**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

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

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The Receiver hereby respectfully replies in further support of her motion for partial summary judgment against SHIP on the issues of agency and imputation, DN 490 (the "**Motion**").[1]

## PRELIMINARY STATEMENT

The Receiver has previously established her entitlement to a finding that as a matter of law, pursuant to the IMAs, the Beechwood Advisers were SHIP's agents in the PPCO Loan Transaction. *See* PPCO Agency MOL Point I. A request for a ruling on the narrow issue of agency at this juncture is not uncommon: a substantial number of cases hold that where a contract unambiguously establishes a principal-agent relationship, courts should defer to the parties' chosen legal relationship unless certain limited circumstances are present, and they are absent here.

Because it cannot avoid the express language of the IMAs, to survive summary judgment, SHIP manufactures factual issues where none exist. However, try as it may, SHIP cannot shoehorn itself into the exceedingly narrow legal exceptions to governing jurisprudence that mandate the enforcement of parties' agreed upon agent-principal relationships. Of particular note is SHIP's attempt to claim that the Receiver has not established Beechwood's knowledge of the fraudulent nature of the transaction, when SHIP itself made an identical claim in its own complaint, a judicial admission of the same. The reality, already established by the Receiver's previous summary judgment filings, is as follows:

- While the IMAs granted the Beechwood Advisors discretion in acting for SHIP, ultimately, SHIP was in control. Indeed, according to Beechwood, it would *always* follow its "clients' wishes." That degree of control retained by SHIP over the Beechwood

[1] Capitalized terms not defined in this Reply shall have the meanings ascribed to them in the: (i) MOL in Support of the Receiver's Motion, DN 493, ("**PPCO Agency MOL**"); (ii) Receiver's Rule 56.1 Statement, DN 495, ("**PPCO Agency SOF**"); (iii) Weinick Dec. in Support of Receiver's Motion, DN 497; (iv) Receiver's Omnibus MOL in Opposition to Defendants' Motions, DN 508, ("**PPCO Opp.**"); (vi) Weinick Dec. in Opposition to Defendants' Motions, DN 504; (vii) Rogers Dec. in Opposition to Defendants' Motions, DN 509; (viii) Receiver's Counterstatement of Facts in Opposition to Defendants' Motions, DN 505, ("**PPCO CSOF**"); and (ix) Receiver's Response to SHIP's 56.1 Statement, DN 507, all of which upon the Receiver relies.

Advisers is entirely consistent with the standards for a finding of agency. *See* PPCO Agency SOF 26-29, 40-41; PPCO CSOF 81, 132(i)(b).

- Although sufficiently set forth in the Receiver's Motion, Beechwood was more than aware of the fraudulent nature of the transaction. It knew of Platinum's dire financial situation, it knew how liens and bad assets would exacerbate that status, it knew of Nordlicht's conflicts, and it certainly knew of its own close relationship with Platinum. While that knowledge is imputable to SHIP, and the inquiry should end there, SHIP itself was told, prior to the transaction, that Platinum was hurting financially, and it knew (or readily could have known if its CEO had not quashed recommended due diligence) of the close relationship between Beechwood and Platinum (close relationships being, according to SHIP's own expert, a hallmark of fraudulent transactions).

- The adverse interest exception is unavailable to SHIP because this exception is exceedingly narrow and may only be invoked when the agent completely and totally disregards its principal's interests. To use SHIP's word, even a "peppercorn" of benefit obtained by SHIP will render the exception unavailable. Here, the undisputed testimony supports the substantial (more than a peppercorn) benefits SHIP received in the PPCO Loan Transaction: (i) improvement of its RBC rating to avoid regulatory rehabilitation (PPCO CSOF 146-54); (ii) ridding itself of non-performing assets (PPCO CSOF 164-209) and (iii) obtaining liens on assets worth far more than the debt it was allegedly extending in the transaction. *Id.* Moreover, a transaction undertaken consistent with the principal's directives (as Beechwood understood SHIP to have provided) can hardly be found to be adverse to the principal's interests.

