UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	:	Civil Action No. 1:18-cv-06658
MELANIE L. CYGANOWSKI, AS EQUITY 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.	:	Civil Action No. 1:18-cv-12018

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF DEFENDANTS BANKERS CONSECO LIFE INSURANCE COMPANY AND WASHINGTON NATIONAL INSURANCE COMPANY

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PRELIMINARY STATEMENT

Many agree that a fraud was afoot, including the United States Attorney's Office for the Eastern District of New York, the Securities and Exchange Commission, Defendants Bankers Conseco Life Insurance Company ("BCLIC") and Washington National Insurance Company ("WNIC"), and numerous others. All agree that the fraudsters are the Platinum and Beechwood Insiders and their dark web of interrelated companies.[1] One of them has already pleaded guilty and been sentenced to 30 months in prison. Others are under indictment. Until the Receiver's Complaint, everyone, including, most notably, the criminal enforcement authorities, agreed that BCLIC and WNIC were the victims of the fraud perpetrated by Platinum-Beechwood.

The Receiver now, incredibly, sues BCLIC and WNIC (and their affiliates, Defendants CNO Financial Group, Inc. and 40/86 Advisors, Inc., collectively with BCLIC and WNIC, the "CNO Defendants") as knowing accomplices in the very fraud that robbed them of millions of dollars. And, she accuses them of perpetrating a fraud *on the Platinum fraudsters themselves*. The Receiver cites *no facts* to support her outlandish theory. Instead, she peppers her Complaint with conclusory allegations about how BCLIC and WNIC "must have known" about the Platinum-Beechwood fraud and therefore participated in it—the "it" including *twenty-two separate RICO enterprises*. The Receiver's allegations are absurd on their face. BCLIC and WNIC did not defraud themselves.

The villains here, the Beechwood and Platinum Insiders, knew and hid from BCLIC and WNIC (and many others) that Platinum and its founders had established Beechwood Re[2] to provide

[1] Unless separately defined here, defined terms have the same meaning as in the Receiver's Complaint.

[2] "Beechwood" means Defendant Beechwood Re Ltd and its affiliates.

Platinum with the liquidity it so desperately needed.[3] Throughout 2013, as the Beechwood Defendants were trying to induce BCLIC and WNIC to enter into reinsurance agreements, under which BCLIC and WNIC would entrust hundreds of millions of dollars to Beechwood, Beechwood misrepresented to BCLIC and WNIC that it had no connection to hedge funds or private equity firms (like Platinum). As the Receiver acknowledges in her Complaint, that was false. Beechwood lied because BCLIC and WNIC would never have entered into reinsurance agreements had they known of Beechwood's ties with Platinum.

Further, Beechwood represented to BCLIC and WNIC that it would invest the Beechwood Reinsurance Trusts' assets prudently, safeguarding them for the payment of policyholders' claims. That was also a lie. From the outset, the plan was to hand over BCLIC and WNIC funds to Mark Nordlicht and others at Platinum to alleviate Platinum's liquidity needs and further Platinum's Ponzi-esque scheme. Beechwood was established to be, and was in fact, a vehicle for Platinum's self-dealing. Again, the Receiver admits this. And, it's confirmed by the email in which Bodner, Huberfeld, and other co-conspirators confess that David Bodner email admitting that they "weren't exactly honest" with BCLIC and WNIC when they surreptitiously plowed reinsurance assets "into platinum with its illiquid investments" that "didn't exactly fit [BCLIC's and WNIC's] investment objective." First Am. Compl., Ex. 31 (Dkt. 159-3), *Trott v. Platinum Management (NY) LLC*, 1:18-cv-10936-JSR (Jan. 25, 2019) ("*Trott* FAC") (consolidated with this case). Most damningly, Beechwood also hid that "beechwood and platinum really are integrated." *Id.* The Receiver, who claims to have conducted an extensive investigation into e-mails, court filings, and financial reports, surely knows she has no basis for suing BCLIC and WNIC for fraud. Her theory that

[3] The government's theory in prosecuting the Platinum Insiders in the Eastern District of New York is that the Insiders established Beechwood to fraudulently obtain liquidity for Platinum, including by victimizing BCLIC and WNIC.

BCLIC and WNIC overlooked the fraud to keep their long-term care liabilities off of their corporate parent's (CNO) balance sheet is implausible nonsense. In entering into the reinsurance agreements, BCLIC and WNIC agreed to transfer to Beechwood approximately *$600 million* that secured future policy liabilities (known as "statutory reserves" in insurance parlance). That money was placed in reinsurance trusts controlled by Beechwood and subject to state regulation. In exchange, Beechwood promised to manage that money prudently and pay policyholder claims with it. Those trusts would be depleted if Beechwood diverted assets to further Platinum's fraud. CNO would then be required to post additional reserves to replace the money Beechwood squandered.[4] Because BCLIC and WNIC remained liable to policyholders, their only incentive was to ensure that Beechwood maintained sufficient assets to pay policyholder claims. Put simply, it is entirely implausible that BCLIC and WNIC would further a scheme that could only injure themselves. Yet, the Receiver's entire theory is that BCLIC and WNIC engaged in such a suicide mission.

This Court should not permit this absurdity to continue and allow BCLIC and WNIC to be victimized all over again. The Receiver has not asserted, nor can she assert through amendment, a factually plausible or legally cognizable claim against BCLIC and WNIC.[5]

[4] And, that is what happened. When the Platinum-Beechwood fraud scheme was revealed, CNO had to inject $100 million in capital to satisfy BCLIC/WNIC's statutory reserve requirements, plus *another* $100 million to shore up their capital. *See* Polivy Decl., Ex. C, CNO Financial Group, Inc. Form 8-K (Sept. 29, 2016), https://www.sec.gov/Archives/edgar/data/1224608/000122460816000081/form8-k09292016reinsurance.htm.

[5] Defendants CNO Financial Group, Inc. and 40/86 Advisors, Inc. are filing a separate motion to dismiss because they have separate grounds for dismissing the Receiver's claims against them.

STATEMENT OF FACTS[6]

I. OVERVIEW OF THE PLATINUM AND BEECHWOOD FRAUDSTERS.

The Receiver represents several entities that were "fraudulently marketed and operated under the name 'Platinum' by a group of now indicted, convicted and/or otherwise malfeasant individuals." ¶ 18. Those individuals, the Platinum Insiders, orchestrated a massive, Ponzi-esque scheme. ¶¶ 459–60. They pilfered money from investors for their own benefit, to prop up failing investments, and to pay distributions to other investors. ¶¶ 28, 120, 135.

