. **Genesis of the PPCO Loan Transaction**

Feuer testified that Nordlicht approached Beechwood with the idea of procuring loans from SHIP to PPCO that might alleviate the difficulties Platinum faced, caused by, among other things, redemptions and untenable interest rates. He suggested doing so, even though such liens were a "stranglehold" on PPCO. SOF 8(iii), 156 Narain testified that upon joining BAM as CIO in January of 2016, there were ongoing discussions concerning the general idea to "reduce the concentration

… in entities related to Platinum," in "SHIP's investments." SOF 8(ii) he further testified that his understanding was that this general idea came from SHIP. SOF 8(ii) As Beechwood's 30(b)(6) witness, Thomas adopted Narain's testimony concerning ongoing discussions in January 2016 to divest SHIP's Platinum assets at SHIP's request. SOF 8(ii) The PPCO Loan Transaction set forth the details of such loans from SHIP to PPCO, combined with the divestment of Platinum-related assets known as Desert Hawk, LC Energy and Northstar, in connection with those loans. SHIP benefited from this integrated transaction by increasing its RBC. Beechwood benefited by keeping its client (SHIP) alive and happy. Nordlicht and the non-PPCO Platinum entities benefited from their access to institutional capital, but to the detriment of PPCO, which was left with the blanket liens that Nordlicht and Beechwood knew would be a "stranglehold" on PPCO.

More specifically, in December 2015 and March 2016, Beechwood executed loans from SHIP to PPCO, evidenced by certain Notes, which were secured by liens against all of PPCO's and its subsidiaries' (the "**PPCO Subsidiaries**") assets and by guarantees by the PPCO Subsidiaries, which as combined lie at the heart of the Receiver's fraudulent conveyances claims. Indeed, as described by Beechwood's General Counsel and 30(b)(6) witness Thomas, in December 2015 "SHIP loaned PPCO $15,500,000" evidenced by a December 23, 2015, Delayed Draw Demand Note (the "**Delayed Draw Demand Note**"), entered into with Platinum Partners Credit Opportunities Master Fund, LP, as the issuer, and SHIP as the lender. SOF 164 That obligation was secured by a security interest in all of PPCO's assets and the assets of all of PPCO's subsidiaries, pursuant to a Master Security Agreement dated December 23, 2015, addressed to "Bam Administrative Services, as Agent" on behalf of the holders of the demand note, and which was executed by "the principal of Platinum Management" and "manager of PPCO," Mark Nordlicht, who signed on behalf of each and every one of the entities set forth therein. SOF 162

SHIP's loan was further secured by a Subsidiary Guaranty, dated December 23, 2015, which guaranteed the obligations of PPCO by its subsidiaries and the signatory for each such PPCO subsidiary was Nordlicht. SOF 164

These December 23, 2015 instruments were accompanied by letters dated December 23, 2015 from PPCO, signed by Nordlicht as CIO, referencing "PPCO Funds Flow," addressed to SHIP's agent, B Asset Manager, a Beechwood entity, setting forth disbursement instructions specifying that $9,178,750 of the indebtedness was to be used to pay for certain SHIP participations in Desert Hawk, all of which arose from "that certain Participation Agreement dated May 22, 2015" between "DMRJ Group I, LLC," a Platinum entity on the one hand, and each of Beechwood Re, BBIL and BAM on the other, which includes payment of unpaid principle indebtedness plus accrued and unpaid interest that had been guaranteed by Platinum, and specifying that $5,000,000 of the funding was intended to be applied in full repayment of all indebtedness owing by LC Energy to lenders for whom Agent acts as agent. SOF 220(iv) Further set forth therein, the initial Desert Hawk participation interest held by Beechwood Re for SHIP was assigned to BBIL, which assigned it to PPCO on December 23, 2015. (*Id.*)

In January 2016, SHIP increased its loan to PPCO to $18,500,000, which is evidenced by a January 20, 2016, Amended and Restated Delayed Draw Demand Note (the "**A&R SHIP Note**"), entered into with Platinum Partners Credit Opportunities Master Fund, LP, as the issuer, and SHIP as the lender, which in turn was further secured by a Reaffirmation and Ratification Agreement dated January 20, 2016, entered into by Nordlicht on behalf of the PPCO subsidiaries. SOF 178

In March of 2016, the total indebtedness was further increased in a restructuring of the existing loan that was extended to PPCO, which effectively increased the total commitment of indebtedness to $69,153,626.82, as set forth in a Note Purchase Agreement, dated March 21, 2016,

and which was done not only as a modification of that existing SHIP note, but also to provide additional syndicate lenders to lend money to PPCO, namely Bankers Conseco Life Insurance Company ("**BCLIC**") and Washington National Insurance Company ("**WNIC**"). SOF 189-192 Of that restructuring, the amount PPCO owed to SHIP was increased to $42,963,949.04, which included $123,190.55 consisting of accrued interest, and which was evidenced by a Second Amended and Restated Secured Term Note dated March 21, 2016, executed by Nordlicht on behalf of PPCO. SOF 188 At the same time an Amended and Restated Master Security Agreement dated March 21, 2016 was executed on behalf of SHIP by its agent, BAM Administrative by Dhruv Narain, and by Mark Nordlicht on behalf of PPCO, and a new Subsidiary Agreement dated March 21, 2016 was executed by Nordlicht on behalf of all of PPCO's subsidiaries. SOF 201 The remaining sum of the total indebtedness that was loaned to PPCO pursuant to the March 21, 2016 tranche was given by the CNO entities, BCLIC and WNIC, with corresponding loan documents. SOF 189-192

This tranche was also accompanied by several Funds Flow letters setting forth disbursement instructions for the proceeds of the loan, and some of the proceeds were then used in connection with an acquisition of Northstar pursuant to certain Assignment Agreements, which describe the unpaid principle and accrued interest acquired of the Northstar assets that PPCO acquired from SHIP and CNO in the transaction. SOF 193, 198, 199

J. Improving SHIP's RBC: Unrated to Rated

Beechwood CIO Daniel Saks ("**Saks**") testified about the "SHIP issue," which involved the "urgency" of having certain SHIP assets rated by a rating agency before year end 2015: "I know that SHIP required, for certain loans, for there to be ratings on those loans. I'm not sure for what reason, but they needed ratings on some of the loans." SOF 153 Saks also testified about this concept as it related to an email on November 18, 2015 about obviously unrated assets, from his

assistant stating, "We should talk about what to send next to solve the SHIP issue. These are the loans in SHIP. Maybe next we should send Implant, LC Energy, and Desert Hawk. I think we need to keep this rolling if we're going to get this done by year-end." SOF 153

This accords with the testimony from a SHIP Oversight Trustee and Board Member, Gregory Serio, who previously served as the New York Insurance Superintendant, that as the PPCO Loan Transaction was occurring, the SHIP Board was actively discussing improvement to SHIP's RBC by means of, among other things, a move from unrated to rated assets. SOF 146 The move from holding assets in the unrated Desert Hawk, LC Energy and Northstar assets to holding Demand Notes from PPCO secured by all of its and its subsidiaries assets, and guaranteed by all of its subsidiaries accomplished that improvement. SOF 149

Even though Feuer consistently testified that his staff would know the details, when Saks was asked about the December 2015 tranche he claimed to have no memory of the deal, even though he signed the documents and at that moment in his deposition just finished demonstrating a fulsome knowledge of a similarly structured transaction. SOF 159 Notably, Saks had settled SHIP's third party claims against him before testifying at his deposition. SOF 159

Similarly, Saks' replacement, Narain, also one of Feuer's staff, claimed he did not understand the purpose of the March 2015 tranche of the transaction. He also claimed he did not spend a lot of time on the Restated Loan nor on the March 21, 2016 Amended and Restated Master Security Agreement SOF 160 nor the Subsidiary Guaranty SOF 160, even though he signed them. And he claimed he did not remember why PPCO would have provided as security all of its assets, but he said that he did have an understanding at the time. SOF 160

K. <u>SHIP Knew Its Platinum Related Assets Were Failing</u>

In 2014, Saks, his childhood friend, to work for Platinum. Nordlicht told Saks that Platinum would have capital from an insurance company he was starting called Beechwood. SOF

4, 68. Later in 2014 Saks left Platinum and moved to Beechwood, where he replaced Levy as CIO, and where he remained until December 2015 SOF 81, 84, 220, 225.[17] He testified that Desert Hawk, LC Energy and Northstar were assets held by SHIP, which he further agreed were not healthy businesses. SOF 225 Moreover, on September 1, 2015, Saks signed a Notice of Exercise, on behalf of BAM Administrative and Beechwood by B Asset Manager, exercising a put agreement that it had with PPVA, for the benefit of SHIP, in connection with a participation in Desert Hawk and, in so doing, he acknowledges it meant that progress of the Desert Hawk business was not good. SOF 220, 225

Further, SHIP received Duff & Phelps reports that described significant losses in the Platinum related entities. SOF 225 In fact, SHIP had an April 2015 Duff & Phelps report that said the outlook of Northstar was becoming "uneconomic," and a January 19, 2016 Duff & Phelps report that said Northstar's debts, including the "company obligations, interest and Capex" were being funded by "Platinum, the company's private equity sponsor." Similarly, SHIP had another Duff & Phelps report that indicated that interest payments for Northstar and LC Energy were being made by Platinum and that, consequently, SHIP knew that the assignments were not worth the par amounts for which they were sold. SOF 233

Feuer testified as to the web of communications among Beechwood and SHIP as related to the specific investments made on behalf of SHIP, that Wegner was in constant communication with Beechwood about SHIP's investment yield, and that such communication was primarily by

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[17] Based upon his experience at Beechwood in 2015, Saks believed that Platinum principals Nordlicht, Huberfeld and Bodner exercised influence over Beechwood. Saks left Beechwood in part because he "was becoming uncomfortable with their client relationships and how they treated their clients and how they acceded to their client's wishes and what they told their clients and they didn't tell their clients, as well as the relationship that they had with Platinum and the -- the influence that certain people at Platinum had on Beechwood, which I guess in hindsight made me uncomfortable." The people he spoke of were Huberfeld, Bodner and Nordlicht. SOF 79, 81

telephone, not by email (which, according to SHIP's own expert, was in accordance with expected communications patterns in a discretionary account such as this, as well as in the context of a fraud). Finally, Taylor testified that SHIP received regular holdings reports that showed all of the assets held in SHIP's accounts. SOF 234

L. SHIP and Beechwood Knew Platinum was Becoming Insolvent

SHIP and Beechwood were aware that the Platinum entities were approaching insolvency. Feuer told Lorentz that Platinum was a "motivated seller who much needs the money" because it had substantial investments in oil interests and the price of oil had dropped, and because it had generous redemption provisions and it was having some trouble meeting the redemption obligations. SOF 155, 220 Similarly, Narain testified that the "Platinum Restructuring" (the PPCO Loan Transaction) came about because the collapse of oil prices Platinum's damaged holdings in oil and gas companies, and was facing liquidity issues in late 2015 – early 2016. SOF 220.

A failed attempt by Beechwood's Saks to exercise a put of SHIP's Desert Hawk holdings back to PPVA also demonstrates Platinum's impending insolvency, which was known by Beechwood and Saks. Indeed, Saks testified that he became aware of liquidity problems at Platinum, which would explain the failure of PPVA (the Platinum fund legally obligated to take back the assets pursuant to the put, not PPCO), to pay the put of Desert Hawk assets in September 2015. SHIP also had received Duff & Phelps reports that described that put option to PPVA. And on November 18, 2015, Beechwood sent an email in response to a capital call stating: "We are assigning Desert Hawk today, which will avail cash for this call." SOF 220 Beechwood as nominee for SHIP assigned the Desert Hawk participation not to PPVA pursuant to the put option, as intended, but rather to BBIL (SHIP's Third IMA agent). Beechwood's 30(b)(6) witness, Thomas, confirmed that the Desert Hawk assets that were the subject of that PPVA put option then went from BBIL to PPCO, but claimed he did not know why. SHIP CFO Paul Lorentz claimed

he had no information about why PPCO received the Desert Hawk participations in the December 2015 transactions instead of PPVA via the put option. SOF 220, 225

BAM General Counsel and 30(b)(6) witness Christian Thomas testified regarding the instruments and the flow of funds letters in connection with the PPCO Loan Transaction, and he acknowledged that interest on the underlying assets was likely not paid, but he agreed that it appeared some were nonetheless paid for at full price. SOF 225

ARGUMENT

POINT I

SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the moving party must show that no genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *See 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)). "The moving party bears the burden of showing the absence of a genuine dispute as to any material fact...." *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 486 (2d Cir. 2014). "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). On issues as to which the non-moving party will bear the burden of proof at trial, the moving party may satisfy its burden by pointing to an absence of evidence only if it amounts to a "complete failure of proof… [that] renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In adjudicating a summary judgment motion, "[t]he court views the record in the light most favorable to the non-movants and resolves all ambiguities and draws all reasonable inferences against the movants." *See Pacho v. Enterprise Rent-A-Car Co.*, 572 F. Supp.2d 341, 346

(S.D.N.Y. 2008). The court must give credence only to "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from noninterested witnesses... [and] must disregard all evidence favorable to the moving party that the jury is not required to believe." *Jasco Tools, Inc. v. Dana Corp.*, 574 F.3d 129, 152 (2d Cir.2009) (quoting, with emphasis, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). "It is only when no rational jury could find in favor of the nonmoving party, that it can be said that there is no genuine issue of material fact and summary judgment properly may be granted to the moving party." *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 721 (2d Cir. 1994).

As detailed herein, following the issuance of this Court's August 20, 2019 Order (the "**MTD Bottom Line Order**") and its October 7, 2019 Opinion and Order (the "**MTD Opinion**"), discovery has confirmed the existence of disputed issues of material fact which require a trial on the Receiver's remaining claims against SHIP, the Beechwood Defendants and PBIH (collectively, the "**Moving Defendants**"), as set forth in the Receiver's First Amended Complaint ("**FAC**").

POINT II

THE SHIP MOTION SHOULD BE DENIED

A. The Court Should Not Grant Summary Judgment Dismissing the Receiver's Fraudulent Conveyance Claims.

Discovery confirmed that the Court's MTD Orders were correct and the Receiver has standing to assert fraudulent conveyance claims. Specifically, discovery and the Receiver's expert report confirm disputed issues of material fact regarding the Receiver's actual and constructive fraudulent conveyance claims under DCL §§ 273-278, SHIP's purported affirmative defense under DCL § 278(1), and on the Receiver's unjust enrichment and declaratory judgment claims.

1. The Receiver Has Standing to Assert Her Fraudulent Conveyance Claims.

a. The Receiver Has Standing to Assert Claims Under the DCL As Receiver of PPCO.

In the MTD Opinion, the Court cautioned against "incorrectly tak[ing] a rigid and literal approach to the word 'creditor,' contrary to the established case law." *Id*. at *35. Yet, SHIP does exactly that and so its arguments should be rejected.

Here, there is no dispute that PPCO was controlled by wrongdoers – Nordlicht and his cohorts – and that the Receiver was appointed as the Receiver for PPCO, which was "controlled" by them. SOF 1 Consequently, as in *Scholes v. Lehmann*, 56 F.3d 750, 752-55 (7th Cir. 1995), PPCO is effectively a "zombie[]' controlled 'completely' by the wrongdoer at issue," the Nordlicht contingent, "rendering [the] transfers [in the PPCO Loan Transaction] 'in essence, coerced.'" *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *35. As explained in Section 2(c) below, the same is true for the PPCO Subsidiaries.

