UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

THE RECEIVER'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS FILED BY BANKERS CONSECO LIFE INSURANCE COMPANY AND WASHINGTON NATIONAL INSURANCE COMPANY

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Melanie L. Cyganowski, as Receiver for the above-named Platinum entities (the "Receiver"), respectfully opposes the Motion to Dismiss [Dkt. No. 169] (the "Motion") filed by Bankers Conseco Life Insurance Company ("BCLIC") and Washington National Insurance Company ("WNIC," and together with BCLIC, "BCLIC/WNIC").[1]

PRELIMINARY STATEMENT

The CNO Defendants are not the hapless victims portrayed in their papers.[2] Rather, their wounds were self-inflicted, and they were complicit in the damages they inflicted on PPCO. At best, the CNO Defendants failed to perform adequate due diligence when they first began their relationship with Beechwood and Platinum. At worst (and as the Complaint alleges), they knew exactly who they were doing business with and accepted the myriad risks associated therewith. And, as sufficiently pled by the Receiver, even if the CNO Defendants were initially ignorant of the true nature of Beechwood's composition and the quality of the investments, the CNO Defendants almost immediately recognized the truth.[3] However, instead of pulling their investments and exposing the fraud, they colluded with the original racketeers, scheming to maximize their return before their own regulators or others found out.

In sum, the Motion should be denied because:

- the Complaint sufficiently pleads, with particularity, plausible claims for fraud, violations of the RICO statute and securities fraud in light of the applicable relaxed pleading standards;
- the Receiver's claims are not barred by *in pari delicto*;

[1] Without conceding the validity of the Motion, the Receiver notes that she intends to file an Amended Complaint on March 29, 2019, which may render the Motion moot.

[2] "CNO" refers to CNO Financial Group, Inc. and "40/86" refers to 40/86 Advisors, Inc. BCLIC, WNIC, CNO and 40/86 are collectively referred to as the "CNO Defendants."

[3] "PPCO" refers to Platinum Partners Credit Opportunities Master Fund LP, and "PPVA" refers to Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation). Unless otherwise defined, the other capitalized terms are as defined in the Complaint.

- the Complaint states a claim for aiding and abetting breach of fiduciary duty and a claim for aiding and abetting fraud against the CNO Defendants; and

- the Complaint states claims under the NYDCL.

STATEMENT OF FACTS

The relevant facts are those alleged in the Receiver's Complaint ("Complaint" or "RC"), incorporated by reference herein and referenced where appropriate below.

ARGUMENT

I. THE COMPLAINT COMPORTS WITH APPLICABLE PLEADING RULES.

Although FRCP 9(b) governs the Receiver's fraud, RICO and securities fraud claims, a relaxed standard for pleading applies because the Receiver is an outsider to the transactions referred to in the Complaint,[4] requiring her to plead based upon second-hand knowledge. *Levine v. Shacklett*, 2005 WL 8160202, at *4 (M.D. Fla. Feb. 4, 2005); *In re Ahead by a Length, Inc.*, 100 B.R. 157, 167 (Bankr. S.D.N.Y. 1989). This relaxed pleading standard is especially appropriate here because the Complaint pleads a complex scheme involving numerous transactions, *U.S. ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 326 (S.D.N.Y. 2004), and many details of the CNO Defendants' involvement in that scheme are primarily within their own control. *Lavastone Capital LLC v. Coventry First LLC*, 2015 WL 1939711, at *9 (S.D.N.Y. Apr. 22, 2015). The Receiver's fraud-based claims – including those for common law fraud, securities fraud and RICO violations – are sufficiently detailed to meet this standard.

BCLIC/WNIC claim that the Receiver violated FRCP 9(b) by pleading upon information and belief. Yet, in *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972), on which they rely, the court recognized that the pleading standard under Rule 9(b) is relaxed "as to matters peculiarly

[4] The current Receiver was not appointed until July 6, 2017. (RC ¶ 11)

within the adverse parties' knowledge [but the] allegations must then be accompanied by a statement of facts upon which the belief is founded." The Complaint includes such a statement (RC ¶¶ 9-10), includes detail to support the claims, and cites to sources supporting the statement. (*E.g.*, RC ¶ 282.) Accordingly, BCLIC/WNIC's criticism is unfounded.

BCLIC/WNIC also assert that the Receiver has engaged in impermissible "group pleading." Yet, as they recognize, the Complaint need only "inform each defendant of the nature of his alleged participation in the scheme." *Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 388 (S.D.N.Y. 2016). The Complaint meets this standard by (i) describing in detail the fraud against PPCO; (ii) describing the relevant time period; and (iii) itemizing the transactions complained of. *In re Ahead by a Length, Inc.*, 100 B.R. at 167 (Bankr. S.D.N.Y. 1989) (receiver's "Amended Complaint [wa]s far from a pretext for discovery, describing in detail a fraudulent scheme for bilking the debtor and its creditors of large sums of money through a phony invoice scheme" even though pleaded on information and belief). Moreover, group pleading is permissible, as here, where the Complaint alleges a tight weave of connections between the fraud defendants, such that any entity playing an essential role in the fraud could be responsible for the acts of its affiliates. *See Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 406 (S.D.N.Y. 2010) ("Like streams converging to form a mighty river, any entity playing an essential role [] is responsible for what [] its subsidiaries did downstream").

The Receiver's claims all satisfy FRCP 8(a), which requires that the Complaint "contain …a short and plain statement of the claim showing the pleader is entitled to relief." (FRCP 8(a)(2)) In this regard, the Complaint 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).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

II. THE RECEIVER'S COMMON LAW FRAUD, SECURITIES FRAUD AND RICO CLAIMS SHOULD BE SUSTAINED.

A. The Receiver Has Pleaded Plausible Claims Against Each CNO Defendant for Common Law Fraud, RICO Violations and Securities Fraud with Particularity.