In 2013, the Platinum Insiders, facing a "severe liquidity crisis," created Beechwood, a reinsurance company, with the Beechwood Insiders. ¶¶ 125–35, 152 ("That Beechwood was a Platinum Insider creation . . . is beyond question."). As the Receiver alleges: "The Beechwood Entities were devoted to the purposes of obtaining a more permanent source of capital for the PPVA Funds and getting monies to insiders of Beechwood and Platinum Partners." ¶ 134. Although purportedly an independent company, Beechwood was secretly owned by the Platinum Insiders. ¶ 137. The Platinum Insiders also controlled the companies that were set up to manage Beechwood's investments, including those from the Beechwood Reinsurance Trusts. ¶ 138.

II. BCLIC AND WNIC TRANSFER NEARLY $600 MILLION TO BEECHWOOD RE.

In 2013, BCLIC and WNIC sought to reinsure certain long-term care policies. ¶ 225. Through a broker (Willis), the companies were put in touch with Beechwood, the company set up by the Platinum Insiders to prop up their fraudulent activities. ¶¶ 226–28. Ultimately, BCLIC and WNIC entered into reinsurance agreements under which they ceded $553 million in future policy liabilities (statutory reserves) and transferred $596 million in assets to Beechwood. ¶¶ 237–38; *see also* Polivy Decl., Ex. A, BCLIC Reinsurance Agreement; Polivy Decl. Ex. B, WNIC

[6] Citations to "¶" refer to paragraphs in the Complaint, Dkt. No. 1, *Cyganowski v. Beechwood Re Ltd., et al.*, 18-cv-12018, unless otherwise noted.

Reinsurance Agreement. The assets were intended to cover future insurance claims and were placed in the Beechwood Reinsurance Trusts pursuant to state regulatory requirements. ¶ 239. Wilmington Trust was the trustee of the Trusts. *Id.*

If Beechwood maintained trust assets at threshold levels exceeding statutory reserve requirements, it could be paid the surplus. ¶ 242. Conversely, Beechwood was responsible for covering any shortfalls, whether due to paid insurance claims or investment losses.[7] ¶ 243. But "WNIC and BCLIC would still be responsible for claims if Beechwood Re were [sic] unable to do so . . . ." ¶ 243. So, if Beechwood became insolvent due to the Platinum fraudsters using the trust assets as a piggy bank, WNIC and BCLIC were at risk of losing the $600 million they transferred, while remaining liable for paying future insurance claims.

III. THE MECHANICS OF THE BEECHWOOD REINSURANCE TRUSTS.

Once BCLIC and WNIC transferred nearly $600 million to Beechwood (through the Reinsurance Trusts), Beechwood—and it alone—managed the Trusts' investments. *See* Polivy Decl., Exs. A and B, § 4.2(c) ("Reinsurer [Beechwood] will . . . direct the trustee to invest or reinvest the trust assets in accordance with the Investment Guidelines."). The Receiver repeatedly confirms that the Platinum and Beechwood Insiders controlled the Trusts and their investments. *See, e.g.*, ¶¶ 134, 137, 138, 302. As is plain from the Reinsurance Agreements, BCLIC and WNIC had no ability to direct investments of trust assets, had no right to veto any investment, and were only entitled to receive reports from valuation companies and Wilmington Trust valuing the trust assets to confirm that the trust assets met or exceeded statutory requirements. *See* Polivy Decl., Exs. A and B, § 4.5. Pursuant to the Reinsurance Agreements, BCLIC and WNIC were beneficiaries of and creditors to the Beechwood Reinsurance Trusts, which were managed

[7] That is, if the trust assets fell below thresholds based on statutory reserve requirements, Beechwood would have to add funds to the Trusts to make up the difference.

exclusively by Beechwood and its designated affiliates. *See id.*, § 4.2(i). In short, and as the Receiver herself must concede, BCLIC and WNIC were at the mercy of Beechwood and, by extension, its cash-starved principals at Platinum.

After entering into the Reinsurance Agreements and "taking control of the assets" in the Beechwood Reinsurance Trusts, "Beechwood immediately began using [those funds] to prop up" the Platinum funds. ¶ 275. To that end, Beechwood lied to BCLIC and WNIC to further the fraud. For example, it falsified periodic investment reports and "applied artificial values" to its investments so that it did not have to cover losses in the Beechwood Reinsurance Trusts. ¶ 276. On September 29, 2016, BCLIC and WNIC terminated the Reinsurance Agreements at the direction of state regulators. *See* First Am. Compl. at ¶¶ 109–11, Dkt. No. 52, *BCLIC v. Feuer*, No. 1:16-cv-7646 (S.D.N.Y. Apr. 27, 2017).

IV. THE RECEIVER'S CONCLUSORY ALLEGATIONS THAT BCLIC AND WNIC PARTICIPATED IN THE PLATINUM FRAUD.

The Receiver's Complaint repeatedly speculates that BCLIC and WNIC engaged in fraud. But cutting through the clutter, the Receiver identifies only *four* instances in which she contends—without any factual support—that BCLIC and WNIC engaged in purported fraud. Every other allegation of fraud involves solely Platinum or Beechwood.

First, the Receiver alleges that BCLIC and WNIC harmed PPCO by causing it to purchase shares of a company called ALS Capital Ventures. *See* ¶¶ 478, 506. But the Receiver does not allege that BCLIC and WNIC even participated in those transactions, let alone caused Platinum to do anything. Moreover, BCLIC and WNIC could not cause PPCO to purchase anything, as there is no allegation that BCLIC and WNIC had any dealings with Platinum whatsoever. Admitting this, the Receiver alleges that the *Platinum Insiders* "cause[d]" PPCO to purchase these shares,

that PPCO was "harmed *by the Platinum Insiders*," and that the "*Platinum Insiders'* orchestration of this transaction harmed PPCO." ¶¶ 304, 306, 308 (emphasis added).

Second, the Receiver alleges that BCLIC and WNIC harmed PPCO by causing it to enter into a series of transactions involving a bankrupt entity called Black Elk Energy Offshore Operations, LLC. ¶¶ 478, 506. Again, the Receiver does not allege that *BCLIC and WNIC* participated in those transactions, and they did not.[8]

Third, the Receiver alleges that WNIC (not BCLIC or the other CNO Defendants) misrepresented the value of certain assets that PPCO acquired by causing PPCO to enter into a series of transactions after borrowing $52 million from various sources. ¶¶ 350–51. The Receiver acknowledges that these transactions were orchestrated "at the hand of the Platinum Insiders," yet speculates that WNIC "knew" that one of these transactions was undervalued. ¶¶ 351, 354. The Receiver does not allege that WNIC was even a party to that transaction (it was not), made any representations regarding the transaction (it did not), or otherwise explain how WNIC "knew" that it was undervalued (it did not).