SHIP argues that, "[t]o the extent the Receiver attempts to argue that her appointment transformed PPCO … 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.'" SHIP MOL 13 n.9 (quoting *Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008). In footnote 15 of the MTD Opinion however, this Court explained why SHIP's reliance on *Eberhard* in this manner is wrong:

> In *Eberhard*, the "transferor" was a Nordlicht-equivalent figure who allegedly committed fraud and directed the entities he controlled in furtherance of the fraud scheme, and, unlike here and other cases that found a receiver's standing, a receiver was appointed with authority over the assets of that individual transferor only, and not the entities allegedly used by the transferor to commit his fraud. 530 F.3d at 133-35. Therefore, the Second Circuit found that the receiver lacked standing to bring fraudulent conveyance claims on behalf of the individual transferor only. *Id.*

In re Platinum-Beechwood Litig., 2019 WL 4934967, at *35.

Consequently, *Eberhard* and the authorities it relies on establish that when transfers were made by a corporation that was dominated by the wrongdoer (as here), a receiver appointed to

recover assets for that corporation – rather than solely for the wrongdoer who manipulated the dominated entity – has standing to bring claims on the corporation's behalf. *Eberhard*, 530 F.3d at 132-34. Here, the Receiver does have standing because, as in *Scholes* and other similar cases, and unlike in *Eberhard*, she is the receiver for the "entities [*i.e.*, the PPCO Funds] allegedly used by the transferor [Nordlicht] to commit his fraud." *Id.* at 35[18]

Tellingly, SHIP fails to address this Court's statements, *see In re Platinum Beechwood Litig.*, 2019 WL 4934967, at *35, or the decisions in *Scholes* or *Cobalt*, on this point, and instead advances the very type of "rigid" and "literal" approach to the meaning of the term "creditor" that this Court expressly rejected in the MTD Opinion as "contrary to the established case law." *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *35. At a minimum, an issue of fact is presented as to whether PPCO was a "'zombie' controlled 'completely' by the wrongdoers at issue [Nordlicht and his contingent] rendering such transfers 'in essence coerced," and, as a result, issues of fact are presented as to whether the Receiver has standing to "bring fraudulent transfer claims on behalf of [PPCO] that [was] technically transferor[] of the fraudulent conveyance at issue." *Id.*

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[18] In *Scholes*, the Seventh Circuit held that a receiver for corporations dominated by a Ponzi scheme principal had standing to assert fraudulent transfer claims against third parties because the receiver was acting on behalf of corporations that were instrumentalities in that scheme. Other Second Circuit decisions have allowed receivers to bring fraudulent transfer claims under similar facts. *See Carney v. Montes*, 2014 WL 671263, at *8 (D. Conn. Feb. 21, 2014); *Ass'n v. Olympia Mortg. Corp.*, 2011 WL 2414685, at *7 (E.D.N.Y. June 8, 2011); *Friedman v. Wahrsager*, 848 F.Supp.2d 278, 289–90 (E.D.N.Y.2012) (adopting *Scholes*); *Armstrong v. Collins*, 2010 WL 1141158, at *33 (S.D.N.Y. March 24, 2010) (same). *See also*, *Cobalt Multifamily Inv'rs I, LLC v. Arden*, 46 F. Supp. 3d 357, 363 (S.D.N.Y. 2014) (*citing Carney*, 2014 WL 671263, at *8); *Carney v. Montes*, 2014 WL 671263, at *8 (D. Conn. Feb. 21, 2014); *Ass'n v. Olympia Mortg. Corp.*, 2011 WL 2414685, at *7 (E.D.N.Y. June 8, 2011); *Friedman v. Wahrsager*, 848 F.Supp.2d 278, 289–90 (E.D.N.Y.2012) (adopting *Scholes*); *Armstrong v. Collins*, 2010 WL 1141158, at *33 (S.D.N.Y. March 24, 2010) (same); *Fed. Nat. Mortg. Ass'n v. Olympia Mortg. Corp.*, 2011 WL 2414685, at *7 (E.D.N.Y. June 8, 2011); *Barnet v. Drawbridge Special Opportunities Fund LP*, 2014 WL 4393320, at *16 (S.D.N.Y. Sept. 5, 2014).

b. The Receiver Has Standing to Assert Claims As Receiver of PPCO Blocker Fund and PPCO Onshore Fund Because Those Entities Are "Creditors" of PPCO.

Even if the Receiver lacked standing to assert fraudulent conveyance claims as the receiver of PPCO, she could assert claims as the receiver of PPCO Blocker Fund and PPCO Onshore Fund. SHIP argues that only a "creditor" of PPCO has standing to assert fraudulent conveyance claims, and PPCO Blocker Fund and the PPCO Feeder Funds are only equity holders – not creditors – in PPCO. SHIP MOL 12 (citing *Eberhard v. Marcu*, 530 F.3d 122, 129 (2d Cir. 2008; *Lippe v. Bairnco Corp.*, 225 B.R. 846, 857 (S.D.N.Y. 1998)). SHIP is wrong.

The record establishes that PPCO Blocker Fund and PPCO Onshore Fund were creditors of PPCO at the time of the December 2015 portion of the PPCO Loan Transaction, at the time of the March 2016 portion of that transaction, and are still creditors of PPCO. Consequently, the Receiver, in her capacity as receiver of PPCO Blocker Fund and PPCO Onshore Fund, has standing to assert fraudulent conveyance claims.[19]

Due to the redemption provisions and structure of the master, feeder and blocker funds as

[19] SHIP claims that, to have standing to assert a claim under the DCL, a party must have been a creditor at the time of the transfer. SHIP MOL 12 However, the scope of the individuals who can assert fraudulent conveyance claims under the DCL depends upon the statutory section under which the claim is asserted. Because DCL § 273 provides that a "conveyance" made under the circumstances described therein is "fraudulent as to creditors," and DCL § 277 provides that a "conveyance" made under the circumstances described therein is "fraudulent as to partnership creditors," only a "creditor" as of the date of the transfer can assert these claims.

In contrast, however, DCL §§ 275 and 276 each provide that a "conveyance" made under the circumstances referred to therein "is fraudulent as to both present and future creditors." DCL §§ 275, 276. Moreover, DCL 278(1) provides that "[w]here a conveyance or obligation is fraudulent as to a creditor, such creditor" shall have certain remedies. It follows that one need not have been a creditor at the time of the fraudulent transfer in order to assert a claim under DCL §§ 275 or 276. The caselaw confirms this. *E.g.*, *Lazar v. Towne House Rest. Corp.*, 142 N.Y.S.2d 315, 321 (Sup. Ct. 1955), *aff'd*, 5 A.D.2d 794, 171 N.Y.S.2d 334 (2d Dep't 1958), *aff'd* 6 N.Y.2d 923, 161 N.E.2d 211 (1959) *In re Direct Access Partners, LLC*, 602 B.R. 495, 514-15 (Bankr. S.D.N.Y. 2019).

detailed at SOF 41-47, both in December 2015 and March 2016, and today, both PPCO Blocker Fund and PPCO Onshore Fund have standing to assert claims under DCL §§ 273-278. Today, they hold $24,803,381.95 in total unpaid withdrawals; they were also owed withdrawals as of December 23, 2015, and March 21, 2016. SOF 42

SHIP relies on several cases standing for the unremarkable propositions that (a) an equity interest alone does not make one a "creditor" under the DCL, and (b) possessing a tort claim is one way an equity holder, such as a limited partner, can become a "creditor" under the DCL. From this, SHIP incorrectly concludes that equity holders can qualify as creditors of the transferor only if they are tort creditors, separate and apart from their status as equity holders.[20] SHIP MOL 14

DCL § 270, however, defines a "[c]reditor" as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." This definition includes claims for breach of contract, such as PPCO Blocker Fund's and PPCO Onshore Fund's

[20] *E.g.*, *Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 428 (S.D.N.Y. 2006) ("[u]nder New York's broad definition of "creditor," one who has a right to maintain a tort action but has not recovered judgment at the time of the transfer is a creditor," without addressing whether a contract claim would also suffice); *In re Lehman Bros. Holdings Inc.*, 855 F.3d 459, 469 (2d Cir. 2017) ([t]hose with 'claims' against a debtor are 'creditors,' [11 U.S.C.] § 101(10), and those with 'equity securities' of the debtor are 'equity security holders,' but not addressing whether an equity holder can also hold a contract claim); *In re Hedged-Investments Assocs., Inc.*, 84 F.3d 1267, 1272 (10th Cir. 1996) (reciting the noncontroversial principle that, under the Bankruptcy Code, "an equity interest is not a claim against the debtor," while distinguishing the holding in *In re St. Charles Preservation Investors, Ltd.*, 112 B.R. 469 (D.D.C.1990), that "a partnership agreement that guaranteed limited partners a stated return on their capital investments made the limited partners creditors of the partnership," because the equity holder in the case at bar failed to meet his burden of proving the existence of such a contractual commitment on the part of the debtor); *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broad. Corp.*, 906 A.2d 218, 224 (Del. Ch. 2006) ("the preferred shares in this case are not debt, but equity, and therefore that Harbinger lacks standing to bring any claims as a creditor," because "under the certificate of designation, the shares at issue provide Harbinger *no right to redeem*, no current dividend payments, and no right to have a dividend declared" and noting that "'*there is no relation of debtor and creditor between the corporation and preferred stockholders ... until the declaration of the dividend, when, in consequence, the obligation of debtor and creditor does arise*'").

claims under Sections 4.2(a) of the LPA. SOF 41-47 Because PPCO was contractually obligated to pay withdrawals to PPCO Blocker Fund or PPCO Onshore Fund within 30 days of the "Withdrawal Date," but failed to do so, under the DCL PPCO Blocker Fund and PPCO Onshore Fund were "creditors" of PPCO at the time of the PPCO Loan Transaction, and they are *still* "creditors" of PPCO today. SOF 41-47

The relevant caselaw – including some of SHIP's own cases – confirms that an unsatisfied claim for unpaid redemptions by a limited partner under a contractual provision of a partnership agreement requiring satisfaction of those redemptions changes the "limited partner" into a "creditor for purposes of DCL §§ 273-278. *In re Bayou Group*, 372 B.R. 661, 665 (Bankr. S.D.N.Y. 2007) ("the Bayou Hedge Fund investor had a contractual right of redemption, and a party with a contract claim against a debtor is a creditor of the debtor."); *In re The Reserve Fund Securities and Derivative Litigation*, 673 F.Supp.2d 182, 198 n.46 (S.D.N.Y. 2009) (confirming *Bayou*'s "holding that investors entitled to a contractual right of redemption are creditors of a debtor in bankruptcy because 'a party with a contract claim against a debtor is a creditor of the debtor.'") (citing *Bayou*); *In re Fairfield Sentry Limited*, 596 B.R. 275, 303 (Bankr. S.D.N.Y. 2018) ("the Defendants became creditors when they requested redemptions").

SHIP's own authorities recognize that one who holds equity may also be a creditor where, as here, the equity holder also has contractual rights under the applicable partnership agreement or shareholders agreement. For example, SHIP relies upon *In re Hedged-Investments Assocs., Inc.*, 84 F.3d 1267, 1272 (10th Cir. 1996), for the noncontroversial principle that "[limited partners' interest do not constitute 'claims' as defined under [11 U.S.C. §] 101(5)." SHIP, however, ignores that the court there recognized that the limited partners could have also been creditors had the debtors made a contractual commitment to them – such as where "a partnership agreement …

guaranteed limited partners a stated return on their capital investments made the limited partners creditors of the partnership" – but held that the equity holder failed to meet its burden of proving the existence of such a contractual commitment by the debtor at trial. 84 F.3d at 1272-73 (*citing St. Charles Preservation Investors, Ltd.*, 112 B.R. 469 (D.D.C.1990)).

SHIP also relies on *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broad. Corp.*, 906 A.2d 218, 224 (Del. Ch. 2006), for the noncontroversial proposition that "the preferred shares in this case are not debt, but equity, and therefore that *Harbinger* lacks standing to bring any claims as a creditor." However, SHIP omits the court's explanation that "the question of whether a security constitutes equity or debt turn[s] on the interpretation of the contract between the corporation and the security holders," which is in turn informed by "numerous factors," and the court's conclusion that the preferred shareholder there was not a creditor. 906 A.D.2d 218, 229-30 (Del. Ch. 2006) (citing *Costa Brava P'ship, III, L.P. v. Telos Corp.*, 2006 WL 1313985, at *5 (Md. Cir. Ct. Mar. 30, 2006)). Here, unlike in *Harbinger Capital*, the two limited partners under the LPA – PPCO Blocker Fund and PPCO Onshore Fund – *did* have a contractual "right to redeem" – namely, their right to funds under pursuant to Section 4 of the LPA to withdraw funds from PPCO. SOF 41-47 Thus they became creditors of PPCO.

For this reason, SHIP's reliance on Trey Rogers' ("**Rogers**") supposed "characterization" of PPCO Blocker Fund's and the PPCO Feeder Funds' "limited partnership interests in PPCO Master Fund" "as 'equity' interests" (SHIP MOL 14-15) is misplaced because PPCO Blocker Fund and PPCO Onshore Fund also hold interests as creditors of PPCO as they are owed monies under Section 4.2 of the LPA, entitled "Voluntary Withdrawals." SOF 41-47 Although Rogers was not asked at his deposition whether PPCO Blocker Fund or the PPCO Feeder Funds were owed unsatisfied claims for unpaid redemptions, the Rogers Dec. confirms that they *are* owed such

claims. SOF 41-47 Section 9.02(b)(ii) of the LPA belies SHIP's attempts to create confusion on this issue, by expressly recognizing that a limited partner – such as PPCO Blocker Fund or PPCO Feeder Fund – can be a creditor in PPCO. SOF 41-47

In re Bayou Grp., LLC, 439 B.R. 284, 298 (S.D.N.Y. 2010), on which SHIP also relies, supports the Receiver's position by confirming that "[t]he fact that an investor holds an equity interest *does not* mean that the investor is not also a creditor," and declining to hold "that fraudulent conveyance claims can *never* be brought in whole or in part to benefit equity." *See also In re Calpine Corp.*, 377 B.R. 808, 815 n. 3 (recognizing that there is no "'all-encompassing bright line rule holding that a fraudulent conveyance claim can never be brought to benefit equity.'") (quoting *Bayou*, 372 B.R. at 664).

SHIP also argues that the Receiver cannot "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."[21] SHIP MOL 15. For purposes of standing to assert the Receiver's claims under DCL §§ 275 and 276, it is sufficient for the Receiver to be the receiver for a current creditor. Moreover, PPCO owed fiduciary duties to PPCO Blocker Fund and the PPCO Feeder Funds, which were its investors, and factual issues exist as to whether or not PPCO breached those duties, as well as whether *in pari delicto* and/or Nordlicht's role in PPCO Blocker Fund and the PPCO Feeder Funds would bar those claims.

Accordingly, in addition to having standing to assert claims for PPCO of fraudulent conveyance, the Receiver has standing to assert claims for fraudulent conveyance in her capacity as Receiver for PPCO Blocker Fund and PPCO Onshore Fund.