In 2014, after agreeing to terms with Beechwood concerning the Reinsurance Agreements, BCLIC/WNIC learned they were buying and selling overly inflated Platinum investments in the four reinsurance trusts – BRe BCLIC Primary, BRe BCLIC Sub, BRe WNIC 2013 LTC Primary, and BRe WNIC 2013 LTC Sub (the "Reinsurance Trusts") – and they willingly continued to do so because (i) the dire financial circumstances of their long-term care insurance ("LTC") business left them with no alternative, and (ii) of the promised significant returns along the lines that Platinum had long boasted. (*See* RC ¶ 60-61.) Far from being an "implausible" theory that the CNO Defendants were knowingly committing "financial suicide," at a time in 2014 when from all outward appearances Platinum was an extraordinarily successful investment enterprise, BCLIC/WNIC willingly joined and continued their membership in an illicit venture.

As one example, the Complaint alleges that when BCLIC/WNIC entered into the Reinsurance Agreements, they were initially enticed by the very favorable deal offered by Beechwood, which, *inter alia*, included highly advantageous terms requiring Beechwood to "top-up" the trust assets should their market values fall "below 102% of statutory liabilities." (RC ¶¶ 237-247) BCLIC/WNIC declined to pass up this seemingly "no-lose" proposition, especially given the abysmal track record of the LTC industry. (RC ¶¶ 176-224)

In March 2014, upon analyzing the actual investments in the Reinsurance Trusts, it became clear to Eric Johnson ("Johnson"), CNO's Chief Investment Officer (who simultaneously held that position with 40/86), that Beechwood was investing assets held in the Reinsurance Trusts in Platinum assets. This prompted communications and in-person meetings among Johnson, BCLIC, WNIC and Beechwood because, as specifically pled in both the Complaint and the BCLIC Complaint, such non-investment grade investments were unsuitable to insurance companies such as BCLIC/WNIC. (RC ¶¶ 278-280) Despite knowing and understanding that the value of the Platinum investments was overly inflated, BCLIC/WNIC continued to buy and sell these investments for two more years. (RC ¶¶ 280-286)

Later in 2014, Beechwood was initially directed by Johnson, on behalf of BCLIC/WNIC, to unwind the Platinum investments. At first, some of these holdings were "partially redeemed."[5] Importantly, Johnson's direction to unwind the Platinum investments – and Beechwood's acquiescence by "partially redeem[ing]" such investments – unequivocally contradicts CNO's argument that Beechwood controlled the investments in the Reinsurance Trusts. At minimum, issues of fact have been raised as to whether the CNO Defendants thereafter established control – at least as it relates to Platinum investments.

All this occurred during a period when the CNO Defendants were sensitive about Platinum investments in the Reinsurance Trusts, and at a point in time when they knew the individual Platinum holdings were overly inflated, and when Platinum was ostensibly worth the risk of participating in these investments. Their continuation of these investments makes it clear that the CNO Defendants planned to benefit from buying and selling these overly inflated assets.

[5] This was confirmed in BCLIC and WNIC's Complaint. (RC ¶ 282, quoting BCLIC Complaint, RC ¶ 97)

Moreover, contrary to the CNO Defendants' feigned drama, a plethora of facts have been alleged, with particularity, demonstrating time and again, through numerous transactions over a period of more than two years, that the CNO Defendants, with actual knowledge, not a "blind eye" as asserted by BCLIC/WNIC (RC ¶¶ 280-86), made material misrepresentations. As described in the Complaint, each Platinum transaction in which BCLIC/WNIC thereafter participated (detailed in the Complaint) necessarily involved the express misrepresentation by BCLIC/WNIC at the moment of the execution/consummation/closing of each transaction that the agreed upon price was a fair price even though it was not. (RC ¶¶ 302-454, 485-493) Particularly under the applicable relaxed pleading standard, these misrepresentations sufficiently satisfy each element required for common and securities fraud, aiding and abetting fraud, breach of fiduciary duty, and the predicate acts required for the RICO claims.

B. The Receiver's RICO Claims Are Not Barred under the Theory that They Are Based Upon Conduct Actionable as Securities Fraud.

BCLIC/WNIC argue that the Receiver's RICO claims are barred by 18 U.S.C. § 1964(c), which prohibits civil suits that "rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities." Yet, they simultaneously seek dismissal of the Receiver's securities fraud claims. The defendants cannot have it both ways. Unless and until the Court determines the Receiver has alleged an actionable securities fraud claim against at least one defendant, dismissal of the RICO claims on this ground would be premature.

C. The CNO Defendants Participated in the RICO Enterprises.

BCLIC/WNIC also incorrectly argue that the Receiver has failed to plead "with specificity" facts showing that they participated in the management or operation of the alleged RICO enterprises, and have alleged "no facts" showing that BCLIC/WNIC "'associated together' with the other RICO defendants 'for a common purpose of engaging in a course of conduct.'"

(MOL[6] 18-19) Contrary to what the defendants may believe, "enterprise" is subject to FRCP Rule 8(a) notice pleading and, in this Circuit, is subject to a "liberal pleading standard." *SKS Constructors, Inc. v. Drinkwine*, 458 F. Supp. 2d 68, 79 (E.D.N.Y. 2006). *See also RD Mgmt. Corp. v. Samuels*, 2003 WL 21254076, at *5 (S.D.N.Y. May 29, 2003) ("enterprise" subject to "notice pleading" under Rule 8(a)).