- SHIP ratified the PPCO Loan Transaction with sufficient knowledge of the fraudulent nature of the transaction (*see* previous bullet point). It did so by seeking to assert and enforce the very claims and liens it alleges were procured by fraud, and by allowing the payment of an $11 million performance fee to Beechwood, the very party it claims acted adversely to it. *See* PPCO Agency SOF 81-91; PPCO CSOF 238.

Recognizing courts' general reluctance to recast the legal relationship chosen by contractual counterparties, and the absence of facts to allow this Court to ignore the principal-agent relationship SHIP bound itself to in the IMAs, SHIP proceeds to argue that this Court may not conclude that the Beechwood Advisers were its agents until the Receiver establishes the precise knowledge and actions the Receiver seeks to impute to SHIP. However, the knowledge and actions attributable to SHIP are issues to be addressed at trial, not at the summary judgment stage. Nonetheless, even if this Court determines that this issue is somehow determinative of whether an agency relationship exists between SHIP and the Beechwood Advisers, the record is clear, and no

trial is needed to demonstrate, that the Beechwood Advisers possessed material and actionable knowledge upon which the fraudulent nature of the PPCO Loan Transaction was built. *To wit*: (i) Beechwood's CEO had been told by Platinum's CIO that liens on PPCO's assets were placing a "stranglehold" on the funds and were otherwise "detrimental," yet Beechwood consummated the PPCO Loan Transaction which placed liens on substantially all of the PPCO Funds and their subsidiaries' assets (PPCO CSOF 156) and (ii) Beechwood knew that the assets it was offloading on SHIP's behalf onto PPCO were nonperforming, yet SHIP received full value for these same assets (PPCO CSOF 220-25) despite the fact that Beechwood's CEO conceded that the inability of a borrower to make interest payments (as was the case here), can negatively impact value. *Id.*

In addition to the forgoing, the record establishes that SHIP too had direct knowledge of the fraud: (a) SHIP had been told by Beechwood that PPCO was a "motivated seller who much needs the money" (PPCO CSOF 155); (b) SHIP's CEO took active measures (for which he was later terminated) to quash diligence that would have revealed the Beechwood-Platinum Relationship (PPCO CSOF 103-05, 212-16); and (c) SHIP was well aware of its Platinum-related assets and that they were not performing -- it needed to rid itself of those assets to improve its RBC rating so as to avoid a regulatory takeover (PPCO CSOF 134, 146, 149, 153).

For these reasons, and those previously set forth, the Motion should be granted.

## POINT I: THE BEECHWOOD ADVISERS WERE SHIP'S AGENTS

SHIP's own witnesses concede that the IMAs unambiguously appointed the Beechwood Advisers SHIP's agents. In the ordinary course, an agreement by the parties that their relationship should be governed as they have chosen ends the inquiry. *See, e.g., Fed. Ins. Co. v. Keybank Nat. Ass'n*, 340 Fed. Appx. 5, 7 (2d Cir. 2009) ("The evidence relied on here by the district court is the contract between Federal and the broker, which created a principal-agent relationship. The district