[21] Contrary to what SHIP implies, *Bayou* does not address whether one who became a creditor after the date of the transfer in question has standing to assert claims under DCL §§ 275 and 276, which set forth transfers that are fraudulent as to "future" "creditors."

c. The Receiver Has Standing to Assert Claims on Behalf of the PPCO Subsidiaries.

SHIP asks the Court to overturn its ruling in the MTD Opinion that the Receiver has standing to bring fraudulent conveyance claims on behalf of the PPCO Subsidiaries, *see* 2019 WL 4934967, at *34-35, but fails to provide any basis for the Court to do so. SHIP initially argues that "[t]he Receiver likewise does not have standing to assert fraudulent conveyance claims in connection with transfer made by the PPCO Subsidiaries because, again, it is undisputed that the Receiver does not represent a creditor of the PPCO Subsidiaries." SHIP MOL 16. SHIP, however, again "incorrectly take[s] a rigid and literal approach to the word 'creditor,' and ignores that "the receiver could bring fraudulent transfer claims on behalf of certain corporations that were technically transferors of the fraudulent conveyance at issue, because they were 'zombies' controlled 'completely' by the wrongdoer at issue, rendering such transfers 'in essence, coerced.'" *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *35 (citing *Eberhard*, 530 F.3d at 132 (analyzing *Scholes*, 56 F.3d at 752-55). Consequently, now that PPCO Master Fund, the NPA Guarantors and MSA PPCO Subsidiaries are controlled by the Receiver, whose only object is to maximize the value of the entities for the benefit of their investors and creditors, there can be no objection to the Receiver's bringing suit to recover corporate assets wrongfully dissipated by Nordlicht and PPCO Portfolio Manager. *See Scholes*, 56 F.3d at 754-55.[22]

SHIP also makes the unsupported and unfounded accusation that "[t]he Court's ruling … was based on allegations that provided an inaccurate account of PPCO Master Fund's property interest in the PPCO Subsidiaries" because "PPCO[]'s interest in the PPCO Subsidiaries is that of an equity holder," but fails to identify anything that the Receiver distorted. SHIP MOL 16. It is

[22] *Martes v. USLIFE Corp.*, 927 F. Supp. 146, 148 (S.D.N.Y. 1996), relied upon by SHIP, is inapposite because it did not address how broadly the word "creditor" under the DCL should be read where an entity and its subsidiaries are completely controlled by a wrongdoer who is later displaced.

SHIP, not the Receiver, that distorts the definition of "Receivership Property" in the Receivership Order – which includes "***all property interests of the Receivership Entities***, including, but not limited to, monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, ***which the Receivership Entities own, possess, have a beneficial interest in, or control directly or indirectly*** …." (emphasis added) – by truncating that definition to eliminate everything after the first appearance of the word "Receivership Entities." SHIP MOL 16 Because: (i) the Receiver is empowered under the Receivership Order to "manage, control, operate and maintain the Receivership Entities," (ii) under the Receivership Order the Receiver is given the "right to sue for and collect … from third parties all Receivership Property," and (iii) "each of the [PPCO Subsidiaries] is majority owned by PPCO Master Fund, with ultimate corporate authority belonging to PPCO," and the Receiver SOF 22, it follows from a reading of the *full* text of the definition of "Receivership Property" that the Court correctly found that, "[p]ursuant to the Receivership Order, the Receiver has the 'right to sue for and collect ... from third parties all Receivership Property,' which includes the guarantee interests granted by the PPCO Subsidiaries." *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *34.

The Court should again confirm the Receiver's standing to assert claims under the DCL.

2. Issues of Fact Exist as to Whether PPCO Entered the PPCO Loan Transaction with an Intent to Hinder, Defraud or Delay Creditors

Causes of Action 9 and 14 of the FAC assert claims for "actual fraud" under DCL § 276. In the MTD Orders, the Court concluded that the claim was "adequately pled," setting forth numerous badges of fraud commonly associated with fraudulent transfers, including: (i) the lack or inadequacy of consideration; (ii) the family, friendship, or close associate relationship between the parties; (iii) the retention of possession, benefit, or use of the property in question; (iv) the

financial condition of the party sought to be charged both before and after the transaction in question; (v) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (vi) the general chronology of the events and transactions under inquiry. *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *37. *See also In re Sharp Int'l Corp.*, 403 F.3d 43, 56 (2d Cir. 2005) ("These 'badges of fraud" may include (*inter alia*): 'a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; ... and retention of control of the property by the transferor after the conveyance.'") (quoting *Wall St. Assocs. v. Brodsky*, 257 A.D.2d 526, 529, 684 N.Y.S.2d 244, 248 (1999)).

The party challenging a transfer as fraudulent under DCL§ 276 "need not establish all of the badges of fraud to give rise to an inference of intent, nor are all the badges necessarily relevant to a specific case." *Chapin Home for the Aging v. McKimm*, 2014 WL 12883697, at *10 (E.D.N.Y. Aug. 7, 2014), *report and recommendation adopted*, 2014 WL 4662401 (E.D.N.Y. Sept. 18, 2014). *See also In re Jacobs*, 394 B.R. at 667 Although SHIP makes a perfunctory argument that the usual "badges of fraud" are not present (based upon a different set of badges of fraud than the Court analyzed in the MTD Orders), an in-depth analysis of the relevant badges of fraud demonstrates that numerous badges of fraud are actually present. Indeed, SHIP even *concedes* the existence of at least one (a close relationship between Beechwood and Platinum) SHIP MOL 35. Other badges of fraud include those addressed below.

B. <u>Lack or Inadequacy of Consideration</u>

As the Prager Report confirms, PPCO did *not* receive adequate consideration for the transfers made by PPCO in the PPCO Loan Transaction. SOF 221-223 In the PPCO Loan Transaction: (i) PPCO issued $67.0 million in notes to SHIP, purportedly secured by a lien against

all of PPCO's and the PPCO Subsidiaries' assets;[23] (ii) PPCO received $9.2 million in face value notes issued by Desert Hawk having only zero value; (iii) PPCO discharged $5.0 million in face value notes issued by LC Energy, which were of zero value; (iv) PPCO received secured notes issued by Northstar having a face value of $29.6 million, which, as set forth in the Prager Report, were worth only $25.5 million;[24] and (v) PPCO's Northstar Notes reflect an increase of $23.2 million in the loan balance payable to it by PPVA.[25] Notably, a creditor's petition seeking to initiate insolvency proceedings against PPVA was filed in the Grand Court, Cayman Islands, only four months later on July 28, 2016, and PPVA was placed in insolvency soon thereafter. SOF 222. Consequently, in the PPCO Loan Transaction, PPCO incurred $67 million of debt, secured by all of its and its subsidiaries' assets, in order to purchase assets having a value of $48.7 to $48.8 million. This factor thus favors a finding of actual fraud under DCL § 276.

C. The Close Relationship between Beechwood and Platinum

SHIP admits that there was "arguably" a "close relationship between Beechwood and Platinum." SHIP MOL 35. And, SHIP's own expert wrote and testified that related party transactions are a badge of fraud. SOF 219. The record in this matter confirms that relationship and SHIP's awareness of that relationship. For example:

- Effective January 15, 2015, SHIP and BRILLC entered into a side letter agreement (the "**BAM IMA Side Letter**") relating to the BAM IMA. SOF 110 Nordlicht executed that agreement as an "Authorized Signatory" of N

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[23] Although the total amount of the notes was approximately $69 million, this included an increase in the loan balance of approximately $2 million in January 2016, for which PPCO received cash.

[24] The Northstar PPCO Assignment Agreement reflects that the total purchase price (at face value) of the notes was $31,457,211.11. However, because PPCO's books and records reflect a payment of approximately $29.6 million for this assignment, the Prager Report uses that amount.

[25] The SHIP-PPVA Northstar Assignment Agreement reflects that the total purchase price of that assignment was $21,323,344.44. However, because PPCO's books and records reflect a payment of approximately $23.2 million as the purchase price of that assignment, the Prager Report uses that amount.

Management LLC, which thereby executed that agreement on behalf of BRI LLC. SOF 110

- Two of Beechwood's CIOs (Levy and Saks) were from Platinum, as were other Beechwood employees such as Kim and Manela. And, SHIP was provided with marketing materials in advance of the IMAs that listed Levy's Platinum past. SOF 74, 76, 94, 225

- Nordlicht was CIO of PPCO Portfolio Manager; Bodner and Huberfeld had ownership interests in PPCO Portfolio Manager and PPCO General Partner, and both believed they had significant enough involvement with the PPCO Funds that they sought and obtain releases from PPCO just prior to the commencement of the receivership. SOF 57, 65, 128 Moreover, Huberfeld felt he had sufficient ties to Platinum that he bribed union officials to induce the union to make investments with PPVA. SOF 235

- Nordlicht told Saks that Platinum would have capital from an insurance company he was starting called Beechwood. SOF 4, 68

- Nordlicht had a Beechwood email address and an office there SOF 80

- As of April 1, 2016, the 20 family members of Nordlicht, Bodner and Huberfeld, including primarily their children held a total of 61.87% (including 20.69% held by family members of Nordlicht) of the beneficial interests in the Beechwood Asset Management Trust I and a total of 44.4% of the beneficial interests in Beechwood Asset Management Trust II (including 15% held by family members of Nordlicht). BAM Trust I held 99.9% of the Class A limited partnership interests and held 99.99% of the Class B limited partnership interests in both BAM and BAM II, while the general partners in BAM I and BAM II held the other 0.01% of the ownership interests. SOF 72, 73

- The full extent of overlapping ownership between various Platinum and Beechwood entities is set forth at SOF 72-74

The close relationship between Beechwood and Platinum is a "badge of fraud" that supports a finding of actual fraud under DCL § 276. *See In re Hypnotic Taxi LLC*, 543 B.R. 365, 374 (Bankr. E.D.N.Y. 2016).

D. <u>Retention of Possession, Benefit or Use of the Property in Question/Retention of Control Property by the Transferor After the Conveyance</u>

As detailed at SOF 102, Beechwood was majority owned by trusts whose beneficial holders were members of the present and former principals of Platinum. Nordlicht's and his cohort's

influence over Beechwood is further confirmed by the fact that Nordlicht executed the BAM IMA Side Letter on behalf of a Beechwood Be Investments, LLC. SOF 110 Moreover, based upon his experience in specific transactions at Beechwood in 2015, Saks believed Nordlicht, Huberfeld and Bodner exercised influence over Beechwood. SOF 79, 81 These circumstances raise issues of fact as to whether Nordlicht and the other Platinum insiders who influenced the PPCO Funds, through their families' interests in and influence over Beechwood, had an economic interest in the notes, security interests and other consideration that Nordlicht purportedly caused PPCO to give in the PPCO Loan Transaction. Accordingly, the Platinum insiders' economic interest in Beechwood, and in assisting the parties Beechwood did business with including SHIP, supports the existence of the badge of fraud. This "badge of fraud" supports a finding of actual fraud under DCL § 276.

E. <u>The Financial Condition of the Party Sought to Be Charged Before and After the Transaction in Question</u>

This factor refers to "[t]he [d]ebtor's precise financial condition before and after the date of the [allegedly fraudulent [t]ransfers." *In re Xiang Yong Gao*, 560 B.R. 50, 64 (Bankr. E.D.N.Y. 2016). As explained in the Prager Report, PPCO was insolvent before and after the December 2015 and March 2016 tranches of the PPCO Loan Transaction. SOF 226-231 In that transaction PPCO purchased distressed debt from SHIP and Beechwood at face value and issued $69 million of notes in favor of SHIP and Beechwood secured by a blanket first lien in all of PPCO's and the PPCO Subsidiaries' assets, drained $18.2 million of value from PPCO, materially worsening PPCO's financial condition. SOF 156, 161-209 Consequently, the "financial condition of the party sought to be charged before and after the transaction in question" is a badge of fraud that favors a finding of actual fraud under DCL § 276.

F. The Existence or Cumulative Effect of a Pattern or Series of Transactions or Course of Conduct after the Incurring of Debt, Onset of Financial Difficulties, or Pendency or Threat of Suits by Creditors

In the PPCO Loan Transaction, PPCO gave a lien on all of its and the PPCO Subsidiaries' assets in exchange for notes issued by Desert Hawk and LC Energy with no value, and notes issued by Northstar that were not worth the value that PPCO paid for them. Because this resulted in liens on all of PPCO's assets, the effect of these transactions was to harm PPCO. SOF 156 As of September 30, 2015, PPCO faced increasing requests from PPCO Blocker Fund and PPCO Onshore Fund for redemptions with a payment due date of April 30, 206, that it could not timely satisfy. Indeed, by June 30, 2016, PPCO had suspended redemptions entirely. SOF 220

G. The Unusual Nature of the Transactions/A Secret and Hasty Transfer Not in the Usual Course of Business

One of the "badges of fraud" described by the Court in *In re Sharp Int'l Corp.*, 403 F.3d 43, 56 (2d Cir. 2005), is "a questionable transfer not in the usual course of business; inadequacy of the consideration; ... and retention of control of the property by the transferor after the conveyance.'" SHIP describes this "badge of fraud" somewhat differently, referring to "a secret and hasty transfer not in the usual course of business." SHIP MOL 35 The PPCO Loan Transaction satisfies either standard because it was a highly unusual transaction, outside of the ordinary course of business: (i) Nordlicht executed all of the documents that were executed by PPCO, PPVA Oil & Gas, LLC, and all of the PPCO Subsidiaries in those transactions, SOF 161-209; (ii) PPCO issued $69 million of notes, secured by liens on all of its assets so that it could receive or discharge notes issued by three distressed companies, two of which had zero value and one of which was overvalued, SOF 161-209; (iii) even more egregiously, $21,323,344.44 of par value of the Northstar notes were assigned to PPVA Oil & Gas, LLC, a subsidiary of PPVA, which was in financial distress and went into receivership only six months later, on September 27, 2016, SOF

221-225; and (iv) finally, the transactions clearly benefitted Beechwood, a substantial portion of which was owned by the principals of PPCO, at the expense of PPCO. SOF 221-225 Consequently, this "badge of fraud" favors PPCO because in the December tranche of the transaction, PPCO issued $14.2 million in notes that were secured by all of its and the PPCO Subsidiaries' assets, yet received only $9.2 million in notes issued by Desert Hawk having no value, and paid off $5 million in notes issued by LC Energy, which also had no value. SOF 221-225 Because the Receiver has adduced extensive evidence of "badges of fraud," at a *minimum*, issues of fact exist precluding an award of summary judgment on the Receiver's claims under DCL § 276. *See*, *e.g.*, *In re Sledziejowski*, 533 B.R. 408, 428 n. 16 (Bankr. S.D.N.Y. 2015).