In *RD Mgmt. Corp.*, the Court explained that "'the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs,'" and only "some part in directing the enterprise's affairs is required," and concluded that, "[a]t this early stage of the litigation, these allegations are sufficient to infer that the defendants had some part in directing the affairs of the "enterprises in question." 2003 WL 21254076, at *7-8. *See also Conte v. Newsday, Inc.*, 703 F. Supp. 2d 126, 135 (E.D.N.Y. 2010) ("the Second Circuit has described the 'operation or management' test as establishing a 'relatively low hurdle for plaintiff to clear' at the pleading stage, 'the RICO defendant must have played some part in directing the enterprise's affairs'") (quoting *DeFalco v. Bernas*, 244 F.3d 286, 310 (2d Cir. 2001)). Here, the Complaint sets forth sufficient allegations to infer the CNO Defendants participation in the operation or management of the criminal enterprises by alleging that they:

- transferred $592 million in assets to Beechwood (RC ¶ 274);
- directed and ratified the investment of their money in the Reinsurance Trusts for more than two years even after learning that those funds were invested in highly aggressive, unsuitable and highly overvalued investments with PPVA or PPCO (RC ¶¶ 274-86);
- together with Beechwood and SHIP, "orchestrated the eventual transfer to PPCO of a portion of their exposure to these [overvalued] companies, which they had previously acquired from PPVA in what amounted, as alleged below, to fraudulent transfers and securities fraud" and "siphoned away the most valuable

[6] "MOL" refers to BCLIC/WNIC's Memorandum of Law in support of their Motion to Dismiss.

asset of PPCO … or acquired security interests in all of PPCO assets…" (RC ¶¶ 315, 401, 402, 425)[7]; and

- cooperated with the other Defendants, "[b]eginning in late 2015 and continuing until early 2017, … to transfer or encumber nearly all of the remaining PPCO Fund assets to or for the benefit of BCLIC, WNIC, SHIP, Beechwood and the select insiders of Platinum Partners" (RC ¶ 401).

The defendants' further efforts to undermine the RICO claims are unavailing.

First, they claim that they were not involved in a RICO enterprise with a "common purpose of engaging in a course of conduct." (MOL ¶ 19, citation and internal quotation marks omitted) However, the Complaint alleges plausible common purposes. One such purpose was to hold the CNO Defendants' assets in the Reinsurance Trusts – notwithstanding the Defendants' (including the CNO Defendants') knowledge that the assets were fraudulently being invested in noncomplying, overvalued Platinum investments, in violation of established investment criteria. This benefitted Beechwood by enabling it to obtain additional assets to manage and which could be used, among other purposes, to prop up PPVA. It also benefitted the CNO Defendants by permitting them to get unprofitable LTC business off their books, and further established a potential upside should the fraudulent investments in Platinum bear fruit. (RC ¶¶ 277-86) Another illicit purpose was to transfer or encumber tens of millions of dollars of assets of PPCO to or for the benefit of the CNO Defendants, SHIP and Beechwood, as well as select insiders at Platinum. (RC ¶¶ 315, 401)

Second, while BCLIC/WNIC rely on *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990), for the proposition that no conspiratorial agreement is pled, in contrast to

[7] BCLIC/WNIC argue that "the Receiver repeatedly alleges that Platinum and Beechwood insiders, not BCLIC/WNIC, 'orchestrated' the allegedly fraudulent schemes." (Mot. 18) However, they conveniently overlook RC ¶ 315. As different defendants may play different roles in a RICO enterprise, each defendant need not orchestrate each aspect of the scheme. *See De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 301 (S.D.N.Y. 2013).

the conclusory allegations in *Hecht*, the Complaint pleads extensive facts supporting the existence of such conspiratorial agreements, starting with the specific words, "[b]eginning in late 2015 and continuing until early 2017, the Defendants conspired to transfer or encumber nearly all of the remaining PPCO Fund assets…." (RC ¶ 401)

Third, BCLIC/WNIC argue that they did not receive or reinvest racketeering income. However, the Beechwood Trusts "held assets of BCLIC and WNIC" (RC ¶ 403), BCLIC and WNIC were their sole beneficiaries (Dkt. 171-2 at 30,171-3 at 21, 171-4 at 24, 27, 30, 171-8 at 3, 171-8 at 32, 171-9 at 28, 171-9 at 31), and the Reinsurance Trusts' assets were ultimately demanded by, and upon information and belief were thereafter transferred to, BCLIC/WNIC (CNO's 8-K dated September 29, 2016 (the "CNO 8-K"), Dkt. 171-10 at 6). At this early stage, these allegations are sufficient to plead both an "association in fact" and the CNO Defendants' active participation.

III. THE RECEIVER'S AIDING AND ABETTING CLAIMS ARE SUFFICIENT.

"Under New York law, there are three elements for aiding and abetting a breach of fiduciary duty: the defendant must (1) have actual knowledge of a breach of fiduciary duty; (2) knowingly participate in or induce the breach; (3) and so injure the plaintiff." *Cohen v. Cohen*, 993 F. Supp. 2d 414, 428 (S.D.N.Y. 2014). "A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance." *William Doyle Galleries, Inc. v. Stettner*, 167 A.D.3d 501, 503, 91 N.Y.S.3d 13, 17 (1st Dep't 2018).

Unlike her fraud claims, the Receiver's claim for aiding and abetting breach of fiduciary duty is only subject to the notice pleading standard in FRCP 8(a). *Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 2003 WL 22218643, at *8 (S.D.N.Y. Sept. 25, 2003). *Official Comm. of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 2002 WL

362794, at *8 (S.D.N.Y. Mar. 6, 2002). That claim is based upon allegations that PPCO's investment managers were conflicted and, as a result of their conflicts of interest, disregarded their fiduciary duties to PPCO by, among other breaches, causing PPCO to enter into the PPCO Loan Transactions and Securities Purchases as well as the earlier transactions, and the CNO Defendants knowingly aided and abetted those breaches.

BCLIC/WNIC ignore both the law and the Complaint's allegations by arguing that the Receiver has failed to state claims for aiding and abetting breach of fiduciary duty and fraud for two reasons: (a) failure to allege that BCLIC/WNIC had actual knowledge of the underlying breaches of fiduciary duty or fraud; and (b) BCLIC/WNIC did not "substantially assist[]" in the commission of those torts.