Fourth, the Receiver similarly alleges that BCLIC and WNIC misrepresented the value of other assets that PPCO acquired after borrowing more money.[9] ¶¶ 402–03. However, what the Receiver details is how Defendant BAM Administrative, not the CNO Defendants, arranged these loans from SHIP and the Beechwood Reinsurance Trusts to purchase overvalued securities. ¶¶ 409–22. The Receiver identifies no valuations that BCLIC or WNIC made, yet concludes, without

[8] Instead, she alleges that the *Platinum Insiders* "made" PPCO enter into these transactions and that this scheme was "orchestrated by the *Platinum Insiders*." ¶¶ 324, 325 (emphasis added). All BCLIC and WNIC knew about Black Elk is what was contained in valuation reports sent to it by Beechwood—namely, that the Beechwood Reinsurance Trusts held Black Elk bonds (the value of which, according to the Receiver, were inflated by the Platinum-Beechwood fraudsters).

[9] These relate to the "PPCO Loan Transactions and Purchased Securities" the Receiver is trying to unwind in her fraudulent conveyance claims.

alleging any facts, that *BCLIC and WNIC* misrepresented the values of these securities. But BCLIC and WNIC never valued anything. That is not how the Reinsurance Agreements worked. Under the Agreements, *Beechwood* was responsible for valuing the investments of trust assets it made. *See* Polivy Decl., Exs. A and B, § 4.5(a).

The Receiver details some other transactions in her Complaint (Golden Gate, Pedevco, Northstar, Montsant, China Horizon, and Agera), *but none of these involve alleged fraud or misrepresentations by BCLIC and WNIC against PPCO, or anyone else*. Instead, they either relate to PPVA or do not involve BCLIC and WNIC at all.[10] BCLIC and WNIC had no dealings with Platinum and did not control the Beechwood Reinsurance Trusts (Beechwood did).

ARGUMENT

I. THE COMPLAINT VIOLATES THE MOST BASIC PLEADING RULES AND SHOULD BE DISMISSED.

For three separate and independent reasons, the Complaint violates Rule 9(b) pleading requirements and should be dismissed. *First*, the very first sentence of the Complaint admits that, except as to "her own status and actions"—meaning her own specific acts as Receiver—the *entire* Complaint is based "on information and belief." This is deficient as a matter of law.[11]

Second, "[t]he Court must be especially vigilant in applying Rule 9(b) where a complaint is made against multiple defendants" because "the complaint should inform each defendant of the

[10] And, some of the Receiver's allegations about these transactions are demonstrably false. For example, the Receiver alleges that CNO, BCLIC, and WNIC are "holders" of a note related to the assets held by a company called Golden Gate Oil. ¶ 336. But the note agreement cited by the Receiver is between Precious Capital LLC; BAM Administrative Services, LLC; and Platinum Partners Value Arbitrage Fund LP. *See* Polivy Decl., Ex. D. CNO, BCLIC, and WNIC were not parties to that transaction, as the Receiver well knows.

[11] *See generally Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972) (affirming dismissal of fraud complaint because it "violate[d] the general rule that Rule 9(b) pleadings cannot be based 'on information and belief'"); *Equitable Life Assurance Soc'y v. Alexander Grant & Co.*, 627 F. Supp. 1023, 1029 (S.D.N.Y. 1985) (dismissing RICO and fraud complaint because a pleading based "'upon information and belief' [is] entirely inappropriate under 9(b)").

nature of his alleged participation in the fraud." *Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 388 (S.D.N.Y. 2016) (quotations omitted). "[G]roup pleading is generally forbidden because each defendant is entitled to know what he is accused of doing." *In re Dreier LLP*, 452 B.R. 391, 409 (Bankr. S.D.N.Y. 2011). Here, the Receiver lumps all the CNO Defendants together even though only two of them are insurers that did business with Beechwood, one is a holding company and the other is an investment advisor not alleged to have a connection with the fraudsters. Making the pleading even lumpier, she groups SHIP and the CNO Defendants together even though they have no relationship.

She then lumps the CNO Defendants with the Beechwood Reinsurance Trusts, and then, undaunted by reason or logic, *lumps the CNO Defendants with Beechwood*. Since the Receiver contends (¶ 165) that Beechwood and Platinum are "alter ego[s]," the Receiver, remarkably, is actually lumping WNIC and BCLIC together with the same Platinum entities seeking relief from them in this case. Putting aside the absurdity of the Receiver's theory—that the actions of the Plaintiff can be attributed to the Defendants so that the Plaintiff can sue the Defendants for the Plaintiff's own fraud—a reader cannot discern from the pleading what BCLIC or WNIC allegedly did or did not do that is distinct from what is being alleged against the Trusts, other CNO Defendants, SHIP or even fraudsters like Beechwood and Platinum. This flunks pleading tests.

Third, to adequately plead a claim sounding in fraud, the Receiver must "set forth the who, what, when, where and how of the alleged fraud." *Lipow v. Net 1 UEPS Techs., Inc.*, 131 F. Supp. 3d 144, 157 (S.D.N.Y. 2015). No such detail is provided here. She does not allege any *facts*, much less well-pleaded facts, showing that BCLIC and WNIC did anything wrong. Two years to draft the Complaint, and the Receiver has nothing. That requires a dismissal of the Complaint. *See Rosenheck v. Rieber*, 932 F. Supp. 626, 628 (S.D.N.Y. 1996) (Rakoff, J.).

As the Second Circuit has explained, these pleading rules play a critical role. Rule 9(b) reflects "the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing." *Segal*, 467 F.2d at 607. CNO is a publicly-traded company, with its own shareholders and regulators, and it is reckless for the Receiver, blindly hunting for a "deep pocket," to accuse a victim of the fraud.

II. THE RECEIVER'S CONCLUSORY FRAUD AND RICO CLAIMS ARE NOT PLAUSIBLE.

Aside from application of Rule 9(b), a complaint will survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) only if it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A. The Receiver's theory that BCLIC and WNIC allowed the Platinum fraudsters—including PPCO—to steal assets held in trust is totally implausible.