H. <u>Other Facts Supporting "Badges of Fraud"</u>

The Receiver has adduced extensive evidence demonstrating the presence of multiple "badges of fraud" including: (i) threatened financial stability or profitability in the form of redemption requests in excess of cash inflows; (ii) significant related party transactions; (iii) highly complex transactions; (iv) the need to obtain debt; (v) little repayment of principal or interest (no principal or interest was paid by PPCO under the PPCO Loan Transaction); (vi) failure of appropriate documentation (numerous conditions to closing were ignored); (vii) management's interest in earnings (as evidenced by management's reliance on management fees); and (viii) history of legal violations (such as Nordlicht's troubles with Optionable and Huberfeld and Bodner's previous securities law violations). SOF 219

Finally, unable to rebut the numerous obvious badges of fraud present here, SHIP makes the unsupported allegation that "the Receiver's case … 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." SHIP MOL 34-35. As demonstrated by the foregoing, that assertion is simply incorrect.

1. SHIP Is Not Entitled to Summary Judgment on PPCO's Claims Under DCL §§ 273-275 and 277 Because Those Claims Involved Disputed Issues of Material Fact.

a. There are Numerous Disputed Issues of Material Fact as to Whether SHIP Received "Fair Consideration."

DCL §§ 273-275 and 277 each require "[f]air consideration." Under the DCL, "fair consideration" has two components – the exchange of fair equivalent value and good faith -- both of which are required to merit "fair consideration" under DCL § 278. *E.g.*, *In re Jacobs*, 394 B.R. 659; *In re Le Cafe Creme, Ltd.*, 244 B.R. 221, 241 (Bankr. S.D.N.Y. 2000). Specifically, DCL § 272, provides that "[f]air consideration is given for property, or obligation": (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or (b) when such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

i. Material Issues of Fact Exist as to Whether PPCO Received a 'Fair Equivalent" for the Assets It Transferred and the Liabilities It Incurred In the PPCO Loan Transaction

SHIP misrepresents the test for "fair equivalent" by formulating a precise percentage range for the value differential which it claims constitutes "fair consideration." SHIP MOL 21-26 However, the formulation for fair consideration "is less than precise" and courts "have ruled that 'fair consideration' must be determined upon the facts and circumstances of each particular case," and that "[s]uch fact specific inquiries are generally inappropriate for summary judgment." *In re Corcoran*, 246 B.R. 152, 159 (E.D.N.Y. 2000) (citing *Glasser v. Kashinsky*, 237 A.D.2d 252 (2d Dep't 1997) (denying summary judgment and noting that "the determination of ... what constitutes fair consideration is generally a question of fact"). *See also United States v. McCombs*, 30 F.3d 310, 326 (2d Cir. 1994) ("our review of the case law convinces us that the concept [of fair consideration] can be an elusive one that defies any one precise formula"). Importantly, where the

facts and circumstances of a particular transaction indicate less than arms-length dealings (as they do here), a lack of reasonably equivalent value may be evinced even by a small disparity between the value given and the value received. *See In re Ames Department Stores, Inc.*, 161 B.R. 87, 90 (Bankr.S.D.N.Y.1993) (denying transferee's motion for summary judgment where the value received by the debtor was equal to 97.875 cents on the dollar).

In the December 2015 and March 2016 tranches of the PPCO Loan Transaction, in the aggregate, PPCO issued approximately $67 million of notes, secured by all of its and its subsidiaries' assets, in order to purchase assets having a value of $48.8 million, a differential of more than 27%. SOF 221-225 This is obviously not a "fair equivalent."

SHIP analyzes the December 2015 tranche of the PPCO Loan Transaction separately from the March 2016 tranche. However, this overlooks the fact that the $15,500,000 Delayed Draw Demand Note issued by PPCO in on December 23, 2015, was rolled into the $18,500,000 A&R SHIP Note issued by PPCO on January 20, 2016, which was then rolled into five "Secured Term Notes" totaling $69,153,626 issued by PPCO as part of a $70,000,000 credit facility established on March 21, 2016. SOF 194 The individual tranches of the PPCO Loan Transaction should not be analyzed in isolation. Moreover, while SHIP asserts that it had no knowledge of the transaction, this ignores the fact that Beechwood was its agent. (*See* Agency Motion.)

Even if the December 2015 and the March 2016 tranches of the PPCO Loan Transaction are analyzed separately, the Prager Report demonstrates that PPCO did not receive fair consideration in either December 2015 or March 2016. SOF 221-225 In the December 2015 step, PPCO issued the Delayed Draw Demand Note to SHIP, $14.2 million of which was disbursed (a) to purchase approximately $9.2 million of notes issued by Desert Hawk having zero value, and (b)

to discharge $5.0 million owed by LC Energy under notes having zero value.[26] SOF 221-222 Exchanging something for value for something with zero value is obviously not fair consideration.

In the March 2016 tranche, PPCO transferred a total of $52.8 million in value, and PPCO received assets valued at $48.7 million (at Prager's midpoint), a difference of approximately $4.0 million. Moreover, as SHIP conceded, "Prager's low-end figure of $47 million figure equates to 89% of the purported value that PPCO… transferred." SHIP MOL 23. Whether this constitutes a "fair equivalent" raises issues of fact. SHIP claims that this is "fair consideration" "as a matter of law." SHIP MOL 23 At a minimum, issues of fact are presented as to whether PPCO received "fair consideration" for the March portion of the transactions. *In re Corcoran*, 246 B.R. at 159; *McCombs*, 30 F.3d at 326; *In re Ames Department Stores, Inc.*, 161 B.R. at 90.

SHIP argues that its role in the transactions must be analyzed separately from any other party's because, in its words, "[t]o justify collapsing transactions in this manner, the Receiver must establish that SHIP had 'actual or constructive knowledge of the [fraudulent scheme]." SHIP MOL 22-23. Here, however, in both December 2015 and March 2016, the transaction documents were negotiated, structured and executed together. SOF 164-194 Thus, knowledge is not required to treat the December 2015 and March 2016 steps as an integrated transaction. *See In re Old CarCo LLC*, 435 B.R. 169, 185 (Bankr. S.D.N.Y. 2010) ("because the deal documents themselves make clear that the entire transaction is linked, collapsing of the constituent elements is not an issue"); *In re TS Employment, Inc.*, 597 B.R. 494, 525 (Bankr. S.D.N.Y. 2019) ("interrelated yet formally distinct steps in an integrated transaction may not be considered independently of the overall

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[26] SHIP argues that paying off the LC Energy notes relieved PPCO of the burden of a guaranty of those notes, which carried a higher interest rate than the "Delayed Draw Demand Note" (SHIP MOL 26), but fails to note that the transaction replaced debt that was not secured by a blanket lien on all of PPCO's assets, with debt that was purportedly so secured. SOF 170-174

transaction"); *In re Waterford Wedgwood USA, Inc.*, 500 B.R. 371, 380 (Bankr. S.D.N.Y. 2013) (collapsing transactions to determine reasonably equivalent value appropriate where (a) the deal documents make clear that the transactions should be consummated contemporaneously with each other; (b) the conditions in the deal documents indicate that the parties intended an integrated transaction; (c) payment under separate agreements is delivered in a single wire transfer; and (d) each step of the transactions could not have occurred on its own, as each step relies on additional steps to fulfill the parties' intent). Where, as here, SHIP's agents, BBIL, BAM, BRe and BAM Administrative, were parties to and therefore had knowledge of both assignments and/or the Note Purchase Agreement, as well as the worthlessness of the Desert Hawk and LC Energy notes, collapsing the transactions is appropriate.[27] SHIP did, in fact, have actual and constructive knowledge of the fraudulent scheme, both based upon its own knowledge and based upon what its agents, the Beechwood Entities knew. SOF 132 *See HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635–36 (2d Cir. 1995) ("In deciding whether to collapse the transaction and impose liability on particular defendants, the courts have looked frequently to the knowledge of the defendants of the structure of the entire transaction and to whether its components were part of a single scheme"). Moreover, even accepting SHIP's claim that it knew nothing of the Platinum-Beechwood connection until the infamous July 26, 2016 Wall Street Journal article, in August 2016, SHIP

[27] The authorities relied upon by SHIP are also distinguishable from the facts here. In those cases, it was undisputed that, the transactions at issue were arms-length transactions. *See Knopf v. Phillips*, 2017 WL 6561163, at *6 (S.D.N.Y. Dec. 22, 2017) ("it is undisputed that Pursuit purchased PHC in an arms-length transaction."); *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 377 (S.D.N.Y. 2003) ("plaintiffs'… conceded that the record contains no evidence to support the claim that less than fair value was paid."). By contrast, it is indisputable here that because Nordlicht, who executed many of the agreements in connection with the PPCO Loan Transaction, had a stake in Beechwood through numerous family members, the transactions were not arms-length. Importantly, unlike in Lippe, SHIP has not indicated that any fairness opinion was provided in connection with the PPCO Loan Transaction.

ratified Beechwood's actions as its agent after the publication of the WSJ article by allowing for the payment of an $11 million performance fee to Beechwood. SOF 238.[28]

The December 2015 transaction documents – which included the Delayed Draw Demand Note, the Master Security Agreement, the Subsidiary Guaranty, the disbursement letters indicating that the loaned proceeds were to be used to fund the assignment of $9.2 million of Desert Hawk notes and to discharge $5 million of notes issued by LC Energy, and three "Assignment Agreements" for the Desert Hawk notes – were negotiated, executed and exchanged as an integrated transaction, and the Delayed Draw Demand Note indicates that "[o]n December 23, 2015 … [t]he Holder shall fund $9,198,750.00 hereunder to the Issuer … pursuant to such distribution instructions delivered by Issuer to Holder on the First Funding Date." SOF 171 Similarly, transaction documents for the March 2016 tranche also involved exchanges and executions as an integrated transaction – with the Note Purchase Agreement, the five term notes, the Amended and Restated Security Agreement, the Subsidiary Guaranty, the Post-Closing Letter, and the two Northstar Assignment Agreements being executed simultaneously. SOF 187 Moreover, Section 2 of the Note Purchase Agreement, entitled "Disbursement Letters," provides: "Prior to the Closing Date, Company shall issue to each purchaser a disbursement letter … setting forth the Purchase Price payable by such Purchaser at such Closing Date and the recipients to receive such proceeds on behalf of Company." SOF 183, 193

Even considering SHIP in isolation, PPCO did not receive from SHIP, and SHIP did not provide, a "fair equivalent" in either December 2015 or March 2016. In the December 2015 portion of the PPCO Loan Transaction, SHIP received at least $840,000 in principal for the sale

[28] SHIP contends "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." SHIP MOL 23 However, SHIP fails to note that it received a note, purportedly secured by all of PPCO's and its subsidiaries' assets.

of a participation owned by SHIP in the loans to LC Energy.[29] In addition, while SHIP claims that it "held no interest in Desert Hawk as of December 2015" (SHIP MOL 25), it fails to mention that a portion of the Desert Hawk notes came from SHIP on November 18, 2015, which assigned a $1,675,000 participation in notes issued by Desert Hawk to BBIL (with whom these assets were parked after the aborted put to PPVA), which in turn assigned that participation interest in the Desert Hawk notes to PPCO on December 23, 2015, as part of the PPCO Transactions. SOF 168, 220 The December 23, 2015 "Assignment Agreement" itself recognizes this prior assignment, stating that "on or about November 18, 2015, SHIP sold its remaining right, title and interest in the Participation to Assignor." SOF 168 Through these transactions, SHIP received at least $2,515,000 of Desert Hawk and LC Energy notes that were sold to PPCO in the December 2015 portion of the PPCO Loan Transaction.

In the March 2016 portion of the PPCO Loan Transaction, SHIP assigned Northstar notes at par for a total purchase price of $32,723,944.44. SOF 198, 199, Applying Prager's midpoint valuation ratio of $25.5 million/$29.6 million, or 86% to this amount, reveals that the value of the assets assigned was $28,191,235. Insofar as SHIP claims to have given cash to fund the assignments, it received a secured term note for that cash.

SHIP also contends that, analyzing its role in the transactions in isolation, 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." SHIP MOL 24. SHIP's position contains at least two errors: ***First***, SHIP claims that "[b]ecause the transfer of the Northstar debt to PPCO … effectuated

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[29] On April 1, 2015, SHIP purchased an $880,000 participation in a note issued by LC Energy from BRe BCLIC Primary, and assigned $40,000 of that participation to LC Energy on September 25, 2015. SOF 170, citing BW-SHIP-00664535 to 664543 and BW-SHIP-00703168-00703175) PPCO paid off the notes issued by LC Energy in the December 2015 tranche of the PPCO Loan Transaction at which time SHIP received a payment of at least $840,000 in principal. SOF 175

a release of the Agrea Pledge, that debt is valued at its face value amount, as Mr. Prager's own report recognizes." However, the Prager Report does not value the Northstar debt at face value. Even after the relief from the Agera Pledge, $29.6 million of Northstar debt is valued at between $23.8 million and $27.2 million ($25.5 million at the midpoint). SOF 222. ***Second***, even assuming, as SHIP does, that SHIP's transactions should be considered in isolation, the proper comparison is between the $15.8 of Northstar debt transferred by SHIP and the value of that Northstar debt, which was between 80.4% and 92.9% of its value (86.1% at Prager's mid-range). At Prager's mid-range ratio, SHIP contributed $9.9 million of cash, and Northstar debt worth $13.6 million, a total of $23.5 million, in exchange for an approximate increase of $26.8 million in the principal amount previously owed to SHIP under the January 2016 A&R SHIP Note – a difference of approximately $3.5 million, or 13%. SOF 222-225 (citing Prager Report, SHIP Ex. 66; SHIP0014763-SHIP0014722 at SHIP0014771). Whether this constitutes "fair consideration" raises issues of fact. *In re Corcoran*, 246 B.R. at 159; *McCombs*, 30 F.3d at 326; *In re Ames Department Stores, Inc.*, 161 B.R. at 90.

Accordingly, SHIP has failed to meet its burden of establishing the nonexistence of triable issues of material fact on either of the following issues: (a) whether SHIP gave a "fair equivalent" for what SHIP received in the PPCO Loan Transaction; (b) whether SHIP had "knowledge of the fraud at the time of purchase"; and (c) whether SHIP acted in "good faith."

ii. Material Issues of Fact Exist as to Whether SHIP Was Acting in Good Faith.

The separate and independent requirement of good faith also raises issues of fact that preclude summary judgment. The "good faith" inquiry is an objective one that generally asks whether the transferee acted fairly, honestly and openly. *Amalgamated Bank of New York v. Marsh*, 823 F. Supp. 209, 223 (S.D.N.Y. 1993). Actual intent to defraud need not be established in order to find an absence of good faith. *In re M. Fabrikant & Sons, Inc.*, 447 B.R. 170, 188

(Bankr. S.D.N.Y. 2011), *aff'd*, 480 B.R. 480 (S.D.N.Y. 2012), *aff'd*, 541 F. App'x 55 (2d Cir. 2013) citing *in re Bayou Group, LLC*, 439 B.R. 284, 310–11 (S.D.N.Y.2010) (discussing 11 U.S.C. § 548(c)(13) (collecting cases).

Further, *any one* of the following constitutes bad faith for purposes of the N.Y.D.C.L.: (1) lack of an honest belief in the propriety of the activities in question; (2) intent to take unconscionable advantage of others; and (3) intent or knowledge of the fact that the activities in question will hinder, delay, or defraud others. *See e.g.*, *Geo-Grp. Commc'ns, Inc. v. Chopra*, 2016 WL 390089, at *4 (S.D.N.Y. Feb. 1, 2016); *Interpool Ltd. v. Patterson*, 890 F. Supp. 259, 267 (S.D.N.Y. 1995); *Amalgamated Bank of New York v. Marsh*, 823 F. Supp. at 223.