Actual knowledge may be pled and proven through circumstantial evidence, *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). Here, the Complaint exceeds the requirement, by alleging that the CNO Defendants had actual knowledge of the fund managers' underlying breaches of fiduciary duty and fraud by alleging, among other things, that they knew that (i) the Reinsurance Trusts were investing with PPCO and PPVA (RC ¶¶ 277-83, 479); (ii) Nordlicht, Huberfeld, Bodner and Levy owed fiduciary duties to the PPCO Funds, *see In re Soundview Elite Ltd.*, 594 B.R. 108, 131 (Bankr. S.D.N.Y. 2018) (RC ¶¶ 58, 126, 132, 133, 146, 162-75, 228, 231-34, 277, 279, 282, 283); and (iii) those individuals had conflicts of interest and were breaching their fiduciary duties and committing fraud against the PPCO Funds by engaging in transactions that advantaged the CNO Defendants and others at the expense of PPCO, and/or advantaged PPVA at the expense of PPCO. (RC ¶¶ 124, 470-83, 507) The Complaint thus adequately alleges sufficient facts from which actual knowledge on the part

of the CNO Defendants can be inferred, with all inferences being drawn in favor of the Receiver, as they must on this Motion.

To plead "substantial assistance," the Receiver need only plead facts "sufficient to show that [the CNO Defendants] knowingly provided substantial assistance to [the breaching party] by 'affirmatively assist[ing], help[ing], conceal[ing] or fail[ing] to act when required to do so, thereby enabling the breach to occur.'" *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 142 (2d Cir. 2011) (citation omitted) (by negotiating and signing agreement with plaintiffs' law firm with knowledge of firm's conflict of interest and that agreement would undermine ability to "fairly represent" plaintiffs, defendant employer aided and abetted breaches of fiduciary duty).

BCLIC/WNIC wrongly argue that the Receiver has pled only "inaction," not "substantial assistance." Although BCLIC/WNIC portray themselves as "victims who failed to protect themselves" (MOL 17), the Complaint alleges otherwise. For example, the Receiver alleges that "Beechwood, CNO, BCLIC, WNIC and SHIP orchestrated the eventual transfer to PPCO of a portion of their exposure to [loans made by the Reinsurance Trusts and SHIP to failing portfolio companies], which they had previously acquired from PPVA in what amounted, as alleged below, to fraudulent transfers and securities fraud" and "siphoned away the most valuable asset of PPCO … or acquired security interests in all of PPCO assets.…" (RC ¶¶ 315, 401-32) While the Receiver has not yet had full discovery from the CNO Defendants, their direct and proactive involvement in the scheme is made all the more plausible by their own statement to this Court, that in "late 2014, [Beechwood officers] Feuer and Taylor promised [BCLIC/WNIC] that Beechwood would begin to unwind Beechwood's significant investments in companies controlled by Platinum," "Plaintiffs were thus led to believe that Beechwood would take steps to divest itself of such investments," and "Beechwood partially redeemed its direct investments in

the Platinum funds, but found other ways to support Platinum, namely, by investing in companies that Platinum owned or controlled." (RC ¶ 282, quoting BCLIC Complaint, ¶ 97.)

These fraudulent transfers damaged PPCO and benefitted the CNO Defendants because (i) the Reinsurance Trusts held assets of BCLIC/WNIC (RC ¶ 403), (ii) BCLIC/WNIC were the sole beneficiaries of the Reinsurance Trusts (Dkt. 171-2 at 30,171-3 at 21, 171-4 at 24, 27, 30, 171-8 at 3, 171-8 at 32, 171-9 at 28, 171-9 at 31), and (iii) BCLIC/WNIC ultimately demanded and, upon information and belief received, all of the Reinsurance Trusts' assets (CNO 8-K, Dkt. 171-10 at 6). The CNO Defendants' involvement in the aiding and abetting breaches of fiduciary duty and fraud is therefore more than plausible. Aided by the CNO Defendants, causing PPCO to enter into these transactions, Nordlicht, Levy, Huberfeld and Bodner breached their fiduciary duties to PPCO. (RC ¶¶ 470-76)[8]

Thus, the Complaint pleads the CNO Defendants' "substantial assistance" and "knowing[] participat[ion] in [the] breach[es]" of fiduciary duty, as well as in the underlying fraud. *See Johnson*; *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 517-18 (S.D.N.Y. 2011) (allegations that defendants "assisted and engineered the transfer of cash into unprotected accounts; and hid[] and misrepresented the risk to the SMFF excess cash when it was placed at RCM" sufficient). This is more than mere "inaction" or the "[a]rtful pleading [of] …allegations [that] come down to omissions or failures to act: *i.e.*, not revealing what State Street knew and suspected, not foreclosing, not responding to inquiries" referred to in the CNO Defendants' leading case, *Sharp International Corp. v. State Street Bank & Trust Co.*, 403 F.3d 43 (2d Cir.

[8] The Complaint also alleges that BCLIC/WNIC aided and abetted fraud. For example, it alleges that the CNO Defendants invested more than $550 million with the Reinsurance Trusts, and, within a month (in March 2014), realized that those monies were being invested with Platinum, and that they subsequently learned that those monies were being used to fuel a fraud. Yet, these defendants thereafter directed and ratified the investments of those monies with PPCO for over two years, enabling the fraud to occur and continue. (RC ¶¶ 274-86, 470-83, 485-93)

2005). BCLIC/WNIC's reliance on *Chemtex, LLC v. St. Anthony Enterprises, Inc.*, 490 F. Supp.2d 536, 546, 547 (S.D.N.Y. 2007) is also misplaced because it involved summary judgment (not a motion to dismiss) in favor of a lender on a claim for aiding and abetting fraudulent conveyance where the plaintiff failed to "come forward with evidence that [the lender] had actual knowledge of any wrongdoing" and the court addressed the lender's "inaction."