The Receiver explains, consistently with what the DOJ, the SEC, BCLIC and WNIC have alleged, that the Platinum Insiders created Beechwood to steal money from insurance companies like BCLIC and WNIC. ¶¶ 124–26, 134. Beechwood entered into the Reinsurance Agreements with BCLIC and WNIC because it was "anxious" to get their "money into Platinum Partners" (¶ 235) to "prop" them up (¶ 275). To get away with this, Beechwood falsified financial records it provided to BCLIC and WNIC. ¶ 276.

The Receiver thus contends that BCLIC and WNIC eagerly joined a scheme that put $600 million of WNIC's and BCLIC's funds at risk so that the Platinum and Beechwood fraudsters could pilfer their assets to prop up failing Platinum investments and pay off other Platinum

investors in the scheme. The Receiver argues BCLIC and WNIC did this to unload insurance liabilities from CNO's balance sheet. *See* ¶ 207. But that ignores the fact—acknowledged by the Receiver herself—that when the Platinum Ponzi-esque scheme collapsed (as all such schemes eventually do), BCLIC and WNIC would be stuck holding the bag. ¶ 243. If Beechwood mismanaged the Trusts and lost money it could not repay, BCLIC and WNIC would be forced to make up the difference. *Id.* BCLIC and WNIC (and by extension, CNO and 40/86 Advisors) therefore had every incentive to make sure that Beechwood prudently managed the Reinsurance Trusts. Indeed, throughout her Complaint the Receiver *admits that BCLIC and WNIC did just that*. *See, e.g.*, ¶¶ 276, 278, 280, 282. The Receiver's theory that BCLIC and WNIC knowingly committed financial suicide by handing over $600 million to fraudsters to help them steal BCLIC and WNIC's money to further a Ponzi scheme is implausible on its face.[12]

B. The Receiver alleges no facts supporting her implausible fraud or RICO claims.

The Receiver cites *no facts* supporting her implausible claim that BCLIC and WNIC assisted the Platinum and Beechwood fraudsters in siphoning money away from the Beechwood Reinsurance Trusts and into the pockets of the Platinum Insiders. As a result, the Receiver's fraud, aiding and abetting, and RICO claims all fail.

Each claim requires the Receiver to allege *facts* showing that BCLIC and WNIC participated in Platinum's scheme:

[12] The Receiver knows full well that it was BCLIC and WNIC who, in 2016, exercised their audit rights under the Reinsurance Agreements, sought (with the assistance of counsel and experts) information from Beechwood Re, terminated the Reinsurance Agreements at the direction of state regulators, and sued Beechwood Re and its principals for fraud. BCLIC and WNIC did this *months before* the SEC or prosecutors brought any action. BCLIC and WNIC first brought this fraud to the public's attention, by filing a lawsuit. *See* Compl., Dkt. No. 1, *BCLIC v. Feuer*, No. 1:16-cv-7646 (S.D.N.Y. Sept. 29, 2016).

- For common and securities law fraud (Counts 2, 3, and 4b),[13] the Receiver must allege with particularity (among other requirements) a misrepresentation of material fact *by each* of BCLIC and WNIC *to PPCO*. *See Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 492–93 (S.D.N.Y. 2011).

- For aiding and abetting fraud or breach of fiduciary duty (Counts 1 and 4a), the Receiver must allege with particularity that BCLIC and WNIC (1) had actual knowledge of Beechwood's fraud (or breach of fiduciary duty) and (2) provided substantial assistance in perpetrating the fraud. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 201–02 (S.D.N.Y. 2006).

- For RICO (Counts 6–8), the Receiver must allege with particularity that each Defendant engaged in at least two predicate racketeering acts with "the same or similar purposes, results, participants, victims or methods of commission . . . ." *Merrill Lynch, Pierce, Fenner & Smith v. Young*, 1994 U.S. Dist. LEXIS 2929, at *85 (S.D.N.Y. Mar. 15, 1994). The Receiver cannot rely on deficient fraud claims to state a RICO claim. *See, e.g., Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 530–31 (S.D.N.Y. 2018) (Rakoff, J.).

The Receiver makes a half-hearted attempt to meet these requirements by asserting that BCLIC and WNIC turned a "blind eye" to the Platinum fraud and made unidentified misrepresentations to PPCO. *See, e.g.*, ¶¶ 7, 230, 395. That does not cut it. Putting aside that the baseless allegation is implausible because, as admitted by the Receiver, the fraudsters were stealing BCLIC and WNIC's money to prop up the Platinum-Beechwood fraud and hence BCLIC and WNIC would have no incentive to overlook a theft of *their* money, the Receiver believes that this alleged "turning a blind eye to multiple red flags of fraud" is the same as being "willing participants in the fraud." *See* Status Report, at 9–10, Dkt. No. 450, *SEC v. Platinum Mgmt. (NY) LLC*, No. 1:16-cv-06848-BMC (E.D.N.Y. Jan. 23, 2019). But that is like a burglar blaming a neighbor who heard a window break for not calling the police to stop the burglary. In any case, the presence of red flags in hindsight is insufficient to establish that BCLIC or WNIC made a knowing

[13] The Receiver's Complaint sloppily contains two causes of action identified as the "Fourth Claim for Relief." *See* Compl. at pp. 144, 146. For simplicity, we refer to the first (aiding and abetting common law fraud) as "Count 4a" and the second (securities fraud) as "Count 4b."

misrepresentation (fraud), knew of the underlying fraud, let alone provided substantial assistance to the fraudsters (aiding and abetting), or committed an unlawful "predicate act" (RICO).[14] These claims fail for additional reasons, explained below.

1. The Receiver does not identify any misrepresentations by BCLIC or WNIC.

The Receiver summarily asserts without any specificity that BCLIC and WNIC "made numerous false representations of material fact." ¶¶ 485, 495. She is apparently alleging that BCLIC and WNIC misrepresented to PPCO the valuation of certain assets that were controlled and operated by the Platinum fraudsters (including PPCO). So, the Receiver is alleging that BCLIC and WNIC defrauded the fraudsters who controlled those assets. That is implausible, if not outright crazy, and the Receiver pleads no facts to support her outlandish theory.