The record here raises triable issues of fact that SHIP had actual and/or constructive knowledge of the PPCO Loan Transaction and the fraudulent purpose of saddling PPCO with unconscionable liens so as to placate SHIP and keep open the access to institutional capital to prop up Platinum, including that the PPCO Loan Transaction would affect PPCO's balance sheet:

(i) SHIP was well aware that there was a relationship between Beechwood and Platinum as early as January 15, 2015. For example, Nordlicht executed the BAM IMA Side Letter as an "Authorized Signatory" of N Management LLC, which thereby executed that agreement on behalf of BRILLC. SOF 110 Wegner, executed the same BAM IMA Side Letter on behalf of SHIP. SOF 110;

(ii) Narain testified that upon starting at Beechwood, he understood that the direction to reduce concentration in Platinum-related assets came from SHIP. SOF 8, 154;

(iii) Wegner was in constant contact with Beechwood concerning investment yield because he was interested in new investments that could improve SHIP's position. SOF 234 Feuer believes he answered any and all of SHIP's questions. SOF 132(i)(b);

(iv) SHIP had a team of approximately 15 people that visited Beechwood's office quarterly for reviews. SOF 132 At these meetings, specific investments were discussed in detail. SOF 132;

(v) According to Feuer, SHIP absolutely knew what it was invested in. SOF

132 In fact, Feuer testified that he did not recall ever having to defend Beechwood's actions to any of its clients because Beechwood kept its clients apprised of their investments. SOF 132;

(vi) Feuer could not testify that SHIP did not have knowledge of the December 2015 Transaction. Feuer affirmatively stated, "I can't say that. I don't know." SOF 154 In fact, it is possible that Feuer may have spoken to Wegner about these Platinum issues. SOF 154 He may also have spoken to Wegner specifically about diversifying away from Platinum other than in connection with Agera. SOF 154;

(vii) At an August 26, 2015 meeting of the SHIP Board of Directors (just four months before the December tranche of the PPCO Loan Transaction), "SHIP's Strategy Update" stated that its "[p]rocess to convert BRe and BBIL IMAs to notes [wa]s continuing." SOF 136 This was part of a larger strategy to increase SHIP's RBC by moving from unrated to rated assets. SOF 146, 149 Consistent with these efforts, Feuer testified that SHIP was restructuring its balance sheet in November 2015. SOF 148;

(viii) SHIP received Duff & Phelps reports that described significant losses in the Platinum related entities at issue in the PPCO Loan Transaction. SOF 225;

(ix) SHIP knew by January 19, 2016 that Northstar's debts, including "company obligations, interest and Capex" were being funded by "Platinum, the company's private equity sponsor" as set forth in the Duff & Phelps report. SOF 233

As set forth in the Agency Motion, the Beechwood Advisers were SHIP's agents pursuant to the IMAs, and Beechwood's actions and state of mind are imputed to SHIP. Even if SHIP did not have knowledge of the transactions and the underlying fraud, the Beechwood Advisers did have such knowledge based upon the following facts: (i) Feuer knew that Nordlicht had a conflict of interest in transactions between PPCO and Beechwood because (a) Feuer knew that Nordlicht was the chief investment officer at Platinum SOF 57, (b) Feuer knew that Nordlicht's wife and children were "owners" of the Beechwood Entities (which they were, through trusts). SOF 69-78; (ii) according to Feuer, over the course of the Platinum-Beechwood relationship, Beechwood loaned PPCO and PPVA a lot of money without taking enough collateral. SOF 124; (iii) Beechwood knew that Platinum assets were not paying. SOF 225 In this regard, Feuer testified

that the inability of a borrower to make interest payments can negatively impact valuation. SOF 225; (iv) Nordlicht was concerned about Platinum's high-interest rates and collateral requirements, and so his claimed need to alleviate the stranglehold placed on Platinum by untenable interest rates coincided with SHIP's need to move away from unrated assets. SOF 156 In fact, Nordlicht approached Beechwood with the idea of the December 2015 transaction in an effort to alleviate the stranglehold *viz*. redemptions, and untenable interest rates. SOF 156 Importantly, Nordlicht was the Platinum point-person during the transaction. SOF 162; and (vi) Nordlicht clearly expressed to Feuer that "having all of Platinum's assets serve as collateral for the loans [in the PPCO Loan Transaction] was detrimental to Platinum at that time." SOF 156

Narain testified that his understanding was that the general idea of SHIP moving away from Platinum assets was SHIP's. SOF 154 Beechwood's 30(b)(6) witness, Thomas, adopted Narain's testimony concerning discussions in January 2016 to divest SHIP's Platinum assets. SOF 154

In March 2016, in connection with the PPCO Loan Transaction, $52.8 million in face value of notes issued by Northstar, an oil and gas exploration company, were assigned by SHIP and Beechwood to PPCO in the PPCO Loan Transaction. SOF 179-201 Narain, who replaced Saks as CIO for BAM and executed transaction documents in the PPCO Loan Transaction, recalled that, following a drop in oil prices, Northstar "was not generating a lot of cash flow." SOF 225(v) Narain testified that talks about the "Platinum Restructuring" came about because the collapse of oil prices damaged holdings in oil and gas companies, which were facing liquidity issues in late 2015 – early 2016. SOF 220,

iii. The Other Requirements of DCL §§ 273, 274, 275 and 277 Are Satisfied.

b. Disputed Issues of Material Fact Exist as to Whether PPCO Was Insolvent at the Time of the Transfers, as Required by DCL §§ 273 and 277.

DCL§§ 273 and 277 both require a "conveyance" made or an "obligation" incurred by "a

person who is or will be thereby rendered insolvent." SHIP argues that the Receiver's insolvency analysis fails because it is "based on an unsupported assumption that 'non-insider' investors in PPCO Master Fund could have asserted fraud claims…" SHIP MOL 28. This argument ignores a fundamental tenet of New York law: where, as here, transfers are made *without* fair consideration, insolvency is presumed, and the burden shifts to the transferee to come forward with proof of solvency. *See e.g.*, *In re Khan*, 2014 WL 10474969, at *9 (E.D.N.Y. Dec. 24, 2014) (*citing Feist v. Druckerman,* 70 F.2d 333, 334 (2d Cir.1934)); *In re Manshul Constr. Corp.*, 2000 WL 1228866, at *53 (S.D.N.Y. Aug. 30, 2000); *Piccarreto v. Mura*, 51 Misc. 3d 1230(A) (Sup. Ct. 2016), *aff'd*, 158 A.D.3d 1095 (4th Dep't 2018). The burden then shifts to the transferee to present evidence of the transferor's insolvency. For the reasons discussed *supra*, the PPCO Loan Transaction lacked fair consideration and SHIP thus has the burden of presenting evidence of PPCO's insolvency -- a burden that SHIP has failed to meet. At best, SHIP's argument that the Receiver's insolvency analysis turns on an "unsupported assumption," raises an issue of fact.

The DCL defines insolvency as follows: "A person is insolvent when the present fair saleable 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." DCL § 271. Insolvency is determined by a "balance sheet test," in other words whether the transferor's assets were exceeded by its liabilities at the time of the transfer. *In re Khan*, 2014 WL 10474969 at *16. "[O]nly assets with a present salable value are taken into consideration in determining insolvency." *McCarthy v. Estate of McCarthy*, 145 F.Supp.3d 278, 286 (S.D.N.Y. 2015) (citations omitted) (quoting *First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc.*, 871 F.Supp.2d 103, 120 (E.D.N.Y.2012)). Debt "includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." DCL § 270. And, as recognized by SHIP's own authorities, the

controlling perspective in evaluating insolvency is that of the transferor and *not* with the benefit of hindsight. *See Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 380 (S.D.N.Y. 2003), *aff'd*, 99 Fed. App'x 274 (2d Cir. 2004) ("[S]olvency must be gauged at the time of the transfer and not with the benefit of hindsight.").

Applying a balance-sheet test, the Prager Report shows that PPCO was insolvent as of the date of the PPCO Loan Transaction. SOF 226-227 After both the December 2015 and March 2016 tranches, PPCO was not adequately capitalized to survive a demand for liquidation by non-insider investors for prompt repayment of the net amount of their investments ("**Rescission Claims**"). SOF 226-227 As clearly set forth in *Bayou*, also relied on by SHIP, rescission claims are properly part of the insolvency analysis for hedge funds. *In re Bayou Grp., LLC*, 439 B.R. 284, 334-36 (S.D.N.Y. 2010). Moreover, the relationship of debtor and creditor arises the moment that the cause of action accrues. *Id.* at 335-36. Here, because the parties do not dispute that there was a fraud dating back to 2012 (SOF 2) the claims of non-redeeming investors accrued prior to the PPCO Loan Transaction and were properly included in the calculation of liabilities in Prager's insolvency analysis. Without citation to contradictory evidence, SHIP's assertion of fatal flaws in the Prager Report is insufficient to warrant summary judgment. *See id.* ("Appellants cannot… credibly assert fatal flaws in [the expert] analysis without supporting evidence of their own. The conclusory statements contained in Appellants' briefs—without citation to contradictory evidence or independent expert analysis—do not raise material issues of fact as to the Bayou Funds' insolvency…"). Importantly, insolvency often raises factual questions. *Klein v. Tabatchnik*, 610 F.2d 1043, 1048 (2d Cir. 1979).

SHIP plainly uses the "benefit of hindsight." Non-insider investors did not assert rescission claims because the Receivership Order precluded them from doing so since December 19, 2016.

SOF 21-23 The authorities on which SHIP relies also miss the mark. In *Shelly v. Doe*, not only had an action not been commenced against the transferor at the time of the alleged transfers, the action was for sexual assault, an action for which the probability and amount of damages is difficult to quantify. *See Shelly v. Doe*, 249 A.D.2d 756 (3d Dep't 1998). In *Ray v. Ray*, the court held that a litigation pending appeal was *not* sufficiently probable for the purposes of an insolvency analysis because the action had been dismissed, and plaintiff's two prior actions for fraudulent conveyance were unsuccessful against the defendant. 2019 WL 1649981 (S.D.N.Y. Mar. 28, 2019). Unlike the claims in those cases, here, PPCO had a contractual *obligation* to pay redemptions. SOF 41-47 Moreover, as of the date of the PPCO Loan Transaction, PPCO was aware of the fraud and that it might have to pay non-insider investors, in amounts that were readily and easily ascertainable (the net amount of their investments) because Nordlicht knew of the fund's insolvency and was overvaluing assets. SOF 3, 158 *See LB on behalf of PB v. Hines*, 2019 WL 3066427, at *4 (S.D.N.Y. July 12, 2019) (holding that debtor need not predict what future debts would be, only that debtor may have to pay some money for the investigated conduct) Evaluating insolvency *from the perspective of PPCO*, which includes the knowledge held by the principals of PPCO as of the date of the transactions, rescission claims were *more than* probable.

c. Issues of Material Fact Exist As to whether, at the Time of the PPCO Loan Transaction, PPCO was "engaged or [was] about to engaged in a business or transaction for which the property remaining in the hands after the conveyance [was] an unreasonably small capital."

A claim under DCL § 274 requires: (1) that the transfer was made or an obligation was given without fair consideration, and (2) that the transfer left the transferor with unreasonably small capital. DCL § 274; *see also In re Tuller's, Inc.*, 480 F.2d 49, 51 (2d Cir. 1973) (affirming judgment for plaintiff under § 274). While the term "unreasonably small capital" is not defined by the DCL, it has been defined by the courts as a "financial condition short of equitable

insolvency," where, although the transferor is technically solvent, the transferor is "doomed to fail." *In re Norstan Apparel Shops, Inc.*, 367 B.R. 68, 79 (Bankr. E.D.N.Y. 2007). In this determination, relevant factors include the transferor's debt to equity ratio, historical capital cushion, and the need for working capital in the transferor's specific industry. *Id.*

SHIP contends that the Receiver's § 274 claim fails because the Prager Report does not adduce any evidence bearing upon the relevant factors set forth above. (SHIP MOL at 31) This argument misses the mark and ignores the actual contents of the Prager Report. ***First***, the Receiver is not required to demonstrate each and every factor outlined above, as not one factor is determinative. *See In re Norstan*, 367 B.R. at 79. Nevertheless, contrary to SHIP's contention, the Prager Report does include an Adequate Capitalization Analysis that bears directly on the Receiver's claim under DCL § 274. SOF 221-222 The insolvency analysis also highlights PPCO's "debt to equity ratio," another factor outlined above. SOF 221-222

Second, because the PPCO Loan Transaction was *not* in "good faith," under DCL § 274 the burden is on SHIP to rebut the presumption of insolvency. *Integrity Elecs., Inc. v. Garden State Distributors, Inc.*, 2016 WL 3637004, at *9 (E.D.N.Y. June 30, 2016) (on summary judgment, "insolvency 'is presumed when a conveyance is made without fair consideration…'"). SHIP has not put forth with any evidence to rebut this presumption. "The Court requires proof of [the transferor's] solvency, such as tax returns, bank statements, or other financial documents." *In re Lindsay*, 2010 WL 1780065, at *10 (Bankr. S.D.N.Y. May 4, 2010) Simply asserting that "Mr. Prager's opinion on PPCO Master Fund's solvency… conflicts with representations and warranties made by PPCO Master Fund" is insufficient to warrant summary judgment. Nor can SHIP rely on SanFilippo's testimony that PPCO was solvent, as he was not employed by PPCO, he is not an expert, and his testimony is contradicted by the Receiver's expert, Mr. Prager. SOF 221-222 and

Opposition to SHIP's Statement of Facts ¶101

Third, where, as here, the question of adequate capitalization turns on fact specific inquiries into the capital requirements for a unique industry, summary judgment is inappropriate. *See In re Adelphia Commc'n Corp.,* 2006 WL 687153, at *12 (Bankr. S.D.N.Y. Mar. 6, 2006) This is especially true because the PPCO Loan Transaction resulted in liens on all of PPCO and its subsidiary's assets, and thus PPCO "was left with all of its tangible assets mortgaged… [and] effectively devoid of capital." *See In re Tuller's, Inc.*, 480 F.2d 49, 52 (2d Cir. 1973). See also *In re Café Crème, Ltd*., 244 B.R. 221, 242-43 (Barkr. S.D.N.Y. 2000) ("It appeared, according to the Debtor's tax returns, that the Debtor's equipment, fixtures, and furnishings, which comprised substantially all of its assets, were also pledged to the LeRouxs as collateral in the event that the Debtor defaulted in its obligations under the Purchase Agreement. Plainly, the Debtor was left with unreasonably small capital.")

d. SHIP Is Not Entitled to Summary Judgment Dismissing the Receiver's Claims Under DCL § 275 Because There Are Disputed Issues of Material Fact Regarding Whether PPCO Intended or Believed that It Would Incur Debts Beyond Its Ability to Pay.

In addition to requiring that a transfer be made without "fair consideration," DCL § 275 requires that "the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature." This portion of the statute "looks to an individual's state of mind, [and] 'issue[s] of fraudulent intent cannot [ordinarily] be resolved on a motion for summary judgment.'" *Field Home-Holy Comforter v. Warns*, 2014 WL 7398904, at *4 (S.D.N.Y. Dec. 23, 2014) (emphasis added) (quoting *Golden Buddha Corp. v. Canadian Land Co. of America, N.V*., 931 F.2d 196, 201 (2d Cir.1991)).