court was entitled to make this determination, and we find no error..."). Nonetheless, SHIP urges this Court to ignore its decision to appoint the Beechwood Advisers as its agents because the level of control the Beechwood Advisers retained over SHIP supposedly negates such a finding. *See* SHIP Opp. 9 (citing *In re Shulman Transp. Enters., Inc*., 744 F.2d 293, 295 (2d Cir. 1984)). In *Shulman*, the court found that the so-called agent had *complete* dominion and control over the principal, meaning that as a matter of law, it was not an agent. The undisputed facts before this Court make *Shulman* entirely irrelevant because SHIP retained a material and substantial amount of control over the Beechwood Advisers because all of the Beechwood Advisers' investment decisions were subject to SHIP's investment guidelines, and as Beechwood conceded, it would ultimately *always follow* its "clients' wishes" (PPCO Agency SOF 26-29, 40-41; PPCO CSOF 81, 132).[2] Moreover, unlike in *Shulman*, wherein the parties' funds were commingled, which led the court to find that the purported agent was in fact not acting in such capacity, the Beechwood Advisers were required to maintain SHIP's funds in designated, client-specific accounts (PPCO Agency SOF 26). Similarly, unlike the agreement in *Mallis v. Bankers Tr. Co.*, 717 F.2d 683, 689 (2d Cir. 1983) (SHIP Opp. 13), the IMAs expressly define the "purpose" of Beechwood's agency. *See Khoder v. Sayyed*, 348 F.Supp.3d 330, 341, 345 (S.D.N.Y. 2018) (holding, on summary judgment, that agency is established where the principal "had the legal right to control its management, even if he made little use of that right."); PPCO Agency MOL 15.[3]

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[2] As a case cited by SHIP recognizes, a measure of discretion by the agent is *not* fatal to a determination that a relationship is that of agent-principal. SHIP Opp. 12 citing *Highland Capital Mgmt. LP v. Schneider*, 607 F.3d 322, 327 (2d Cir. 2010).

[3] Confronted with facts establishing agency as a matter of law, SHIP seeks to rely on cases with easily distinguishable facts to justify a different result. SHIP relies on *Rubin Bros. Footwear, Inc. v. Chem. Bank*, 119 B.R. 416, 422 (S.D.N.Y. 1990), where, unlike here there was no contract governing the relationship and *Red Pocket, Inc. v. Interactive Commc'ns Int'l, Inc.*, 2020 WL 838279, at *8 (S.D.N.Y. Feb. 20, 2020) where the agreement at issue was ambiguous, unlike the unambiguous IMAs which expressly establish an agency relationship. SHIP Opp. 8-9.

**POINT II: THE BEECHWOOD ADVISERS ACTED FOR SHIP, NOT AGAINST IT**

There is but one narrow exception under which a court will ignore a party's decision to be bound by its agent: the adverse interest exception. SHIP seeks safe harbor under this doctrine, asserting that the Beechwood Advisers totally abandoned SHIP's interests in carrying out their obligations under the IMAs. *See* SHIP Opp. 19. However, it is uncontroverted that the PPCO Transaction was motivated, in large part, to satisfy SHIP's directives and indeed, benefited SHIP so it cannot plausibly be argued that Beechwood *totally* abandoned SHIP's interests:[4]

- Beechwood was tasked by SHIP just prior to the PPCO Loan Transaction to offload its Platinum-related investments. Paul Lorentz from SHIP had directed the reduction of Platinum interests to a level below a $5.5 million threshold in accordance with stated investment guidelines Weinick Dec. Ex. 11, Narain Tr., 485:20-487:24, 533:17-534:5, 584:3-588:5; *see also* Weinick Dec. Ex. 6, Thomas Tr., 375:25-376:22 (Beechwood's 30(b)(6) witness adopting Narain's testimony concerning ongoing discussions in January 2016 to divest SHIP's Platinum assets at SHIP's request).

- At the time of the PPCO Loan Transaction, SHIP was actively seeking to improve its RBC rating by exiting unrated assets and investing in rated assets. Weinick Dec. Ex. 13, Serio Tr., 181:11-15. Improvement of that measure was necessary to avoid a regulatory takeover, a benefit which allowed SHIP to continue as it then existed and allowed the then current management (since terminated for dishonesty), to remain in place. (PPCO CSOF 146-54)

- On or about November 18, 2015, Beechwood's Chief Investment Officer, Daniel Saks, received an email 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." Saks subsequently testified that the "SHIP issue" involved the urgency of having certain SHIP assets rated by a rating agency before year end: "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." Weinick Dec. Ex. 52, Dep. Ex. 492; Weinick Dec. Ex. 8, Saks Tr., 273:16-277:24.