Nordlicht and crew's divided loyalties were facially obvious, making it impossible for the CNO Defendants to avoid knowing they were aiding and abetting a breach of their duties. Accordingly, the Receiver has stated claims against the CNO Defendants for aiding and abetting breach of fiduciary duty and aiding and abetting fraud.

IV. THE RECEIVER'S CLAIMS ARE NOT BARRED BY *IN PARI DELICTO*.

BCLIC/WNIC incorrectly argue that all of the Receiver's claims are barred as a matter of law by the doctrine of *in pari delicto*.

The availability of the equitable defense of *in pari delicto* varies depending on the underlying claim and the defendant. Federal law governs the application of *in pari delicto* to federal claims. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306, (1985). *See also Republic of Iraq v. ABB AG*, 768 F.3d 145, 163 (2d Cir. 2014) (applying *Bateman Eichler* to RICO). Under the *Bateman Eichler* test, *in pari delicto* only bars federal claims where: (i) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (ii) preclusion of the suit would not significantly interfere with the effective enforcement of federal law and protection of the investing public. *See Bateman Eichler*, 472 U.S. at 311. BCLIC/WNIC fail to satisfy either prong.

In *Gordon v. Royal Palm Real Estate Inv. Fund I, LLLP*, an SEC receiver brought an action for federal securities fraud against the individuals and entities involved in the fraudulent

management of the receivership entities. 320 F. Supp. 3d 910, 919 (E.D. Mich. 2018). While that Court did impute to the receivership entities at least substantially equal responsibility for the violations the receiver sought to address, the receiver's federal claims nonetheless still were not barred under *Bateman Eichler*. *See id*. The *Gordon* court held that:

> Permitting parties who have plainly violated federal securities laws to evade liability for their actions strictly on the basis that another individual has engaged in similar conduct would thwart the purposes behind such laws . . . Assuming arguendo that Complaint states a plausible claim for federal securities violations against Defendants, the effective enforcement of securities laws would be best served by allowing Plaintiff to proceed on his claims.

Id. at 919.

Moreover, here, the Receiver is an "equity receiver," vested by the District Court under its equity powers with the authority and responsibility to preserve assets and pursue claims on behalf of the Receivership entities, and their investors and creditors.[9] As such, this Court should not apply the same "substantially equal responsibility for the violations" prong to the Receiver because it is in this Court's discretion whether to impute that standard to the Receiver, who did not participate in the entity's violations, but whose preclusion from pursing the claims would significantly interfere with the effective enforcement of federal law and protection of the investing public. This is especially so because one of the Receiver's goals in bringing this litigation is to avoid liens precluding distribution to innocent investors and creditors. But even if the first prong is applied, the defense should still be precluded.

State law governs the application of the defense to the Receiver's state statutory and common law claims. Regardless of the choice of law, Indiana, the physical location of the CNO

[9] The *in pari delicto* defense is based entirely in equity, having no statutory basis under federal or state law. Accordingly, the application of the *in pari delicto* defense is in the discretion of the court. *Acme Am. Repairs, Inc. v. Katzenberg*, 2011 WL 3876971, at *2 (E.D.N.Y. Aug. 31, 2011) (citation omitted); *Couldock & Bohan, Inc. v. Socie´te´ Generale Sec. Corp.*, 93 F. Supp. 2d 220, 233 (D. Conn. 2000).

Defendants, or New York, where PPCO and the Receiver are based, the Receiver's claims should be sustained.

Under Indiana law, the Receiver's tort claims are not barred by *in pari delicto.* Indiana courts employ an "equitable alignment" test that favors equity receivers. *Marwil v. Cluff*, 103-CV-0787-DFH-JMS, 2007 WL 2608845, at *9 (S.D. Ind. 2007) (*in pari delicto* did not apply because the "equitable alignment" of the allegations in the case favored the receiver who sought to recover from defendants who were also the principal beneficiaries of the fraud). Moreover, Indiana law treats the receivership as a "new entity, untainted by the corporation's wrongdoing [and not] necessarily barred by *in pari delicto*." *Isp.com LLC. v. Theising*, 805 N.E.2d 767, 773 (Ind. 2004); *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("*in pari delicto* loses its sting when the person who is in pari delicto is eliminated"). Here, the "equitable alignment" does not support the application of *in pari delicto*. The Receivership is an untainted new entity created to protect PPCO's assets and pursue claims on behalf of it and its investors.

Assuming *arguendo* for the purpose of opposing the Motion only that New York law applies, as it does to the Receiver's claims under the NYDCL, *in pari delicto* does not bar fraudulent conveyance claims. *Wimbledon Fin. Master Fund, Ltd. v. Wimbledon Fund, SPC on behalf of Class C Segregated Portfolio*, 162 A.D.3d 433, 434, 80 N.Y.S.3d 3, 5 (1st Dep't 2018) (citing *FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 150 A.D.3d 492, 497, 56 N.Y.S.3d 12, 19 (1st Dep't 2017)); *Cobalt Multifamily Inv'rs I, LLC v. Arden*, 46 F.Supp. 3d 357, 363 (S.D.N.Y. 2014). Consequently, it cannot bar the Receiver's claims under the NYDCL.

Moreover, the Receiver's claims are valid under the "adverse interest exception" to *in pari delicto*, which "rebuts the usual presumption that the bad acts of managers acting within the scope of their employment are imputed to the corporation." *In re TS Employment, Inc.*, 2019

WL 1084388, at *6 (Bankr. S.D.N.Y. Mar. 7, 2019). The exception applies "where the corporation is actually the victim of a scheme undertaken by the agent to benefit himself or a third party personally, which is therefore entirely opposed (*i.e.*, 'adverse') to the corporation's own interests," such as where the agent has "totally abandoned his principal's interests" and is "acting entirely for his own or another's purposes," including, for example, "outright theft or looting or embezzlement – where the insider's misconduct benefits only himself or a third party; *i.e.*, where the fraud is committed against a corporation rather than on its behalf." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466-67, 912 N.Y.S.2d 508, 938 N.E.2d 941 (2010). The "adverse interest" exception is also subject to a transaction by transaction or scheme by scheme analysis.