Fatal to her claims, the Receiver never alleges *what* BCLIC and WNIC misrepresented; *when* those misrepresentations occurred; *who* at BCLIC or WNIC made those representations; or *how* PPCO relied on those misrepresentations. The Receiver does not even identify *any statement* (whether fraudulent or not) made by *anyone* at BCLIC and WNIC to PPCO (or anyone else). Instead, the Receiver generally alleges that all "Defendants" or a group of defendants misrepresented something. That is bogus. *See Kosovich v. Metro Homes, LLC*, 2009 U.S. Dist. LEXIS 121390, at *8–9 (S.D.N.Y. Dec. 29, 2009) (Rakoff, J.) (finding that the plaintiff's

[14] *Meridian Horizon Fund, LP v. KPMG (Cayman)*, 487 F. App'x 636, 640–41 (2d Cir. 2012) (affirming dismissal of common law and securities fraud claims that were an "archetypical example of impermissible 'allegations of fraud by hindsight'") (quoting *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000)); *In re J.P. Jeanneret Assocs.*, 769 F. Supp. 2d 340, 377 (S.D.N.Y. 2011) ("Merely alleging that Margolin 'would' or 'could' or even 'should' have known of Madoff's fraud if only it had paid attention to the 'red flags' is insufficient to make out a 10(b) claim.").

allegations referencing "defendants" generally without any indication of who was responsible for making which representation resulted in an overarching deficiency in the plaintiff's fraud claim).[15]

The Receiver also alleges that some assets the Platinum fraudsters forced PPCO to acquire were improperly valued by the selling party. As a result, the Receiver alleges that various defendants (including BCLIC and WNIC) improperly engaged in those transactions or made misrepresentations regarding the value of those assets. But in each case, the Receiver references only how the "Beechwood Insiders" and the "Platinum Insiders" did anything wrong.[16] And, BCLIC and WNIC were *not* parties to those transactions, nor does the Receiver allege that they were.[17] Further, the Receiver's theory is nonsensical. *According to the Receiver*, the fraudsters were moving assets between the entities they controlled because that was part of their fraud

[15] The Receiver's failure to identify any misrepresentation by BCLIC and WNIC also means she is unable to meet the other elements of fraud, necessitating dismissal. *See Hindsight Sols., LLC v. Citigroup, Inc.*, 53 F. Supp. 3d 747, 773 (S.D.N.Y. 2014). Moreover, the Receiver has not alleged and cannot plausibly allege that the Platinum fraudsters relied, let alone reasonably or to their detriment, on anything their victims might have told them, least of all anything having to do with the assets the fraudsters were shuffling between entities to further the fraud scheme outlined in the Complaint.

[16] *See, e.g.*, ¶¶ 304, 308 (Platinum Insiders "cause[d]" PPCO to purchase shares in ALS Capital Ventures and the "Platinum Insiders' orchestration of this transaction harmed PPCO"); ¶ 316 (the "Platinum Insiders' manipulation of PPCO" led to its participation in Black Elk).

[17] The Receiver identifies several parties to those transactions, but none are BCLIC or WNIC. *See* ¶¶ 303–08 (PPCO, PPVA, the Platinum Insiders, and Reinsurance Trusts controlled by Beechwood Re); ¶ 325 (PPVA, Beechwood Re, Platinum Insiders, and PPCO); ¶ 351 (SHIP, PPCO, and Reinsurance Trusts controlled by Beechwood); ¶¶ 405–08 (BAM Administrative, Beechwood Bermuda, Beechwood Re, PPCO, and SHIP); ¶ 405 (PPCO and BAM Administrative); ¶ 406 (PPCO subsidiaries); ¶ 409 (PPCO and SHIP); ¶ 410 (PPCO and its subsidiaries); ¶ 411 (PPCO, BAM Administrative, and Beechwood Reinsurance Trusts controlled by Beechwood Re); ¶ 412 (PPCO and BAM); ¶ 414 (PPCO, Platinum Partners Credit International LP, SHIP, and Reinsurance Trusts controlled by Beechwood Re); ¶ 415 (SHIP and PPCO); ¶¶ 416–19 (PPCO and Reinsurance Trusts controlled by Beechwood Re); ¶ 420 (BAM Administrative, PPCO, and Reinsurance Trusts controlled by Beechwood Re); ¶ 421 (BAM Administrative, PPCO, PPVA Oil and Gas LLC, and SHIP).

scheme, so any allegation that these transactions were motivated by nonparties to those transactions (such as BCLIC and WNIC) contradicts the Receiver's own allegations.

Moreover, the Receiver's Complaint demonstrates a fundamental misunderstanding of how the Reinsurance Agreements worked (and how reinsurance works generally). BCLIC and WNIC did not "engage" in *any* transactions with Platinum or any receivership entity. BCLIC and WNIC each entered into a single Reinsurance Agreement with Beechwood under which Beechwood took total control of nearly $600 million of transferred assets. Beechwood then agreed to manage that money and pay policyholder claims. BCLIC and WNIC had no involvement with PPCO or any Platinum entity (just as routine investors in the Platinum funds had no dealings with Black Elk), and the Receiver does not allege any facts suggesting that they did.

And, the transferred assets were placed in the Beechwood Reinsurance Trusts that, pursuant to the plain terms of the Reinsurance Agreements, were managed by Beechwood and its agent/investment manager, BAM, and held by Wilmington Trust, as trustee. The Receiver admits this. ¶¶ 142, 239. BCLIC and WNIC thus were not parties to or involved in any transactions where Beechwood and BAM invested trust assets with Platinum or its affiliates. The Receiver confounds, rather than clarifies, the actual relationships to pin Beechwood's fraud on BCLIC and WNIC. But this is a farce because only Beechwood—by contract—had the ability to manage the trust funds, and it did so in cahoots with Platinum *to harm* BCLIC and WNIC.

Indeed, that was the *purpose* of the fraud—Platinum and Beechwood sought to steal BCLIC's and WNIC's money to prop up their Ponzi scheme. The Receiver has repeatedly admitted this. ¶¶ 125–26, 129–31, 134. What is more, the Receiver admits that Beechwood, covertly puppeteered by the very Platinum entities the Receiver contends may now recover from WNIC and BCLIC, defrauded WNIC and BCLIC by fraudulently inducing them with a web of

lies to enter into the Reinsurance Agreements. ¶¶ 159–162; *see also Trott* FAC, Ex. 31 (email in which Bodner, Huberfeld, and other co-conspirators admit they were not "exactly honest" with BCLIC or WNIC "about the original investment or that beechwood and platinum really are integrated"). The Receiver seeks to recover from the *victims* of the fraud perpetrated by the entities in whose shoes the Receiver now stands.