- BAM has admitted that interest on the transferred assets in the PPCO Loan Transaction was not likely paid, yet the assets were purchased by PPCO for full price (Weinick Dec.

[4] This analysis is consistent with *Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000), relied upon by SHIP, wherein the court ruled that the adverse interest analysis must be conducted on a transaction-by-transaction basis, which here, means the analysis is limited to Beechwood's actions regarding the PPCO Loan Transaction, and no other part of its relationship with SHIP.

Ex. 6, Thomas Tr., 376:23-433:18) while Beechwood CEO Feuer conceded that the inability of a borrower to make interest payments can negatively impact value. Weinick Dec. Ex. 21, Feuer Tr., 660:10-661:8.

- To secure the indebtedness it provided, SHIP, among others, was granted liens over assets with book values many times the value of the loan.

Taken together, these facts establish that the PPCO Loan Transaction, wherein SHIP rid itself of unrated assets, sought to dip below the aforementioned $5.5 million investment threshold, and obtained all asset liens on PPCO and its subsidiaries' assets – which was contractually required to be rated (*see* Section 1.1 of NPA Note 1) – provided a *material and significant* benefit to SHIP.[5] In turn, the case law dictates a finding that the narrow adverse interest exception is inapplicable. *See Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466 (2010) ("To come within the exception, the agent must have *totally* abandoned his principal's interests and be acting entirely for his own or another's purposes.") (emphasis supplied).[6]

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[5] It matters not that SHIP has not or may not be repaid as SHIP complains. SHIP Opp. 22. Rather, the measure is the benefit realized by SHIP at the time of the transaction. *See e.g., Hamlet at Willow Creek Dev. Co., LLC v. Ne. Land Dev. Corp.*, 64 A.D.3d 85, 115-16 (2d Dep't 2009); *Empire Fin. Services, Inc. v. Bellantoni*, 53 A.D.3d 1095, 1097 (4th Dep't 2008); *Mayer v. Bishop*, 158 A.D.2d 878, 881 (3d Dep't 1990). At the time of the PPCO Loan Transactions, it was advantageous to SHIP because SHIP became over-secured, improved its RBC and improved its relative position versus other creditors at a time when it and its agent knew that PPCO was insolvent or nearly so. PPCO CSOF 111, 132, 141-43, 146-54, 164-209.

[6] Many of the cases cited by SHIP to invoke the adverse interest exception predate *Kirchner* and are therefore irrelevant in determining the breadth of the exception. The cases post-dating *Kirchner* make clear that *any* benefit received by the principal is sufficient to find that the adverse exception is unavailable. *See Cobalt Multifamily Investors I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 428 (S.D.N.Y. 2012) ("[I]f a corporation receives any benefit from the [misconduct], the adverse interest exception will not apply, even if the [misconduct] ultimately causes the corporation to suffer harm in the long term, and even where the insider intended to benefit himself at the corporation's expense."); *Concord Capital Mgmt., LLC v. Bank of Am., N.A.*, 102 A.D.3d 406 (1st Dep't 2013) (barring claims by corporate wrongdoer, despite allegations of "looting" by plaintiffs' former executives, where "corrupt executives' scheme brought millions of dollars into plaintiffs' coffers and allowed plaintiffs to survive for a few years."); *In re Arbco Capital Mgmt., LLP*, 498 B.R. 32, 46-47 (Bankr. S.D.N.Y. 2013) (rejecting attempt by trustee to invoke adverse interest exception despite conclusory allegations that company received "no benefit" from fraud, where fraud allowed company to survive for several years by raising additional funds); *New Greenwich*

As part of its effort to distance itself from Beechwood and further its claim that Beechwood acted outside the scope of any agency relationship, SHIP cites to *Seward Park Hous. Corp. v. Cohen*, 287 A.D.2d 157, 167 (1st Dep't 2001), for the unremarkable proposition that only knowledge acquired by an agent acting within the scope of its agency may be imputed to the principal. SHIP Opp. 14. Importantly however, SHIP ignores the First Department's conclusion that where violations are open and notorious "the imputation of knowledge, and its concomitant responsibility, may not be avoided by the simple expedient of closing one's eyes, covering one's ears, and holding one's breath." *Seward Park* at 168-69.