Here, the Complaint describes extensive misconduct that victimized the PPCO Funds and benefitted the CNO Defendants and others, including:

- the PPCO Loan Transactions and Securities Purchases – a series of cashless transactions by which tens of millions of dollars of value were transferred from PPCO to BCLIC, WNIC and SHIP in which (a) SHIP and the Reinsurance Trusts (the sole beneficiaries of which were BCLIC/WNIC) sold nonperforming loans to PPCO at the wildly inflated purchase price of $70 million, PPCO borrowed $70 million from the sellers which was guaranteed by PPCO and its 35 subsidiaries (the "Subsidiaries"), and PPCO and the Subsidiaries granted the purchasers security interests in substantially all of their assets (RC ¶¶ 315, 401-32);

- numerous other transactions funded in part by the CNO Defendants that were designed to benefit PPVA at the expense of PPCO, including $30 million in transfers and/or loans that were never repaid by PPVA to PPCO, PPCO's temporary purchase of an interest in Black Elk to benefit PPVA, which subsequently resulted in a $24 million damage claim against PPCO by the Black Elk bankruptcy trustee (RC ¶ 472);

- the payment of $35 million in unearned management and professional fees by PPCO (RC ¶¶ 472, 505); and

- the Complaint further alleges that innocent insiders would have reported, and thereby stopped, the wrongdoing had it been brought to their attention (RC ¶¶ 89, 90).

Because this misconduct was devastating to the PPCO Funds and benefitted only others, the "adverse interest" exception to the *in pari delicto* doctrine applies, and the doctrine does not bar any of the Receiver's claims. *In re Refco Sec. Litig.*, 779 F. Supp. 2d 372, 376 (S.D.N.Y. 2011) (Rakoff, J.), *aff'd sub nom. Krys v. Butt*, 486 F. App'x 153 (2d Cir. 2012); *Neogenix Oncology, Inc. v. Gordon*, 133 F. Supp. 3d 539, 543–44 (E.D.N.Y. 2015). Accordingly, the Receiver's claims are not barred by *in pari declicto*.

V. THE COMPLAINT STATES A CLAIM FOR FRAUDULENT CONVEYANCE.

BCLIC/WNIC incorrectly argue that the Receiver's NYDCL claims should be dismissed because: (a) they are not properly pled; (b) the Receiver lacks creditor status; and (c) they did not receive any transfers.

A. The Receiver's Claims Under NYDCL §§ 273-76 and 278 Are Properly Pled.

1. The Complaint Provides "Fair Notice" of All of the NYDCL Claims.

BCLIC/WNIC argue that the Receiver's fraudulent conveyance claims should be dismissed "for failing to provide BCLIC/WNIC with 'fair notice' of the fraudulent conveyance claims being asserted against them." (MOL 23) That is wrong.

The Complaint asserts claims against BAM Administrative, SHIP, the Reinsurance Trusts and BCLIC/WNIC seeking avoidance and recovery of fraudulent transfers under NYDCL §§ 273, 274, 275, 276 and 278. "Under the DCL, a conveyance by a debtor is deemed constructively fraudulent if it is made without 'fair consideration,' and (inter alia) if one of the following conditions is met: (i) the transferor is insolvent or will be rendered insolvent by the transfer in question, DCL § 273; (ii) the transferor is engaged in or is about to engage in a business transaction for which its remaining property constitutes unreasonably small capital, DCL § 274; or (iii) the transferor believes that it will incur debt beyond its ability to pay, DCL § 275." *Sharp International*, 403 F.3d at 53. NYDCL § 276 provides: "Every conveyance made

and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." The Complaint provides BCLIC/WNIC with "fair notice" of all of the claims asserted against them under the NYDCL, and it pleads the claim under NYDCL § 276 with particularity. *In re M. Fabrikant & Sons. Inc. v. JP Morgan Chase Bank. N.A.*, 394 B.R. 721, 735 (Bankr. S.D.N.Y.2008).

The Receiver's claims under the NYDCL allege that BAM Administrative, LLC, as agent for SHIP and the Reinsurance Trusts (which held assets of BCLIC/WNIC, *see* RC ¶ 403), entered into the PPCO Loan Transactions and Securities Purchases – a series of transactions with PPCO, in which:

- SHIP and the Reinsurance Trusts sold to PPCO certain loans (the "Purchased Loans") which SHIP, the Reinsurance Trusts and BCLIC/WNIC knew were nonperforming for more than $69 million – multiples of their actual value;
- BAM Administrative functioned as agent for SHIP and the Reinsurance Trusts;
- PPCO financed the purchase price of the Purchased Loans by borrowing $69,153,626.82 from SHIP and the Reinsurance Trusts (against through their agent, BAM Administrative) – including $42,963,949 borrowed from SHIP, $14,989,678 from BRe WNIC 2013 LTC Primary, $700,000 from BRe WNIC 2013 LTC Sub, $10,000,000 from BRe BCLIC Primary, and $500,000 from BRe BCLIC Sub – and having its Subsidiaries guarantee the Purchased Loans; and
- PPCO and the Subsidiaries purportedly gave SHIP and the Reinsurance Trusts (for the benefit of BCLIC/WNIC) security interests in substantially all of the assets of the Reinsurance Trusts. (RC ¶¶ 403-32)