SHIP argues that "the Receiver has not proven that PPCO … intended to or believed that it incur debts beyond its ability to pay at the time of those transactions." SHIP MOL 32 However, the Receiver need not prove anything. Instead, SHIP must show the nonexistence of disputed

issues of material fact. As the Rogers Dec. confirms, however: PPCO's cash balances as of December 23, 2015 and March 21, 2016 only were $534,345 and $156,929, respectively. Yet, as of both December 23, 2015, and March 21, 2016, PPCO knew that (a) redemption requests of approximately $7.2 million that had been placed by investors with PPCO Onshore Fund no later than September 30, 2015, with an effective date of March 31, 2016, and a payment date of April 30, 2016, and (unless withdrawn) payment of that amount would be due from PPCO to PPCO Onshore Fund as of April 30, 2016, and (b) redemption requests of approximately $17.6 million that had been placed by investors in the three feeder funds that invested through PPCO Blocker Fund by no later than September 30, 2015, with an effective date of March 31, 2016, and a payment date of April 30, 2016, and (unless withdrawn) payment of that amount would be due from PPCO to the Blocker Fund as of April 30, 2016. CSOF 46 These amounts remain unpaid and are due as withdrawals under the LPA from PPCO to the Feeder Fund and the Blocker Fund. CSOF 46

While SHIP raises several assertions that it claims showed Nordlicht's motivation in entering into the March 2016 tranche, these assertions raise factual issues that cannot be resolved on summary judgment. For example, SHIP claims that the purchase of Northstar notes provided relief from the "Agera pledge" which provided PPCO with liquidity, but fails to point out that in fact Agera was then encumbered by the liens given in the PPCO Loan Transaction, and, in any event, PGS (which PPCO owned jointly with PPVA), not PPCO, owned Agera. SOF 172 At a minimum, this raises issues of fact as to whether the Agera pledge provided no direct liquidity to PPCO. SHIP also asserts that there was an increase in the balance owed by PPVA, but fails to mention that a creditor's petition seeking to initiate insolvency proceedings against PPVA was filed in the Grand Court, Cayman Islands, only four months later on July 28, 2016. SOF 222 SHIP further claims that guaranteed debt with LC Energy was refinanced at a lower rate, but fails to

point out that the guaranty was replaced with a security interest in all of PPCO's assets. SOF 224 Because PPCO issued secured term notes for $69 million, purportedly secured by all of PPCO's and the PPCO Subsidiaries' assets so it could purchase assets worth $18.2 million less than $69 million, PPCO was disadvantaged, not advantaged, by the transaction, and the transaction did not increase liquidity SOF 226-227 SHIP's request for summary judgment on the Receiver's claim under DCL § 275 should be denied.[30]

2. SHIP Is Not Entitled to Summary Judgment on Its Affirmative Defense Under DCL 278(1).

SHIP contends that it is entitled to the defense in DCL. § 278(1) for a "purchaser ***for fair consideration*** without knowledge of the fraud at the time of the purchase." SHIP MOL 17. (emphasis added). This is an affirmative defense on which SHIP bears the burden of proof and must show that it was "a purchaser for fair consideration" and was "without knowledge of the fraud at the time of the purchase." *Allstate Ins. Co. v. Mirvis*, 2017 WL 6029128, at *7 (E.D.N.Y. Dec. 5, 2017). "[T]he burden of proof rests with [the transferee] to establish that, indeed, [it was a] bona fide purchaser[] for valuable consideration and had neither actual nor constructive knowledge that the conveyance … was fraudulent." *United States v. Orozco-Prada*, 636 F. Supp. 1537, 1542 (S.D.N.Y. 1986), *aff'd*, 847 F.2d 836 (2d Cir. 1988). "A person must use ordinary thoughtfulness and make accessible inquiries. If he does not, and avoids the inquiry, he is chargeable with the knowledge which ordinary diligence would have elicited, and cannot be

[30] SHIP's cases do not support its position. In *Innovative Custom Brands, Inc. v. Minor*, 2016 WL 308805, at *3 (S.D.N.Y. Jan. 25, 2016) (citation omitted, emphasis added), the Court did not allege, unlike here, "'*any facts* relating to [Defendants'] intent to incur debt that [they] believed [they] would be unable to pay.'" In *In re Chin*, 492 B.R. 117, 123 (Bankr. E.D.N.Y. 2013), unlike here, the defendant "submitted numerous affidavits and exhibits in support of the motion", including an affidavit of the debtor "deny[ying that] she believed she would incur debts beyond her ability to pay them," while the plaintiff did "not submit any deposition testimony, affidavits, appraisals, account statements, or other evidence." *MFS/Sun Life Tr.-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 943 (S.D.N.Y. 1995), unlike here, followed a trial.

considered a bona fide purchaser." *Orozco-Prada*, 636 F. Supp. at 1543.

Accordingly, SHIP is not entitled to summary judgment DCL § 278(1) because material issues of fact exist as to (a) whether PPCO received, and SHIP and BAM gave, a "fair equivalent" in the PPCO Loan Transaction; and (b) whether SHIP and BAM were in "good faith." *See* __ *supra.* Moreover, the same issues of fact that exist as to "bad faith" also exist as to whether SHIP was also "without knowledge of the fraud."

I. <u>The Receiver's Unjust Enrichment Claim against SHIP Raises Triable Issues of Fact</u>.

"To state a claim for unjust enrichment under New York law, a plaintiff must allege that: '(1) 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.'" *In re Platinum-Beechwood Litig.*, 2019 WL 1570808, at *9 (S.D.N.Y. Apr. 11, 2019) (quoting *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004)). "Relief for unjust enrichment is available where 'circumstances create an equitable obligation running from the defendant to the plaintiff.'" *Id.* (quoting *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (2012)). To support a claim for unjust enrichment, the plaintiff's relationship with the defendant must not be "too attenuated." *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 513, 973 N.E.2d 743, 744 (2012). The Receiver's Eighteenth Claim for Relief meets this standard as detailed at FAC ¶¶ 237-258.

In the MTD Opinion, the Court denied SHIP's motion to dismiss the Receiver's unjust enrichment claim, concluding that the Receiver's "unjust enrichment claims are not completely duplicative of the contracts and torts claims, as they are framed as an alternative to the fraudulent conveyance claims," and that "the FAC adequately pleads how BCLIC, WNIC, and SHIP may have been enriched through the December 2015 and March 2016 conveyance transactions." *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *31-32.

Nevertheless, SHIP seeks summary judgment dismissing the Receiver's unjust enrichment

claim, challenging each of the three required elements of a claim for unjust enrichment. SHIP also argues that (a) the relationship between PPCO and SHIP was "too attenuated" to support the Receiver's unjust enrichment claim, and (b) the Receiver's claim is barred by the doctrine of *in pari delicto*. SHIP MOL 37 Each of SHIP's arguments raises issues of fact that cannot be decided on a motion for summary judgment and so SHIP's motion should be denied.

SHIP initially argues that it is entitled to summary judgment that it was not enriched by the PPCO Loan Transaction because it has not yet been repaid on the secured note it received, which SHIP claims is secured by all of PPCO's and the PPCO Subsidiaries' assets. SHIP MOL 36 However, as explained above, SHIP was enriched because (a) it improved its position from (i) holding participations in at least $1.675 million of worthless notes issued by Desert Hawk and in at least $840,000 in worthless notes issued by LC Energy, and owning millions of dollars of overvalued notes issued by Northstar, to (ii) owning notes issued by PPCO which SHIP claims are guaranteed by all of PPCO's and the PPCO Subsidiaries' assets and secured by first liens in all of PPCO's and the PPCO Subsidiaries' assets, and (b) based upon the values of what was exchanged in the transaction, SHIP was in fact unjustly enriched by those transactions. SHIP MOL 36

In other words, SHIP benefitted from the PPCO Loan Transaction because the transaction improved SHIP's position from holding interests in unrated and distressed assets, to holding a first priority secured lien on all of PPCO's assets and in all of the PPCO Subsidiaries' assets in an amount higher than the value of those assets. SOF 226 SHIP also benefitted from the transaction because it avoided the expenses and losses that it otherwise would have sustained in those transactions. *E.g.*, *Pacwest, Ltd. v. R.T.C.*, 1996 WL 325647, at *3 (S.D.N.Y. June 11, 1996) ("Unjust enrichment may occur not only where a person 'receives money or property, but also where he otherwise receives a benefit. He receives a benefit where his debt is satisfied or where

he is saved expense or loss.'"), *aff'd sub nom. PacWest, Ltd. v. Resolution Tr. Corp.*, 108 F.3d 1370 (2d Cir. 1997); *Blue Cross of Cent. New York, Inc. v. Wheeler*, 93 A.D.2d 995, 996, 461 N.Y.S.2d 624, 626 (4th Dep't 1983) ("A person may be unjustly enriched not only where he receives money or property, but also where he otherwise receives a benefit. He receives a benefit where his debt is satisfied or where he is saved expense or loss").[31] Further, although SHIP argues that it has not yet been paid on the notes issued to it by PPCO, whether the defendant was enriched at the expense of the plaintiff is determined at the time of the transfer, not years later. *Hamlet at Willow Creek Dev. Co., LLC v. Ne. Land Dev. Corp.*, 64 A.D.3d 85, 115-16, 878 N.Y.S.2d 97, 119 (2009) In any event, payment of SHIP's loans to PPCO has been delayed in part because PPCO is in receivership, and also it is not yet known whether SHIP will be paid in full. SOF, 19-24 Issues fact exist as to whether SHIP was enriched by the PPCO Loan Transaction.

SHIP next argues that PPCO "clearly benefitted from the transactions." SHIP MOL 36-37 However, the Prager Report demonstrates that, rather than benefitting from the PPCO Loan Transaction, PPCO sustained more than $18 million in damages as a result of those transactions. SOF 226 Indeed, at the time of the PPCO Loan Transaction, Nordlicht admitted to Feuer that "having all of Platinum's assets serve as collateral for the loans [in the PPCO Loan Transaction] was detrimental to Platinum at that time." SOF 156 At a *minimum*, this raises issues of fact as to whether PPCO and the other PPCO Funds were disadvantaged by the PPCO Loan Transaction, precluding summary judgment in SHIP's favor.

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[31] Indeed, "[a] person may be liable for unjust enrichment even though the benefit received as a result of unjust enrichment did not allow that person to turn a profit." *Grynberg v. ENI S.p.A.*, 2009 WL 2482181, at *5 (S.D.N.Y. Aug. 13, 2009) (*citing U.S. E. Telecommunications, Inc. v. US W. Commc'ns Servs., Inc.*, 38 F.3d 1289, 1299 (2d Cir. 1994) (affirming jury verdict on unjust enrichment claim, reasoning that, while Defendant lost money, evidence was presented that completion of the project was essential to Defendant's ability to "receive future job offers.")).

SHIP also argues that "no injustice exists requiring restitution" because, according to SHIP, Prager's analysis and Nordlicht's own assessment of the transaction at the time of the transactions are wrong. Instead, according to SHIP the PPCO Loan Transaction involved a "fair exchange" that later "became unfair" to SHIP. SHIP MOL 37. Because SHIP again asks the Court to decide disputed issues of fact (whether there was a fair exchange of value), SHIP's request for summary judgment on this issue is without merit.

SHIP also argues against PPCO's unjust enrichment claim because "'the connection between the parties is too attenuated'" "because there is no evidence that SHIP has any direct dealings with any of the Receivership Entities." SHIP MOL 37 (citations omitted). To the contrary however, "'New York law does not require an unjust enrichment plaintiff to plead "direct dealing," or an "actual, substantive relationship" with the defendant,' or that the plaintiff "'be in privity with the defendant to state a claim for unjust enrichment'" – only that the plaintiff's relationship with the defendant "'not [be] too 'attenuated.'" *McCracken v. Verisma Sys., Inc.*, 131 F. Supp. 3d 38, 51 (W.D.N.Y. 2015) (quoting *Waldman v. New Chapter, Inc.*, 714 F.Supp.2d 398, 403 (E.D.N.Y.2010) (quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215–16, 831 N.Y.S.2d 760, 863 N.E.2d 1012 (2007)))). *See also Amusement Indus., Inc. v. Midland Ave. Assocs., LLC*, 820 F. Supp. 2d 510, 537 (S.D.N.Y. 2011) ("'New York law does not require an unjust enrichment plaintiff to plead "direct dealing," or an "actual, substantive relationship" with the defendant. It merely requires that the plaintiff's relationship with a defendant not be 'too attenuated."'") (quoting *Waldman*, 714 F.Supp.2d at 403 (quoting Sperry, 8 N.Y.3d at 215–16, 831 N.Y.S.2d 760, 863 N.E.2d 1012)))).

Even if such a requirement did exist, SHIP's relationship with PPCO (and, through PPCO, the PPCO Feeder Funds and PPCO Blocker Funds) is not "too attenuated" because: (i) SHIP

assigned assets to PPCO, (ii) SHIP received funds as a result of those assignments, and (iii) SHIP purportedly obtained a blanket lien in all of PPCO's assets and the PPCO Subsidiaries' assets in the PPCO Loan Transaction. This is sufficient to support a claim for unjust enrichment. *See Onewest Bank, FSB v. Spencer*, 145 A.D.3d 1488, 1490, 44 N.Y.S.3d 640, 643 (4th Dep't 2016) ("Contrary to defendant's contention, her relationship to plaintiff is not too attenuated to sustain an unjust enrichment cause of action inasmuch as she is an owner of the property on which plaintiff holds a mortgage.") (citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182-83, 919 N.Y.S.2d 465, 944 N.E.2d 1104 (2011)).

Importantly, SHIP's argument ignores the fact that it dealt with PPCO through its agent, Beechwood. As set forth in the Agency Motion, it is well settled, under New York law, that an agent's actions and knowledge are imputed to the agent's principal, and that an agent's (here, Beechwood's) dealings on behalf of its principal (here, SHIP) with the plaintiff (here, PPCO) are actions of the principal for purposes of determining whether the relationship between the principal and the plaintiff is "too attenuated" to support a claim for unjust enrichment. *See McCracken*, 131 F. Supp. 3d at 51 Because Beechwood, acting as SHIP's agent, dealt directly with PPCO in the PPCO Loan Transaction, the relationship between SHIP and the PPCO Funds was plainly not "too attenuated" to support the Receiver's unjust enrichment claim against SHIP. Not surprisingly, the authorities on which SHIP relies are wholly inapposite because, unlike here, none of SHIP cases involved a defendant that had direct dealings with the plaintiff through an agent. Accordingly, the Court should reject SHIP's argument.