Yet, that is exactly what SHIP did by ignoring its own auditing department's admonition to perform more due diligence of Beechwood's ownership structure (*see* PPCO CSOF 100-05, 212-16, detailing SHIP's CEO's efforts to minimize due diligence regarding, *inter alia*, Beechwood's overlapping ownership with Platinum).[7] And so, although the focus of this Motion is the imputation of Beechwood's knowledge to SHIP, contrary to SHIP's allegation, SHIP itself was fully and sufficiently knowledgeable about the Beechwood-Platinum relationship and the PPCO Loan Transaction, its fraudulent nature and its harmful impact on PPCO. SHIP Opp. fn 2. As such, it must bear liability for the same. Specifically:

- Beechwood's CEO Feuer told SHIP that Platinum was a "motivated seller who much needs the money." (PPCO CSOF 155);

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*Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 145 A.D.3d 16, 27 (1st Dep't 2016) (finding that actions that "enabled the funds to continue to survive" defeat the adverse interest exception).

[7] SHIP's CEO's attempts to curtail the diligence regarding Beechwood's ownership demonstrates SHIP'S knowledge. *In re Lyondell Chem. Co.*, 2016 WL 5818591, at *6 (S.D.N.Y. Oct. 5, 2016) (cited by at SHIP Opp. 13), held that knowledge acquired by an officer is imputed to the corporation as its agent. SHIP's reliance on *Grupo Verzatec S.A. de C.V. v. RFE Inv. Partners*, 2019 WL 1437617 (S.D.N.Y. Mar. 29, 2019) (SHIP Opp. 14) simply because the court declined to impute an officer's knowledge to the corporation is misplaced because unlike here, that agreement specifically stated that the representations were solely those of the agent, and not the principal.

- Beechwood's CIO as of January of 2016, testified to ongoing discussions concerning the general idea to "reduce the concentration … in entities related to Platinum," in "SHIP's investments," and that this general idea came from SHIP. Beechwood's 30(b)(6) witness adopted that testimony. (PPCO CSOF 8(ii));[8]

- Beechwood's two CIOs were from Platinum, as were other Beechwood employees. And, SHIP was provided with marketing materials in advance of the IMAs that listed Levy's Platinum past. (PPCO CSOF 74, 76, 94, 225);

- Nordlicht signed the side letter to the third IMA on behalf of BRILLC, which was also signed by SHIP, demonstrating SHIP's knowledge of the relationship between Beechwood and Platinum's Nordlicht, and 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 (PPCO CSOF 110, 111, 141-143);

- 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 PPVA guaranteed by its managing member, Mark Nordlicht (PPCO CSOF 220, 225); and

- 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. (PPCO CSOF 132(vi))

*See also* Receiver's Opp. 25-26.

As demonstrated by a case cited by SHIP itself, SHIP benefitted from the transaction by eliminating worthless assets from its balance sheet, thereby improving its RBC rating, allowing for its corporate continuance. In *Conway v. Marcum & Kliegman LLP*, 176 A.D.3d 477, 478 (1st

[8] This stands in stark contrast to the facts in *Maung Ng We v. Merrill Lynch & Co.*, 2000 WL 1159835, at *4 (S.D.N.Y. Aug. 15, 2000) (quoting *Rubin Bros. Footwear, Inc. v. Chem. Bank*, 119 B.R. at 422), relied upon by SHIP (SHIP Opp. 8-9). Here, Beechwood and SHIP had an express agency agreement, not a parent-subsidiary relationship, SHIP limited Beechwood's discretion, and as established by the foregoing cited testimony, Beechwood entered into the PPCO Loan Transaction, in part, to satisfy the demands of its principal, SHIP, which was both seeking to increase its RBC and diversify its investment portfolio away from Platinum related assets. PPCO CSOF 146-49.