Moreover, the Receiver affirmatively alleges that *Beechwood* misrepresented *to* BCLIC and WNIC the value of trust assets. ¶ 276. The Receiver thus cannot be heard to plausibly claim that Beechwood's misrepresentations are somehow attributable to BCLIC and WNIC, or that by relying on such valuations (to their detriment), BCLIC and WNIC actively participated in a fraud. BCLIC and WNIC are victims, not perpetrators. *See Picard v. Legacy Capital Ltd.*, 548 B.R. 13, 34–35 (Bankr. S.D.N.Y. 2016) (dismissing fraud claims where the complaint failed to set forth factually plausible allegations that the defendant had actual knowledge of the fraud, instead finding that "[t]he only plausible explanation is that like everyone else that Madoff fooled, Khronos did not uncover in real time what the Trustee and everyone else discovered with the aid of hindsight.").

2. The Receiver's aiding and abetting allegations against BCLIC and WNIC are equally unavailing.

To aid and abet a fraud or breach of fiduciary duty, one has to know it exists. "New York law requires that the alleged aider and abettor have 'actual,' as opposed to merely constructive, knowledge of the primary wrong." *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 546 (S.D.N.Y. 2007). Allegations that, as here, one "should have known" do not suffice. *Id.* at 547. Indeed, "even alleged ignorance of obvious warning signs of fraud will not suffice to adequately allege 'actual knowledge.'" *Id.* In addition, "allegations that a bank disregarded . . . . suspicious circumstances which might have well induced a prudent banker to investigate do not suffice to state a claim for aiding and abetting." *Id.* (citation omitted). Here,

the Receiver merely alleges that BCLIC and WNIC had reason to investigate Beechwood's relationship to Platinum. Those allegations are inadequate.

Moreover, aiding and abetting liability requires "substantial assistance" in the fraud. *Id.* Such assistance must be "affirmative" because "[m]ere inaction is insufficient to sustain a claim for aiding and abetting fraud unless the defendant has an independent duty to [] plaintiff." *Id.* The Receiver makes no allegations of substantial assistance, or *any* assistance for that matter. To the contrary, the Receiver paints BCLIC and WNIC as victims who failed to protect themselves through more robust due diligence, but that purported lack of diligence as a *victim* is hardly the same as "substantially assisting" a fraud, let alone where the fraud was not even known to exist.

In factually similar circumstances, the Second Circuit has affirmed dismissal of an aiding and abetting claim for want of substantial assistance. In *Sharp International Corp. v. State Street Bank & Trust Co.*, 403 F.3d 43 (2d Cir. 2005), the plaintiff was forced into bankruptcy after its controlling shareholders "looted [] fraudulently raised funds as well as other corporate profits." *Id.* at 46–47. The trustee filed suit against the plaintiff's former bank, believing it "facilitated the victimization of other lenders and the continued looting of Sharp itself." *Id.* at 46. The Second Circuit affirmed dismissal of the complaint that, when stripped of "artful pleading," came down to allegations of omissions or failures to act, which were insufficient to constitute "substantial assistance." *Id.* at 51–52. Here, the Receiver's claim that BCLIC and WNIC were in a position to "blow the whistle" on the fraud committed by Platinum and Beechwood but failed to do so (even though they did, *see supra* n. 12) is insufficient to sustain a claim. *See* 403 F.3d at 53.

C. The Receiver's ramshackle RICO claims suffer from additional defects.

As an initial matter, the Receiver's RICO claims should be dismissed because—as shown above—she has not adequately pleaded that BCLIC and WNIC engaged in any unlawful predicate acts. But they are also legally defective in other ways.

1. The Receiver's RICO claims are barred because they relate to the "purchase or sale of securities."

The RICO statute expressly prohibits civil suits that "rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities." 18 U.S.C. § 1964(c). This is "to prevent litigants from using artful pleading to boot-strap securities fraud cases into RICO cases, with their threat of treble damages." *MLSMK Inv. Co. v. JPMorgan Chase & Co*., 651 F.3d 268, 274 (2d Cir. 2011). The Receiver bases her RICO claims on several alleged transactions, each of which she admits involves the purchase or sale of securities.[18] Each of her RICO claims are therefore barred as they relate to the "purchase or sale of securities." 18 U.S.C. § 1964(c).

2. The Receiver alleges no facts that BCLIC or WNIC participated in the operation or management of any of the twenty-two alleged RICO enterprises.

To state a RICO claim, a plaintiff must plead facts with specificity showing that, among other things, each defendant "participa[ted] 'in the operation or management'" of each enterprise. *RD Mgmt. Corp. v. Samuels*, 2003 U.S. Dist. LEXIS 9013, at *20–21 (S.D.N.Y. May 28, 2003) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993)).

The Receiver claims there are *twenty-two* different enterprises. ¶¶ 462, 529. However, she does not allege any facts demonstrating that BCLIC or WNIC participated in the operation or management of any of them. Nor does she explain the structure of any of these alleged enterprises, or why some enterprises include some defendants but not others. Because the Receiver has not pleaded facts demonstrating that BCLIC or WNIC participated in the operation or management of

[18] *See, e.g.*, ¶ 374 ("Each of the above-described investments in the PPCO Funds and the PPVA Funds . . . constitute securities transactions."); ¶ 403 (alleging that PPCO entered into various transactions "in order to purchase certain securities").

any of these myriad enterprises,[19] the civil RICO claims against BCLIC and WNIC should be dismissed.

In addition, the Receiver alleges no facts showing that BCLIC and WNIC "associated together" with the other RICO defendants "for a common purpose of engaging in a course of conduct." *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 305 (S.D.N.Y. 2010). As the Receiver admits throughout her Complaint, it is factually, legally, and logically self-evident that they did not.[20]

III. THE RECEIVER STANDS IN THE SHOES OF THE PLATINUM FRAUDSTERS AND THUS CANNOT ASSERT CLAIMS AGAINST BCLIC AND WNIC UNDER THE *IN PARI DELICTO* DOCTRINE.

New York law strictly prohibits wrongdoers (or those standing in their shoes) from suing other alleged wrongdoers. *See ICP Strategic Credit Income Fund Ltd. v. DLA Piper, LLP (US)*, 730 F. App'x 78, 81 (2d Cir. 2018) ("The *in pari delicto* doctrine prevents a party from seeking to recover against others for a wrong in which the party participated or is deemed through

[19] To the contrary, because the Receiver repeatedly alleges that the Platinum and Beechwood Insiders, not BCLIC and WNIC, "orchestrated" the allegedly fraudulent schemes (*see, e.g.*, ¶¶ 308, 325), the Receiver effectively admits that BCLIC and WNIC did not participate in the operation and management of the alleged RICO enterprises.