The Complaint provides BCLIC/WNIC with more than "fair notice" of the transfers. It describes the initial transfers in detail, separately breaking out each step of the transactions between PPCO, and SHIP and the Reinsurance Trusts (for the benefit of BCLIC/WNIC), alleging that PPCO did not receive "fair consideration" for the transfers it made and the obligations it incurred. (RC ¶¶ 403-32) The Complaint also sets forth the other factual predicates

for avoidance of the initial transfers and obligations incurred by PPCO, and recovery under NYDCL §§ 273, 274, 275 – including that the transferor was insolvent or rendered insolvent by the transactions (NYDCL § 273), that the transferor had unreasonably small capital to justify the transfer (NYDCL § 274), and that the transferor believed it would not be able to repay the debt (NYDCL § 275) – and alleges that the conveyances were made, and liens were incurred, by PPCO "with actual intent … to hinder, delay, or defraud either present or future creditors," as required by NYDCL § 276. (RC ¶¶ 555-83)

This is more than enough to provide BCLIC/WNIC with fair notice of the transactions. *See In re M. Fabrikant & Sons. Inc.* 394 B.R. at 735–36; *Fed. Nat'l Mortgage Ass'n v. Olympia Mortgage Corp.*, 2006 WL 2802092, at *9 (E.D.N.Y. Sept. 28, 2006); *Gindi v. Silvershein*, 1995 WL 347397, at *4–5 (S.D.N.Y. June 8, 1995) (finding that claims alleging non-particularized transfers were sufficient to survive a 12(b)(6) motion to dismiss, yet not to satisfy Rule 9(b)).

BCLIC/WNIC incorrectly argue only that "the Complaint does not provide any indication of how BCLIC/WNIC are alleged to be involved in any such transactions." (MOL 29) Because the Complaint alleges that the obligations and liens incurred to the Reinsurance Trusts are "fraudulent" under NYDCL §§ 273-76, under NYDCL § 278, the Receiver may avoid those obligations and liens "as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser." BCLIC/WNIC's argument is baseless.

BCLIC/WNIC are beneficiaries and subsequent transferees of the fraudulent transfers made, and obligations and liens incurred, by PPCO to BCLIC/WNIC because (i) the Reinsurance Trusts held assets of BCLIC/WNIC (RC ¶ 403), (ii) as the papers filed in support of BCLIC/WNIC's Motion demonstrate, BCLIC and WNIC were the sole "[b]eneficiaries" of the

Reinsurance Trusts (Dkt. 171-2 at 30,171-3 at 21, 171-4 at 24, 27, 30, 171-8 at 3, 171-8 at 32, 171-9 at 28, 171-9 at 31), and (iii) the Reinsurance Trusts' assets were ultimately demanded by, and upon information and belief thereafter transferred to, BCLIC/WNIC (CNO 8-K, Dkt. 171-10 at 6).

To the extent any requirement exists that BCLIC/WNIC be participants in the transfers,[10] BCLIC/WNIC "exercised their right to withdraw all of the assets" from the Reinsurance Trusts after conducting an audit of the Reinsurance Trusts. (Dkt. 171-10 at 4, 6) Based on that audit, BCLIC/WNIC were beneficiaries and subsequent transferees who are alleged to have known of the fraudulent conveyances by the time they caused the Reinsurance Trusts to convey all of their assets to themselves. The Complaint thus provides BCLIC/WNIC with more than "fair notice" of the avoidance claims against them under NYDCL §§ 273-276 and 278. Accordingly, the Receiver is entitled to avoid PPCO's loan obligations and any related security interests given to it by PPCO or the Subsidiaries to the extent now owned by BCLIC or WNIC, or, if the Reinsurance Trusts, BCLIC or WNIC have monetarized those loan obligations or liens, to recover any proceeds of those obligations or liens now in the hands of BCLIC or WNIC or a money judgment equal to the value thereof. *See Fed. Nat. Mortg. Ass'n*, 2006 WL 2802092, at *9; *Paradigm BioDevices, Inc. v. Viscogliosi Bros.*, LLC, 842 F. Supp. 2d 661, 667 (S.D.N.Y. 2012); *Constitution Realty, LLC v. Oltarsh*, 309 A.D.2d 714, 715-716 (1st Dep't 2003). Further,

[10] S*ee, e.g., Fed. Nat. Mortg. Ass'n v. Olympia Mortgage Corp.*, 2006 WL 2802092 at *10 (E.D.N.Y. Sept. 28, 2006) (denying motion to dismiss by subsequent transferee that "was a participant in the transfers"); *RTC Mortg. Tr. 1995-S/N1 v. Sopher*, 171 F. Supp. 2d 192, 201 (S.D.N.Y. 2001) (emphasis added) (recovery is proper from defendant that "participate[d] in the fraudulent transfer and are either transferees of the assets or beneficiaries of the conveyance"); *Sullivan v. Kodsi*, 373 F.Supp.2d 302, 309 (S.D.N.Y. 2015) ("While *ordinarily it might be difficult for a transferee or beneficiary to be distinguished from a participant in the transfer*, the particular relationship of these defendants to the transferred assets creates just such a distinction") (emphasis added).

BCLIC/WNIC's reliance on *In re Dreier LLP*, 452 B.R. 391, 409 (Bankr. S.D.N.Y. 2011), for the proposition that "allegations regarding both actual and constructive fraudulent conveyance must be made with respect to each individual defendant" is misplaced because the statement they quote was made in *Dreier* with respect to Rule 9(b), which is inapplicable to claims for constructive fraudulent conveyance.

2. The Claims Under NYDCL § 276 Are Pled with Particularity.

BCLIC/WNIC also argue that the Receiver's claim under NYDCL § 276 should be dismissed because it is not pled with particularity. In general, to plead a claim for fraudulent transfer under NYDCL § 276 with particularity, "[t]he 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.'" *Flannigan v. Vulcan Power Grp., L.L.C.*, 712 F. Supp. 2d 63, 67 (S.D.N.Y. 2010). Here, however, because the Receiver is an outsider to the transactions at issue and information regarding any transfers between the Reinsurance Trusts and BCLIC/WNIC are within the control of BCLIC/WNIC and Beechwood, the particularity requirement should be relaxed. *In re Dreier LLP*, 452 B.R. at 408; *In Re Enron Corp.*, 328 B.R. 58, 73 (Bankr. S.D.N.Y. 2015).