Finally, SHIP argues that the Receiver's unjust enrichment claim should be dismissed under the doctrine of *in pari delicto* because, according to SHIP, in paragraph 2 of the FAC, "[t]he 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." (SHIP MOL 37-38) SHIP's argument is misguided because this Court has already held that application of the doctrine of *in pari delicto* is not to be addressed on a global basis, but instead "with respect to specific instances of alleged misconduct," *see In re PlatinumBeechwood Litig.*, 2019 WL 2569653 (S.D.N.Y. Jun. 21, 2019) ("the Court holds that the applicability of the adverse interest exception must be evaluated with respect to specific instances of alleged misconduct"), and applies to the Receiver's claims "only to the extent that a portion of a given claim is premised on the overvaluation of PPCO's assets." *See In re Platinum Beechwood Litig.*, 2019 WL 4934967, at *28. Thus, *in pari delicto* does not bar claims – such as the Receiver's unjust enrichment claim against SHIP, which is based upon the PPCO Loan Transaction – that "can be viewed only as 'fraud … committed against [the PPCO Funds] rather on its behalf" or in which PPCO did not receive adequate consideration for assets it transferred. *In re Platinum-Beechwood Litig.*, 2019 WL 2569653, at *7 (S.D.N.Y. June 21, 2019), *reconsideration denied*, 400 F. Supp. 3d 2 (S.D.N.Y. 2019). ("For example, the alleged diversion of the Renaissance Sale proceeds to the Preferred Investors can be viewed only as "fraud ... committed against [PPVA] rather than on its behalf." …. The same is true of the Nordlicht Side Letter, which allegedly obligated PPVA - for no consideration - to apply proceeds from the sale of one of its assets toward a debt owed to BAM."). Importantly, paragraph 2 of the FAC does *not* allege – nor does SHIP even suggest – that the PPCO Funds perpetrated a fraud on the investing public through the PPCO Loan Transaction, and the FAC expressly alleges that the PPCO Loan Transaction enriched SHIP at the expense of the PPCO Funds. (FAC ¶¶ 237-258)[32] Because SHIP benefitted from the PPCO

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[32] Indeed, contrary to what SHIP asserts, paragraph 2 of SHIP's FAC does not say when the "fraudulent scheme" referred to therein ended. (FAC ¶ 2)

Loan Transaction at the expense of the PPCO Funds, those transactions involved "fraud ... committed against [the PPCO Funds] rather than on [their] behalf." Accordingly, SHIP is not entitled to summary judgment on the Receiver's unjust enrichment claim.

J. <u>SHIP Is Not Entitled to Summary Judgment on the Declaratory Judgment Claim</u>

SHIP seeks summary judgment dismissing the Receiver's claim for a declaratory judgment that its liens do not attach to the assets of the PPCO Subsidiaries. However, there is no evidence before this Court establishing that such liens were granted pursuant to proper corporate authority.

Nordlicht controlled the PPCO Funds with little to no oversight. SOF 55-57 This allowed him to compel the PPCO Subsidiaries to execute both the December 2015 Security Agreement and the Ratification Agreement, whereby they each pledged substantially all of their assets to secure the obligations incurred by the Master Fund in connection with the December 2015 loan transaction. Yet, there is no record before this Court establishing that Nordlicht bound each PPCO Subsidiary in accordance with proper corporate formality and in concert with his fiduciary duties. Indeed, there is no record before this Court that any of the loan proceeds were intended to, or in fact were, transferred to any of the PPCO Subsidiaries.

Complicating the issue, when BAM and the Master Fund amended and restated the December 2015 Security Agreement, none of the PPCO Subsidiaries executed the amendment. While the Amended Security Agreement provides that the liens and security interests granted under the December 2015 Security Agreement "shall continue in full force and effect during the term of this Master Security Agreement" the ambiguity created by these contrary provisions necessitates the trier of fact to look beyond the four corners of the document in order to discern the intent of the parties. Accordingly, this issue is not ripe for summary judgment.

<u>POINT III</u>

<u>THE BEECHWOOD MOTION SHOULD BE DENIED</u>

A. <u>The Beechwood Motion Should Be Denied as Procedurally Defective</u>.

The Beechwood Defendants were required to submit "a separate, short and concise statement, in numbered paragraph, of the material facts as to which [they] contend[ed] there is no genuine issue to be tried." L.R. 56.1. That rule further provides that "[f]ailure to submit such a statement may constitute grounds for denial of the motion." Moreover, Rule 2(a) of Your Honor's Individual Rules of Practice requires that "Citations to the record in any memorandum of law filed in connection with a motion for summary judgment must include a citation to the party's Local Civil Rule 56.1 Statement of Material Fact or opposition thereto."

The Beechwood Defendants' failure to comply with these rules enables them to play a game of "hide the ball," in which the Receiver has been deprived of notice of the facts upon which the Beechwood Defendants rely. Moreover, although the Beechwood Defendants purportedly rely on the SHIP MOL (but not SHIP Rule 56.1 Statement), the facts underlying some issues raised by SHIP (such as BAM Administrative's "good faith," provision of a "fair equivalent" and "knowledge") differ for the Beechwood Defendants. Consequently the Court should deny the Beechwood Motion. *Law v. Corizon Med. Servs.*, 2014 WL 2111675, at *1 n. 1 (S.D.N.Y. May 12, 2014). Alternatively, the Beechwood Defendants should not be entitled dispute any facts in the Receiver's Rule 56.1 Statement on reply. *Sec. & Exch. Comm'n v. Afriyie*, 2018 WL 6991097 at *1 n. 1 (S.D.N.Y. Nov. 26, 2018), *aff'd*, 788 F. App'x 59 (2d Cir. 2019).

B. <u>The Beechwood Entities' Request for Summary Judgment on the Receiver's Aiding and Abetting Claims Should Be Denied.</u>

Because the Beechwood Defendants failed to file a Rule 56.1 Statement in support of the Motion, there are no facts supporting their request for dismissal of the Receiver's aiding and abetting claims, and this Court must accept as true all of the facts in the FAC. This Court previously denied a motion to dismiss the same claims. *In re Platinum-Beechwood Litig.*, 2019

WL 4934967, at *32-33.[33] Since the Beechwood Defendants failed to submit any additional facts, the Court's prior ruling is law of the case and should still apply. *In re Refco Inc. Sec. Litig.*, 2013 WL 2526661, at *2 (S.D.N.Y. June 6, 2013) ("These holdings remain law of the case, and the Court does not disturb its earlier rulings ...."); *Grocery Haulers, Inc. v. C & S Wholesale Grocers, Inc.*, 2013 WL 342693, at *3 (S.D.N.Y. Jan. 29, 2013); *F.T.C. v. Metro. Commc'ns Corp.*, 977 F. Supp. 295, 297 (S.D.N.Y. 1997).

Regardless, each of the elements of a claim for aiding and abetting breach of fiduciary duty is met. The Beechwood Defendants knew that Nordlicht was CIO of PPCO Portfolio Manager and therefore owed fiduciary duties to PPCO. SOF 48-57 They also must have known that Nordlicht was conflicted because, as noted above, through family members, he held a substantial equity interest in BAM, BAM II, BBL (which owned 100% of BBIL, which in turn owned 100% of BBIHL) and BRe Holdings (which owned 100% of BRe) and he executed documents on behalf of Beechwood (including the BAM IMA Side Letter) on behalf of Beechwood SOF 110, and Feuer agreed at his deposition that at the time of the PPCO Loan Transaction, Nordlicht expressed to Feuer that "having all of Platinum's assets serve as collateral for the loans [in the PPCO Loan Transaction] was detrimental to Platinum at that time." SOF 156 Since the PPCO Loan Transaction resulted in all of PPCO's assets serving as collateral for a $69 million loan, this necessarily disadvantaged PPCO. Finally, Beechwood Defendants substantially assisted in the breaches of fiduciary duties in connection with the PPCO Loan Transaction because they were parties to those transactions: (i) BAM Administrative was the agent for the loans and assigned Desert Hawk Notes; (ii) BBIL and BRe were assigned loans in Desert Hawk, and (3) PPCO's

[33] Because the Beechwood Defendants do not challenge any of these elements, they concede the FAC states a claim for aiding and abetting fraud, and aiding and abetting breach of fiduciary duty.

records reflect that on July 7, 2014, PPCO engaged in a short sale of $3,335,000 of Black Elk bonds on July 7, 2014. SOF 126 Finally, aiding and abetting is self-evident, since Beechwood was integrally involved in negotiating, structuring and implementing the transactions. SOF Section II. 09

The Beechwood Defendants argue that "the *Wagoner* rule and the doctrine of *in pari delicto* bar the Receiver's claims relating to the alleged overvaluation of the PPCO's net asset value,…." (Beechwood MOL 2 (quoting *In re Platinum-Beechwood Litig.*, 18-12018 (JSR), 2019 WL 4934967, at *27)) Because the Beechwood Defendants do not further specify any facts as a basis for this assertion, their statement adds nothing.

Relying on *Geo-Grp. Commc'ns, Inc. v. Chopra*, 2018 WL 3632498, at *8 (S.D.N.Y. July 30, 2018), the Beechwood Defendants assert that "New York courts appear to have rejected the notion that an aiding and abetting fraudulent conveyance claim is viable in analogous circumstances." Beechwood MOL 2. *Geo-Grp.*, however, addressed the circumstances in which a party may be held liable under the DCL, *not* whether a party can be held liable for an otherwise factually supported aiding and abetting fraud or breach of fiduciary duty claim. *Geo-Grp. Commc'ns, Inc.*, 2018 WL 3632498, at *8. *See also Amusement Indus., Inc. v. Midland Ave. Assocs., LLC*, 820 F. Supp. 2d 510, 532-33 (S.D.N.Y. 2011) (confirming that issue relates to existence of claim under DCL). Because the Receiver does not assert a claim for aiding and abetting fraudulent conveyance, and instead asserts claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty, *Geo-Grp.* is inapposite. And, unlike *Geo-Grp.*, here BBIL and BRe each actually received transfers, making *Geo-Grp.* inapplicable in any event. SOF 193

The Beechwood Defendants further argue, without authority or facts, that "there is no evidence that BBL, which is simply a holding company, participated in the transactions, let alone

proximately caused a loss to PPCO," "[s]o the claims against that entity must be dismissed in any case." Beechwood MOL 2-3. Even assuming that BBL is a holding company, that does not preclude its liability on aiding and abetting claims particularly where, as here, all of the Beechwood Entities were run by the same individuals. SOF 34

Next, the Beechwood Defendants make the carefully worded and unsupported statement that "the Beechwood Entities were not involved in the purchase or sale of any Black Elk Bonds from the PPCO Master Fund, and they certainly were not the proximate cause of any injury suffered by the PPCO Master Fund in connection with any assets it purchased from Platinum Partners Value Arbitrage Fund L.P." (Beechwood MOL 3) Yet, PPCO's records reflect that on July 7, 2014, PPCO borrowed from PPBE $3,335,000 in Black Elk bonds to sell them short to Beechwood on July 7, 2014. SOF 126 PPCO's financial statements also refer to that transaction, but did not identify Beechwood by name, instead stating that "[i]n July 2014, the Company borrowed BEEOO corporate bonds with a face value of $3,335,000 from PPBE, an affiliate of the Company [referring to Beechwood], and sold them to an investor in the fund [referring to Beechwood] for a cash payment of $3,351,327, which included $49,678 of accrued interest, equivalent to 99 percent of par." SOF 127

C. <u>**BAM Administrative Is Not Entitled to Summary Judgment on the Receiver's Fraudulent Conveyance Claims.**</u>

The Beechwood Motion makes a one-sentence request for summary judgment dismissing the Receiver's fraudulent conveyance claims purporting to incorporate by reference "Section I(A), I(B)(2), I(C), I(D), of the memorandum of law filed in support of [SHIP's] motion for summary judgment" (but not SHIP's Rule 56.1 Statement). Beechwood MOL 3. However, this would require a ruling that it was a "purchaser for fair consideration," *i.e.*, that BAM Administrative (and all of the parties for which it was and is agent) were in "good faith" and gave a "fair equivalent,"

and that PPCO was "without knowledge of the fraud." Since BAM Administrative has failed to submit a Statement of Undisputed Facts or any underlying factual material setting forth the facts underlying these matters, Rule 56.1 requires denial of BAM Administrative's request for summary judgment on these issues. Moreover, BAM Administrative should not be permitted to file such a statement on reply. Accordingly, the Court should accept the Receiver's facts on these issues as undisputed, including: (i) at all relevant times, the sole managing member of BAM Administrative was BAM and Dhruv Narain was an "authorized Signatory" of BAM Administrative. As a result, BAM Administrative knew everything BAM knew and was in bad faith if and only if BAM Administrative was in bad faith. For the reasons set forth above, BAM had knowledge of the fraud and was not in good faith. Consequently, BAM Administrative likewise was not in good faith. SOF 177, 185, 198-201; (ii) at all relevant times, pursuant to the NPA, BAM Administrative served as agent for the lenders under "Secured Term Notes" issued by PPCO to SHIP and the four Beechwood Reinsurance Trusts having an original principal balance of approximately $69 million. SOF 194; (iii) As set forth in the Prager Report, PPCO received $18.2 million less than the $69.2 million in liens that were purportedly transferred from PPCO to BAM Administrative, as agent; SOF 226-227; (iv) Pursuant to the MSA and the A&R MSA, BAM Administrative, as agent, was purportedly granted liens against all of PPCO's assets. SOF 161-191; and (v) BAM Administrative has submitted a Proof of Claim in the Receivership seeking to enforce those liens. SOF 25 (BAM Administrative Proof of Claim).

For the reasons set forth above, BAM Administrative is not entitled to summary judgment.

POINT IV

THE PBIH MOTION SHOULD BE DENIED.

The Receiver asserts claims against PBIH for aiding and abetting breach of fiduciary duty and aiding and abetting fraud. PBIH has moved for summary judgment dismissing those claims.

Both claims raise disputed factual issues. Consequently, the PBIH Motion should be denied.

A. Issues of Material Fact Exist Regarding the Underlying Violations.

The threshold issue for an aiding and abetting claim is whether there was an underlying violation. Contrary to what PBIH contends, Nordlicht and PPCO Portfolio Manager owed fiduciary duties to the PPCO Funds, and breached those duties. They also committed fraud.

"'In determining whether a fiduciary duty exists, the focus is on whether one person has reposed trust or confidence in another and whether the second person accepts the trust and confidence and thereby gains a resulting superiority or influence over the first.'" *In re PlatinumBeechwood Litig.*, 2019 WL 1570808, at *8 (S.D.N.Y. Apr. 11, 2019) (quoting *Independent Asset Mgmt. LLC v. Zanger*, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008)). "Investment advisers, fund managers and others in control of investment funds … owe fiduciary duties to the funds, much as general partners owe fiduciary duties to limited partners." *In re Soundview Elite Ltd.*, 594 B.R. 108, 126-27 (Bankr. S.D.N.Y. 2018).

PPCO Portfolio Manager entered into portfolio management agreements with each of the PPCO Funds, under which PPCO Portfolio Manager, and Nordlicht as its chairman and the CIO of the PPCO Funds, by which the PPCO Funds gave them control over the investments by providing that they had the power to "allocate, trade, invest, re-invest and otherwise manage the Assets …," "possess, purchase, sell, transfer," "make all decisions relating to the manner, method and timing of investment transactions." SOF 48-57 Consequently, PPCO Portfolio Manager and Nordlicht owed fiduciary duties to the PPCO Funds.