Dep't 2019) (cited at SHIP Opp. 20, 21, 23) an auditing firm sought summary judgment under *Kirschner* on malpractice claims brought by court-appointed fiduciaries for several failed hedge funds. *See Stokoe v. Marcum & Kliegman LLP*, 135 A.D.3d 645 (1st Dep't 2016) (reversing dismissal of the pleadings in the same case). In reversing the lower court's grant of summary judgment and dismissal of the case, the Appellate Division concluded that, in the context of hedge funds, "the mere continuation of a corporate entity does *not* per se constitute a benefit that precludes application of the adverse interest exception." *Id.* (emphasis added). As SHIP is not a hedge fund, *Conway*'s "exception to the exception" does not apply. Moreover, SHIP's continuity afforded by an improved RBC resulting from the PPCO Loan Transaction, (directed by SHIP *itself*) is a sufficient benefit to demonstrate that its agent Beechwood had not completely abandoned its interests. PPCO CSOF 154. At *minimum*, the PPCO Loan Transaction benefited SHIP by stabilizing the RBC and avoiding a regulatory takeover, as well as improving its security interest position.

In sum, because Beechwood acted for SHIP, not against it, and because SHIP, at minimum, was purposefully ignorant of any conflicts of interest that Beechwood may have had, SHIP may not avail itself of the very narrow adverse interest exception.

## POINT III: SHIP RATIFIED BEECHWOOD'S ACTIONS ON ITS BEHALF

Even if this Court were to find that the Beechwood Advisers' actions ran completely contrary to SHIP's interests and were never intended to provide SHIP with a benefit, SHIP has since unequivocally ratified its agents' actions after the date it claims it first learned of the Beechwood-Platinum relationship.[9] In doing so, the case law mandates a finding by this Court

[9] While the Receiver disputes this assertion, SHIP claims it did not learn of the Beechwood-Platinum connection until after the June 8, 2016 arrest of Murray Huberfeld and the July 25, 2016

that, as a matter of law, SHIP is now therefore bound by its agents' actions. After all, there are no disputed facts: SHIP filed the Proof of Claim and permitted the $11 million performance fee. *See* PPCO Agency SOF 81-91; PPCO CSOF 238.

When SHIP filed the Proof of Claim in the Receivership Case to enforce the liens and claims it received under the PPCO Loan Transaction, it ratified Beechwood's actions. PPCO Agency SOF 88-91. Filing a proof of claim is exactly the type of "fruit of the fraud" that runs afoul of the adverse interest exception. *In re Maxwell Newspapers, Inc.*, 164 B.R. 858, 866-68 (Bankr. S.D.N.Y. 1994) (cited at SHIP Opp. 19). Indeed, as a matter of law, SHIP cannot seek the benefit of the liens it was granted under the PPCO Loan Transaction while simultaneously disavowing imputation of Beechwood's knowledge in executing the transaction documents. *In re Bennett Funding Group, Inc.*, 336 F.3d 94, 100 (2d Cir. 2003) (affirming decision that management's misconduct was imputed to debtor); *In re Payroll Express Corp.*, 186 F.3d 196, 208 (2d Cir. 1999) (affirming summary judgment against application of "adverse interest doctrine"); *DGI-BNSF Corp. v. TRT LeaseCo, LLC*, 2019 WL 5781973, at *5 (S.D.N.Y. Nov. 6, 2019); *In re Vargas Realty Enterprises, Inc.*, 440 B.R. 224, 236 (S.D.N.Y. 2010); *In re Adler, Coleman Clearing Corp.*, 263 B.R. 406, 462 (S.D.N.Y. 2001); PPCO Agency MOL 21-22.