[20] For example, the Receiver alleges that the Platinum Insiders sought to fleece investors like BCLIC and WNIC of funds to enrich themselves. ¶ 126. She also admits that BCLIC and WNIC sought to have the assets they transferred to Beechwood Re prudently invested to ensure that BCLIC and WNIC's future long-term care liabilities would be met. ¶ 192. They did not share a "common purpose" with the Platinum and Beechwood Insiders to defraud themselves, and they did not participate in the operation and management of the alleged RICO enterprises that perpetrated that fraud. Nor does the Receiver allege that they did, as such allegations are implausible on their face. Similarly, the Receiver's Section 1962(a) claim (Count 7) fails because she does not specifically identify any racketeering income that *BCLIC and WNIC* received (or how they unlawfully reinvested it). *See Pyke v. Laughing*, 1998 U.S. Dist. LEXIS 884, at *20–21 (S.D.N.Y. Jan. 22, 1998) (requiring plaintiff to allege facts showing racketeering income). And the Receiver's Section 1962(d) claim (Count 8) fails because she does not allege facts showing any conspiratorial agreement. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990) (merely alleging that the defendants "conspired" or "agreed" with one another insufficient).

'imputation' to have participated.").[21] "Indeed, the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be weakened by exceptions." *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010) (internal quotation marks omitted). And where, as here, the application of *in pari delicto* is readily apparent on the face of a complaint, resolving the issue on a motion to dismiss is appropriate. *See, e.g.*, *In re Lehr Constr. Corp.*, 528 B.R. 598 (Bankr. S.D.N.Y. 2015); *In re Haven Indus., Inc.*, 462 F. Supp. 172 (S.D.N.Y. 1978).

Just as a wrongdoer cannot profit from his misconduct, a receiver cannot pursue damages when the entity in receivership engaged in the misconduct. Courts across the country agree. For example, in *Knauer v. Jonathon Roberts Financial Group*, 348 F.3d 230, 236–38 (7th Cir. 2003), the Seventh Circuit applied the *in pari delicto* doctrine to bar a receiver from asserting claims on behalf of an entity associated with a Ponzi-schemer (like PPCO here). "The basic equity is that a broker dealer, which apparently had little to do even with the Ponzi scheme, should not be liable to [the receivership entity], which was deeply complicit in the crimes . . . ." *Id.* at 237.[22]

The Receiver in this case details an elaborate—and covert—fraud perpetrated by the Platinum Insiders. The Receiver repeatedly identifies the Platinum Insiders as those who "caused" or "orchestrated" the scheme and acknowledges that PPCO was founded and controlled by the Platinum Insiders. ¶¶ 44–46, 58. In light of New York's strong preference for robust application of *in pari delicto*, the Receiver should not be allowed to pursue these bogus claims.[23]

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[21] New York law governs the rights of the Receiver. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994).

[22] *See also Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543, 551 (Fla. Dist. Ct. App. 2003) (rejecting "common law tort claims against third parties to recover damages in the name or shoes of the corporation for the fraud perpetrated by the corporation's insiders").

[23] For the same reasons, *in pari delicto* should bar the Receiver's federal claims. *See Bateman Eichler, Hill Richards, Inc., v. Berner*, 472 U.S. 299, 310–11 (1985) (holding that the *in pari delicto*

IV. THE RECEIVER'S FRAUDULENT TRANSFER CLAIMS FAIL AS A MATTER OF LAW.

The Receiver pleads five fraudulent transfer claims, each lumping BCLIC and WNIC together with Beechwood, and failing to identify how either BCLIC or WNIC was in any way involved with any conveyance. These pleading deficiencies give rise to three independent grounds to dismiss the fraudulent conveyance claims against BCLIC and WNIC.

First, to survive a motion to dismiss, the Receiver must adequately plead each element of actual and fraudulent conveyance claims under the New York Debtor and Creditor Law ("NYDCL"), plead sufficient facts to provide each defendant with "fair notice" of such claims, and as pleaded the claims must be plausible. In addition, claims of actual fraudulent conveyances must be pleaded with particularity. The Receiver fails to meet these standards.

Second, fraudulent conveyance claims may only be asserted by creditors of alleged transferors. The Receiver fails to allege creditor status with respect to any alleged fraudulent conveyance to or involving BCLIC or WNIC.

Third, a fundamental requirement for the recovery of any purported fraudulent transfer is the existence of a transfer to defendants. The Receiver fails to allege that BCLIC or WNIC were the recipients of any such transfer, mandating dismissal of her fraudulent conveyance claims.

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doctrine can bar a securities act claim); *see also Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 546–47 (S.D.N.Y. 2013) (dismissing a RICO claim based on the *Bateman Eichler* test of *in pari delicto*). The *Wagoner* rule similarly deprives the Receiver of standing to bring suit. *See Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991) ("A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation."); *Picard v. HSBC Bank PLC*, 454 B.R. 25, 29–30 (S.D.N.Y. 2011) (Rakoff, J.) (explaining that "prudential considerations deprive a bankruptcy trustee of standing to even bring a claim that would be barred by *in pari delicto*").

A. The Receiver's fraudulent conveyance claims are inadequately pleaded and should be dismissed.

To assert a claim of *actual* fraudulent conveyance under New York law, the Receiver must plead that each alleged transfer was made with the "actual intent . . . to hinder, delay or defraud either present or future creditors" (NYDCL § 276) and do so in satisfaction of the heightened pleading requirements of Rule 9(b). *See In re M. Fabrikant & Sons, Inc.*, 394 B.R. 721, 733 (Bankr. S.D.N.Y. 2008) (collecting cases). "The party asserting an intentional fraudulent transfer must 'specify the property that was allegedly conveyed, the timing and frequency of those allegedly fraudulent conveyances, [and] the consideration paid.'" *Id.* (quoting *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 221 (S.D.N.Y. 2002)) (collecting cases).