Nordlicht had obvious conflicts of interest in causing the PPCO Funds to enter into transactions with Beechwood because, through his family members (including his wife and 9, 11, 15, 17, 20 and 22 year old children), he had a significant stake in Beechwood, including a stake in BBL, which owned 100% of BBI, which, in turn owned 100% of BBIHL, which is the same

company as PBIH. SOF 33, II.F.1

PBIH, however, argues that there were legitimate business purposes to the transactions and, as a result, Nordlicht was acting in PPCO's best interests when he caused PPCO to enter into those transactions. PBIH MOL 19 However, Nordlicht's conflict of interest raises issue of fact as to whether he breached his fiduciary duties to the PPCO Funds by causing PPCO to enter into the PPCO Loan Transaction, in which, according to the Prager Report, PPCO issued $69.2 million of secured term notes in favor of a group of lenders so that PPCO could purchase debt in three companies worth $18.2 million less than the full amount of the notes issued, when Nordlicht knew that the issuers could not even make the interest payments on those notes, precluding reliance on the business judgment rule. SOF, 225 *See Serio v. Rhulen*, 24 A.D.3d 1092, 1094, 806 N.Y.S.2d 283 (2005); *People by Attorney Gen. of State v. Lutheran Care Network, Inc.*, 167 A.D.3d 1281, 1286, 92 N.Y.S.3d 154, 159 (N.Y. App. Div. 2018); *Amfesco Indus., Inc. v. Greenblatt*, 172 A.D.2d 261, 264, 568 N.Y.S.2d 593, 596 (1st Dep't 1991). *See also*, footnote 6, *supra*.

PBIH claims that the LPA and PPMs "expressly disclosed and authorized 'conflicts of interests' arising from transactions made by and between the Platinum-related funds, including PPVA." PBIH MOL at 19. Yet, those documents did not disclose Nordlicht's conflict of interest arising from his interests in Beechwood, thereby rendering the disclosures immaterial.

To establish liability for aiding and abetting fraud under New York law, a plaintiff must show (1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *In re Platinum-Beechwood Litig.,* 2019 WL 1570808, at *9 (S.D.N.Y. Apr. 11, 2019) (quoting *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014)). Compelling evidence of fraud includes, in addition to saddling

PPCO with the liens, overvaluations, and entry into the PPCO Loan Transaction.[34]

B. Issues of Fact Exist as to Whether PBIH Substantially Assisted in the Breaches of Fiduciary Duty.

PBIH also asserts that it is entitled to summary judgment that PBIH did not substantially assist in the breaches of fiduciary duty. PBIH is wrong.

A defendant provides substantial assistance when it affirmatively assists, helps conceal, or by virtue of failing to act when required to do so, enables primary violations to occur. *See In re Platinum-Beechwood Litig.*, 2019 WL 1570808 at *8-9 (stating the elements for aiding and abetting fraud, and aiding and abetting breach of fiduciary duty). To satisfy this element, the Receiver need only adduce evidence that PBIH contributed to the perpetration of the underlying violations, not that PBIH dealt directly with Nordlicht. *See e.g., JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 257 (S.D.N.Y. 2005); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 652 F. Supp. 2d 495, 511 (S.D.N.Y. 2009). *See also In re Platinum-Beechwood Litig.,* 2019 WL 4934967, at *33 (S.D.N.Y. Oct. 7, 2019).

On this Motion, the Receiver is not required to "prove" her case. Instead, PBIH must show there is "no genuine dispute as to any material fact on this issue. Fed. R. Civ. P. 56(a). The record developed during discovery confirms that there are issues of fact on whether BBIHL substantially assisted in Nordlicht's and PPCO Portfolio Manager's breaches of fiduciary duty by causing PPCO to enter into the PPCO Loan Transaction, in which Nordlicht caused PPCO to transfer $18.2 million of value to PPCO, SOF 221-222, including the March 2016 portion of those transactions in which, as confirmed by the Prager Report, Nordlicht caused PPCO to issue secured term notes,

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[34] It is inconsequential that PPCO's 30(b)(6) witness testified that SHIP was the "mastermind" behind the PPCO Loan Transaction, or that Steinberg testified that the PPCO Loan transaction was executed in good faith and for a valid business purpose. Because the PPCO Loan Transaction was detrimental to PPCO, whether Nordlicht breached his fiduciary duties by consummating the PPCO Loan Transaction raises a triable issue of fact.

secured by all of their assets, and $52.8 million of overpriced notes were paid to SHIP and certain Beechwood entities pursuant to payment direction letters and used to purchase secured term notes issued by Northstar. *Id.* PBIH substantially assisted in those transactions by, along with its affiliated Beechwood Entities, receiving $2,111,222.22 under a $2 million participation in Northstar notes held by SHIP.

PBIH does not deny that PPCO "directed SHIP and the CNO Trusts to distribute the funds flowing from the March NPA to 'BAM Administrative Services LLC, as Agent for each of the [March NPA] Lender, BRe WNIC 2013 LTC Primary, Beechwood Bermuda International Limited and Beechwood Bermuda Investment Holdings, Ltd, for its segregated accounts'" or that the funds were utilized "to purchase assignments of all right, title, and interest in the entirety of a $50 million Senior Secured Note." (PBIH MOL 7-8) Instead, it argues that the Receiver's "purported evidence does not prove … that BBIHL even participated in the March 2016 Transaction – much less substantially assisted in Nordlicht's or the Portfolio Manager's fraud or breach of fiduciary duties." PBIH MOL at 15-16

However, on or about December 21, 2015, BBIHL entered into a "Participation Agreement" with SHIP (the "**BBIHL-SHIP Participation Agreement**"), "for the benefit of its "BRE-SHIP account" in which SHIP sold a $2 million participation (the "**BBIHL-Northstar Participation**") to BBIHL in a $20,200,000.00 note issued by Northstar to SHIP designated as "No. 003." SOF 195 The BBIHL-SHIP Participation Agreement reflects that (a) it was executed by Feuer himself as an "Authorized Signatory" of BAM II, as "investment manager" of BBIHL, and (b) it was executed by Feuer as an "Authorized Signatory" of BAM, as "investment manager" of SHIP – which PBIH's 30(b)(6) witness testified was "unusual." SOF 195

Nor is there any legitimate question that the $2,111,222.22 payment was for PBIH's

participation in the Northstar notes. A statement issued by Wilmington Trust for December 2015 reflects the purchase of the BBIHL Northstar Participation for a "CASH DISBURSEMENT" of $2,050,666.67 on December 22, 2015, and reflects that, at the end of the month, the BBIHL Custody Account included "OTHER ASSETS" as of December 31, 2015" that included: "NORTHSTAR GOM HOLDINGS GROUP PARTICIPATION AGREEMENT BBIHL-SEG-COPY CUSIP 99Y800HG5." SOF 197

A Wilmington Trust Statement for the period from March 1, 2016 through March 31, 2016 (the "**March 2016 Wilmington Trust Statement**") confirms, in a section entitled "Activity Detail," BBIHL's transfer of the BBIHL Northstar Participation on March 25, 2016 and receipt of $2,111,222.22 by "CASH RECEIPT WIRE FROM BAM ADMINISTRATIVE SERVICES …," and, in the section of that statement entitled "Investment Detail" that, as of March 31, 2016, BBIHL no longer has any Northstar notes. SOF 197 Feuer is also reflected as the recipient of an email forwarding an "Available Cash Report" dated as of March 29, 2016, which referred to a payment of $2,111,222.22 to BBIHL, a payment of $10,767,233.33 to "BBIL Custody," and $8,233,766.67 to "BBIL SHIP," in a row entitled "Northstar Payment." SOF 197

In 2017, BBIHL changed its name to PBIH. SOF 32 Wilmington Trust, as trustee, held funds on behalf of PBIH, in a custody account at Wilmington Trust. SOF 197

PBIH claims that it merely played a "passive role … analogous to a bank." PBIH MOL 15. Yet, its role can hardly be viewed as passive, when viewed in the context of Beechwood's overall role in negotiating and structuring the deal, and execution of virtually all of the transaction documents for the March 2016 tranche of the PPCO Loan Transaction. (Reed Dec., Ex. I) *See also*, SOF 83 (Feuer testimony that Beechwood's people acted for all the entities "we were part of" and that they were "absolutely" taking care of our whole company.)

PBIH claims that, because "[t]he security interest resulting in the December 2015 Transaction was perfected by filing a UCC-1 financing statement," "had the March 2016 Transaction … not occurred, the blanket lien of which the Receiver complaint would still encumber the assets of PPCO and its subsidies in equal force." PBIH MOL 17 However, that argument fails because the March 2016 tranche of the PPCO Loan Transaction increased the amount of the debt purportedly secured by those liens by approximately $50 million.

Accordingly, PBIH's predecessor, BBIHL, substantially assisted the breaches.

C. Issues of Fact Exist as to Whether PBIH Has Actual Knowledge of the Breaches of Nordlicht's and PPCO Portfolio Manager's Breaches of Fiduciary Duty.

PBIH argues that the undisputed facts show that PBIH did not have "actual knowledge" of Nordlicht's and PPCO Portfolio Manager's underlying breaches of fiduciary duty and fraud. PBIH MOL 10-14 PBIH is wrong.

"A claim for aiding and abetting a breach of fiduciary duty requires, *inter alia*, that the defendant knowingly induced or participated in the breach." *In re Platinum-Beechwood Litig.*, 2019 WL 1570808, at *8 (S.D.N.Y. Apr. 11, 2019) (quoting *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014)). PBIH does not dispute that Feuer and Taylor served as directors of PBIH. Rather, PBIH contends that there is no evidence that they had "actual knowledge" of Nordlicht's primary breach to establish aider liability. The question before the Court on summary judgment is not whether the Receiver should prevail on this question, but whether there is a genuine dispute as to a material fact concerning BBIHL's "knowledge" of the underlying violation. *See In re Allou Distributors, Inc.*, 446 B.R. 32, 51 (Bankr. E.D.N.Y. 2011). Actual knowledge does not require that the Receiver produce PBIH's explicit acknowledgement of Nordlicht's breach of fiduciary duty, but instead such may be established by "identifying circumstances indicative of conscious behavior." PBIH Motion, citing *AHT Corp. v. BioShield Techs., Inc. (In re AHT Corp.)*, 292 B.R.

734, 746 (S.D.N.Y. 2003). *See also Silvercreek Mgt., Inc. v. Citigroup, Inc.*, 346 F. Supp. 3d 473, 487 (S.D.N.Y. 2018); *People ex rel. Cuomo v. Coventry First LLC*, 52 A.D.3d 345, 346 (1st Dep't 2008), *aff'd*, 13 NY3d 108 (2009). Thus, the Receiver is only required to adduce evidence supporting a reasonable inference of knowledge. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 652 F. Supp. 2d 495, 503 (S.D.N.Y. 2009).

This Court previously held that allegations that the Receiver pled "actual knowledge" against BAM Administrative, BRe, BBIL, BBIHL and BBL by alleging Nordlicht's conflict of interest in structuring those transactions and that the transactions were intended to benefit solely the defendants was sufficient to create an inference of knowledge. 2019 WL 4934967, at * 33. During discovery, the Receiver adduced evidence confirming that Feuer knew that Nordlicht was hopelessly conflicted in purporting to act on behalf of PPCO in dealings with the Beechwood Entities, by adducing evidence indicating that (a) Feuer knew that Nordlicht was the chief investment officer at Platinum SOF 57, and (b) Feuer knew that Nordlicht's wife and children were "owners" of the Beechwood Entities (which they were, through trusts). SOF 66, 69-70, 72-78 Feuer also knew that Platinum assets, including Northstar, were not paying interest SOF 225 and testified that the inability of a borrower to make interest payments can negatively impact valuation. SOF 225 Moreover, while Feuer testified that Nordlicht expressed to him that he understood that having all of Platinum's assets serve as collateral for the loans was detrimental to Platinum (SOF 156) by the conclusion of the March 2016 tranche of the PPCO Loan Transaction, PPCO had purported liens against all of its assets secured by $69 million in loans. Moreover, Druhv Narain was made aware, by either Feuer or Taylor, of ongoing discussions and the general idea to "reduce the concentration … in entities related to Platinum," and that included "SHIP's investments." SOF 154 This is sufficient to raise issues of fact as to Feuer's actual knowledge.

PBIH, however, argues that "neither Feuer nor Taylor acquired knowledge about the March 2016 tranche within the scope of their agency with BBIHL – especially as Feuer admitted that he did not even know what BBIHL was or how BBIHL fit into the Beechwood structure, if at all," and that only the knowledge of the third director, David Lessing, who PBIH claims was in charge of BBIHL's "retail business." PBIH MOL 12, 15

As noted, Feuer executed the BBIHL-SHIP Participation Agreement SOF 34 and is reflected as the recipient of an email forwarding an "Available Cash Report" dated as of March 29, 2016, which referred to $2,111,222.22 to BBIHL as a "Northstar Payment." SOF 195-197 Consequently, even if, as PBIH claims, Lessing was in charge of BBIH's "retail business," sufficient issues of fact exist as to whether Feuer was responsible for the Northstar transaction.

The record belies PBIH's assertion that Feuer and Taylor were uninvolved in BBIH's business and that Feuer never heard of BBIH and instead shows that: (i) Feuer and Taylor were two of BBIH's three directors from December 17, 2014 until June 30, 2016. SOF 34; (ii) during that time, they executed written resolutions regarding BBIHL and participated board meetings. SOF 34; (iii) Feuer and Taylor executed a "Custody Agreement" for PPCO for the BBIH Segregated Account. SOF 34 Feuer, Taylor and several other individuals each had joint signing authority for BBIH's U.S. operating account and the segregated accounts. SOF 34

Accordingly, PBIH is not entitled to summary judgment on this element.

D. The Receiver's Claims Are Not Barred by *In Pari Delicto* or the *Wagoner* Rule.

PBIH also incorrectly argues that the Receiver's claims are barred by *in pari delicto* and the *Wagoner* rule based on an assertion that, as a matter of law, claiming that "the Receiver's own valuation expert admits that PPCO benefitted from the March 2016 Transaction." PBIH MOL 20-24 The Prager Report shows that PPCO lost between $5.8 million and $2.3 million in the March 2016 tranche of the PPCO Loan Transaction, with a midpoint of $4.0 million. SOF 226-227 This

alone shows that PPCO did not benefit from this tranche of the transaction.

PBIH attempts to create confusion by including a table from the Prager Report showing a lower deficit after the December 2015 tranche of the transactions than after the March 2016 tranche, and claims "[t]his table shows the March 2016 Transaction dramatically improved PPCO's entire financial condition" because the "deficit" under the balance sheet, adequate capitalization and CCAR tests decreased. PBIH MOL 23 Even though three months passed between December 2015 and March 2016, PBIH fails to point out that changes in valuations or in PPCO's portfolio between December 2015 and March 2016 caused these changed. For this reason and because PPCO fails to mention the increase of $52.8 million in PPCO's liabilities of $52.8 million as a result of the secured notes issued by PPCO, PBIH's argument is baseless. PBIH also attempts to justify its position by claiming that the impact on the Agera pledge "release[d] a guaranty on PPCO's most valuable asset" PBIH MOL 23-24, but fails to point out that this factor is already taken into account in Prager's analysis of the effect of the March 2016 tranche of the transaction. Accordingly, issues of fact exist as to whether the "adverse interest" doctrine applies.

CONCLUSION

For all the reasons set forth herein, this Court should deny the Motions.

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Respectfully submitted,

OTTERBOURG P.C.

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