SHIP does not challenge this conclusion or address these cases (or any of the cases cited in PPCO's Agency MOL for that matter, with the exception of *Payroll Express*, with which it agrees). Instead, SHIP argues that: (a) the Proof of Claim was merely an attempt to "mitigate" its alleged damages and (b) regardless of Beechwood's knowledge of the underlying fraudulent nature of the PPCO Loan Transaction, SHIP did not have "full knowledge of all the material facts

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*Wall Street Journal* article regarding Platinum and its ties to Beechwood. SHIP Opp. 4. *See also* PPCO CSOF 235-238.

involved in the transaction" to have ratified the actions. SHIP Opp. 24 (citing *In re First Republic Grp. Realty, LLC*, 421 B.R. 659, 682 (Bankr. S.D.N.Y. 2009) and *Breen Air Freight, Ltd. v. Air Cargo, Inc.*, 470 F.2d 767, 773 (2d Cir. 1973)). These arguments fail.

**A. <u>The Proof of Claim Was Ratification, Not Mitigation</u>.** SHIP's attempt to re-cast the Proof of Claim as mitigation instead of ratification falls short as evidenced by its citation to *In re First Republic*. SHIP Opp. 24-25. Not surprisingly, SHIP does not address that court's observation that "it is well-established that the filing of a lawsuit to enforce one's rights pursuant to a promissory note or other contract given in connection with an allegedly unauthorized act, ratifies the unauthorized act." *In re First Republic*, 421 B.R. at 682-83; s*ee also IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 26 F.3d 370, 375 (2d Cir. 1994) ("[O]ne of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act.") (internal citations and quotations omitted). The Proof of Claim is no different than a party's assertion of rights under a contract in litigation, which, as set forth in the cited cases, constitutes ratification, not mitigation. Indeed, SHIP could not commence a lawsuit against PPCO by virtue of the Receivership Order's injunction provisions, thereby leaving the filing of the Proof of Claim as the only method upon which it could seek to enforce its perceived rights.

Along these lines, *Banque Arabe Et Internationale D'Investissement v. Maryland Nat. Bank*, 850 F. Supp. 1199 (S.D.N.Y. 1994), *aff'd*, 57 F.3d 146 (2d Cir. 1995) is instructive. There, the assignee of a participating bank brought an action against the lead bank following a borrower's default, seeking rescission of the participation agreement. The defendant argued that the plaintiff could not seek rescission because it ratified the participation agreement by: (1) accepting its *pro rata* share of the foreclosure sale and (2) filing a proof of claim in the guarantor's bankruptcy proceeding. The court held that the plaintiff there was mitigating its damages because the plaintiff

(unlike SHIP) had formally pled a rescission claim: "the formal pleading of a rescission claim eliminates any implication of a subsequent ratification … he has made an unambiguous request to have the contract voided, and the acceptance of payments do not negate his intent to disaffirm the contract." *Id.* at 1215. Moreover, in filing a proof of claim in the guarantor's bankruptcy, the plaintiff specifically stated that "[b]y submitting this claim, claimant does *not* waive any rights it has against [lead bank-defendant]." *Id.* (emphasis supplied). In stark contrast, here, SHIP sued Beechwood to *enforce* the IMAs and has not sought to rescind the IMAs or the PPCO Loan Transaction (nor did it reserve the right to rescind them in its Proof of Claim). Thus, SHIP ratified its agent's actions regarding the PPCO Loan Transaction.

**B. SHIP Knew of the Alleged Fraud Prior to Ratifying the PPCO Loan Transaction.** SHIP next argues that even if its Proof of Claim constitutes ratification, the doctrine does not apply because it allegedly did not have the requisite knowledge of the fraudulent nature of the PPCO Loan Transaction when it filed the Proof of Claim. SHIP Opp. 24-25 (citing *Breen Air Freight, Ltd. v. Air Cargo, Inc*. 470 F.2d at 773 for the proposition that "ratification can only occur when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it.") *First*, even if SHIP did not, and even if its agent did not, have prior or contemporaneous knowledge of the transaction and the fraud connected therewith (and it did), SHIP cannot deny that it had after-the-fact knowledge when it filed the Proof of Claim. This Court's docket establishes that SHIP filed suit against Beechwood for a host of alleged fraud prior to filing the Proof of Claim, thereby serving as a judicial admission of SHIP's deep and comprehensive nature of the alleged fraud. *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 525, 528 (2d Cir. 1985) ( "A party's assertion of fact in a pleading is a judicial admission by which it is normally bound throughout the course of the proceeding").