To assert *constructive* fraudulent conveyance claims, the Receiver must allege that each transfer was made "without fair consideration" and that one of the following conditions is met: (1) the transferor was insolvent or was rendered insolvent by the transaction (NYDCL § 273); (2) the transferor had unreasonably small capital to justify the transfer (NYDCL § 274); or (3) the transferor believed it would not be able to repay the debt (NYDCL § 275). Such allegations must, at a bare minimum, provide BCLIC and WNIC with "fair notice" of the claims asserted against them. In addition, as noted above, allegations regarding both actual and constructive fraudulent conveyances must be made with respect to each individual defendant. *See In re Dreier LLP*, 452 B.R. at 409 "([G]roup pleading is generally forbidden because each defendant is entitled to know what he is accused of doing.").

The Receiver's kitchen sink pleading alleges every transaction was both constructively and actually fraudulent. As discussed above, the Receiver's allegations do not even approach the heightened pleading standards of Rule 9(b). The Complaint is devoid of any particularized

allegations of fraud on the part of BCLIC and WNIC and thus all fraud claims against BCLIC and WNIC, including Count 12, should be dismissed. *See supra* Section II.

Moreover, all of the Receiver's fraudulent conveyance claims should be dismissed for failing to provide BCLIC and WNIC with "fair notice" of the fraudulent conveyance claims being asserted against them. First and foremost, while the Receiver seeks to avoid the so-called "PPCO Loan Transactions and Securities Purchases" (*see* ¶¶ 405–24) as fraudulent conveyances, the Complaint does not provide *any* indication of how BCLIC or WNIC are alleged to be involved in *any* such transactions. Beginning at paragraph 405 of the Complaint, the Receiver "summarize[s]" several agreements and transfers alleged to constitute the "PPCO Loan Transactions and Securities Purchases." With one limited exception, there is not even *any* mention of BCLIC or WNIC in *any* of the subsequent paragraphs describing the purported fraudulent conveyances.[24] The Receiver simply catalogues a number of transactions which constitute the "PPCO Loan Transaction and Securities Purchases" without any reference to how BCLIC or WNIC are involved or, critically, what would be the basis of any fraudulent transfer liability on the part of BCLIC or WNIC.

Further, the Receiver fails to identify even the basic elements of any fraudulent conveyance claim against BCLIC and WNIC such as the transferor, the transferee, what was transferred, and the consideration exchanged. Such details must be alleged with respect to any purported fraudulent

[24] The only mention of BCLIC or WNIC occurs at paragraph 425 of the Complaint, which consists of a conclusory allegation that "BCLIC and WNIC represented that these were the true values of the Purchased Securities, which representations were false and were known by these defendants to be false when made." Such allegations violate Rule 9(b), and BCLIC and WNIC, not being parties to any transactions, never represented anything to Platinum or Beechwood, least of all the value of assets Beechwood/Platinum controlled. Further, even if taken to be true, such allegations are no basis for any fraudulent conveyance claim against BCLIC or WNIC.

conveyance to BCLIC or WNIC in order to satisfy applicable pleading standards.[25] The Complaint does not adequately plead a single required element of a fraudulent conveyance claim.

B. The Receiver is not a "creditor" entitled to sue under New York's fraudulent conveyance statutes.

A party to a fraudulent transfer may not under New York law sue to set it aside.[26] Instead, "it is thus well settled under New York law that the challenger must be a creditor" of the alleged transferor of the fraudulent conveyance. *United States v. Watts*, 786 F.3d 152, 162 (2d Cir. 2015). Plaintiff does not plead she is a creditor to any receivership entity, dooming her claim.

"[T]he power of a securities receiver is not without limits" and the "receiver has no greater rights or powers than the corporation itself would have." *Eberhard*, 530 F.3d at 132. Here, the Receiver's fraudulent transfer claims fail to identify which Platinum entities—*if any*—are creditors to other Platinum entities, and how and in what amounts. She fails to identify which claims she wants to set aside, and how she has standing to seek such relief, requiring dismissal. *See Barnet v. Drawbridge Special Opportunities Fund LP*, 2014 U.S. Dist. LEXIS 124410, at *40–46 (S.D.N.Y. Sept. 5, 2014) (no standing because liquidators were not "creditors").

C. BCLIC and WNIC were not parties to the transactions at issue and cannot be sued for fraudulent conveyance.

Finally, the Receiver fails to allege another critical element of such claims—that BCLIC or WNIC actually received any avoidable transfer. The Receiver challenges transfers made *from the Beechwood Entities/Reinsurance Trusts* into PPCO and PPVA, and vice-versa. *See supra* n.

[25] *See In re M. Fabrikant & Sons, Inc*, 394 B.R. at 733 ("The party asserting an intentional fraudulent transfer claim must specify the property that was allegedly conveyed, the timing and frequency of those allegedly fraudulent conveyances, [and] the consideration paid.") (internal quotation marks omitted).

[26] *See Eberhard v. Marcu*, 530 F.3d 122, 133 (2d Cir. 2008) ("transferor [ ] may not bring an action to set aside his own fraudulent conveyance").

17 (listing transactions). *None of this involves BCLIC or WNIC.* That is fatal.[27] The law only permits the "nullification of the transfer by returning the property at issue back to the transferor." *Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC*, 842 F. Supp. 2d 661, 667 (S.D.N.Y. 2012). It "does not create an independent remedy of money damages against third parties." *Id.* (internal quotation omitted). As a result, the Receiver's conclusory recitation of the elements of a fraudulent conveyance claim against WNIC and BCLIC is insufficient.[28]

CONCLUSION

For these reasons, the Receiver's claims against Bankers Conseco Life Insurance Company and Washington National Insurance Company should be dismissed with prejudice.

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Respectfully submitted,

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[27] *See BBCN Bank v. 12th Ave. Rest. Grp.*, 150 A.D.3d 623, 623–24 (N.Y. App. Div. 1st Dep't 2017) ("[T]here is no cause of action for aiding and abetting a fraudulent conveyance . . . ."); *Shefner v. Beraudiere*, 127 A.D.3d 442, 442 (N.Y. App. Div. 1st Dep't 2015) ("Providing assistance to an alleged transferee does not state a claim sounding in fraudulent conveyance . . . .").

[28] *See Guangzhou Love Live Culture Dev. Ltd. v. Belinda Int'l Ltd.*, 2017 U.S. Dist. LEXIS 221774, at *16–18 (E.D.N.Y. Dec. 28, 2017) (dismissing a plaintiff's fraudulent conveyance claim because it consisted "of little more than a formulaic recitation of the elements").

Attorneys for Bankers Conseco Life Insurance Company and Washington National Insurance Company

CERTIFICATE OF SERVICE

It is hereby certified that on this 8th day of March, 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this adversary proceeding.

Dated: March 8, 2019

Respectfully submitted,

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