Also unexplained by SHIP is its decision (i) to allow an $11 million performance fee to Beechwood, weeks after the now infamous July 26, 2016 article detailing the Platinum-Beechwood relationship and (ii) enter into a transaction with PPCO affiliate PGS the day after Murray Huberfeld's arrest. PPCO Opp. 46-47; PPCO CSOF 236-38.

## POINT IV. THE ACTIONS AND KNOWLEDGE IMPUTABLE TO SHIP

Based on the law and the undisputed facts established by the Receiver, this Court now has a record upon which it can find, on summary judgment, that the Beechwood Advisers acted as SHIP's agents in the PPCO Loan Transaction. SHIP nevertheless seeks to put the cart before the horse by arguing that these issues must be decided now, as part and parcel of making a determination of the legal relationship between the parties. While SHIP is mistaken, the record before this Court is replete with undisputed evidence establishing exactly what the Beechwood Advisers knew, how they knew it and how that information was used against PPCO's interests:

- Beechwood's CEO Feuer demonstrated Beechwood's knowledge of Platinum's growing insolvency and financial concerns by telling SHIP that Platinum was a "motivated seller who much needs the money." Feuer learned this from Platinum's CIO Nordlicht who 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" and that high-interest rates and collateral requirements were a "stranglehold." (PPCO CSOF 155-156);

- Feuer knew Nordlicht was conflicted as between PPCO and Beechwood because he knew (a) Nordlicht was Platinum's chief investment officer; and (b) Nordlicht's family members were "owners" of the Beechwood Entities. (PPCO CSOF 57, 69-78); and

- Beechwood knew that the loans PPCO was purchasing were not paying interest yet PPCO was paying full price for such loans. Indeed, Beechwood's CFO has since conceded that a borrower's failure to pay interest negatively impacts valuation. (PPCO CSOF 225).

- Finally, SHIP set forth in its own Complaint that Beechwood knew of the fraudulent nature of its transactions with Platinum, a judicial admission of same. *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d at 528.

To avoid imputation of this knowledge, SHIP asserts that the knowledge was gained while the Beechwood Advisers acted for other entities. For example, SHIP cites to *Owens v. Gaffken & Barriger Fund, LLC*, 2011 WL 1795310 (S.D.N.Y. May 5, 2011) (SHIP Opp. 14) wherein the agent's knowledge was obtained in his capacity as agent for its principal but also *separately* as agent for an unrelated trust which the court found was not within the scope of the agency of the funds at issue. Once again, the scope in which the Beechwood Advisers learned of certain information which the Receiver seeks to impute to SHIP is not an issue which determines whether in fact the Beechwood Advisers were SHIP's agent. The fact that the Beechwood Advisers learned information while acting as agent for multiple parties does not negate the fact that they learned that information while serving as SHIP's agent.

## CONCLUSION

The PPCO Loan Transaction may be viewed as a marriage of convenience. SHIP needed to improve its RBC, and Platinum needed to avoid a financial "stranglehold." Despite the fact that both SHIP and its indisputable agent Beechwood knew of Platinum's dire circumstances and Nordlicht's conflicted position, they proceeded with the transaction. At the time, and today, PPCO came out the victim because the all-asset liens SHIP obtained are, this very day, strangling PPCO.

For these reasons, the Court should grant the Receiver's Motion finding that the Beechwood Advisers were SHIP's agents as a matter of law, and that their knowledge of the fraudulent nature of the PPCO Loan Transaction is imputable onto SHIP.

Dated: New York, New York
March 17, 2020

**OTTERBOURG P.C.**

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