In any event, the Complaint satisfies the particularity requirement by alleging that each of the Reinsurance Trusts received loan obligations and liens from PPCO for which the Reinsurance Trusts did not give "fair consideration," by detailing the transactions, participants, time periods, amounts and nature of the transfers (§ A.1 above & RC ¶ 403-32), and alleging that "each transfer made, each obligation incurred, and each lien given [by PPCO] in connection with the PPCO Loan Transactions and Securities Purchases, was made, incurred or given by PPCO … and its subsidiaries with an actual [intent] to hinder, delay and defraud their present and future creditors, in violation of New York Debtor & Creditor Law § 276." (RC ¶ 577) *Sharp*

International, 403 F.3d at 56; *In re Dreier LLP*, 452 B.R. at 433. For this reason, BCLIC/WNIC's group pleading objection at page 23 of the MOL is baseless.

Moreover, the Complaint and BCLIC/WNIC's own submission establishes that: (i) BCLIC/WNIC were beneficiaries of the transfers because the Reinsurance Trusts held their assets (RC ¶ 403), (ii) according to their own submissions, they were the sole "[b]eneficiaries" of the Reinsurance Trusts (Dkt. 171-2 at 30,171-3 at 21, 171-4 at 24, 27, 30, 171-8 at 3, 171-8 at 32, 171-9 at 28, 171-9 at 31); (iii) BCLIC/WNIC were subsequent transferees of PPCO's assets (Dkt. 171-10 at 6); and (iv) BCLIC/WNIC were active participants in the transfers they received because they "exercised their right to withdraw all of the assets" from the Reinsurance Trusts after conducting an audit of the Reinsurance Trusts. (Dkt. 171-10 at 4) Consequently, the Receiver is also entitled to avoid and recover the fraudulent transfers from BCLIC/WNIC on her claims under NYDCL § 276. Nor did the Receiver engage in improper group pleading because it is obvious that BCLIC/WNIC's liability is based on their status as the sole beneficiaries of the Reinsurance Trusts, which held all of their assets, and they "exercised their right to withdraw all of the assets" from the Reinsurance Trusts. (Dkt. 171-10 at 4)

B. The Receiver Has Standing to Sue under the NYDCL.

BCLIC/WNIC erroneously argue that the Receiver lacks standing to assert NYDCL claims because (i) only a receiver for a creditor of transferor, not a receiver for the transferor, can assert claims under the NYDCL, and (ii) the Receiver is not the receiver for a creditor of PPCO.

In support of this argument, BCLIC/WNIC rely on *Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008), and two cases that cite it. *Eberhard*, however, actually supports the Receiver's position here. In *Cobalt Multifamily Inv'rs I, LLC v. Arden*, the Court explained that, while *Eberhard* found no standing because it involved a receiver for only the individual transferor, "*Eberhard* … strongly suggests that, '[i]n the Second Circuit, when transfers are made by a

corporation that is dominated by the wrongdoer, a receiver appointed to recover assets for the receivership entity – rather than for a wrongdoer who manipulated the dominated entity – has standing to bring claims on the corporation's behalf' to recover the fraudulent transfers." 46 F. Supp. 3d 357, 363 (S.D.N.Y. 2014) (citing *Carney v. Montes*, 2014 WL 671263, at *8 (D. Conn. Feb. 21, 2014)).[11] The Court in *Cobalt* emphasized that "New York courts have historically concluded that a receiver for a corporation may sue to set aside fraudulent transfers, even when the receivership entity itself might have been barred from doing so." *Cobalt*, 46 F. Supp. 3d at 363.

Here, as in *Cobalt*, and unlike in *Eberhard*, the Receiver is not the receiver for an individual. Instead, she is the receiver for PPCO, an entity controlled by wrongdoers who, together with the defendants, caused PPCO to make fraudulent transfers in complete abrogation of their duties to the entity. She thus has standing to assert claims under NYDCL §§ 273, 274, 275 and 276 for assets and liens wrongly transferred by the PPCO Funds.

In any event, BCLIC/WNIC admit that a receiver for a creditor of the transferor has standing to sue under the NYDCL. (MOL 24) At least two Receivership Entities – PPCO Fund and PPCO Blocker Company – are creditors of PPCO, on whose behalf the Receiver asserts fraudulent transfers by PPCO. Accordingly, BCLIC/WNIC's argument is baseless.

C. BCLIC/WNIC Were Parties to the Transactions at Issue and Can Be Sued for Fraudulent Conveyance.

BCLIC/WNIC also erroneously claim that they were not parties to the transaction at issue therefore and cannot be sued for fraudulent conveyance. (MOL 24-25) As noted above, that

[11] *See also Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190–92 & nn. 4–5 (5th Cir.2013) (collecting cases). *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).

argument is wrong because the Complaint alleges that the Reinsurance Trusts "held assets of BCLIC and WNIC" (RC ¶ 403), under the trust agreements governing the Reinsurance Trusts BCLIC and WNIC were the sole beneficiaries of those trusts (Dkt. 171-2 at 30,171-3 at 21, 171-4 at 24, 27, 30, 171-8 at 3, 171-8 at 32, 171-9 at 28, 171-9 at 31), and, following an audit by the CNO Defendants, the Reinsurance Trusts' assets were ultimately demanded by, and upon information and belief were thereafter transferred to, BCLIC and WNIC (171-10 at 4, 6). Moreover, the Receiver may recover money damages against parties who participate in the fraudulent transfer and ***are either transferees of the assets or beneficiaries of the conveyance***. *RTC Mortg. Tr. 1995-S/N1 v. Sopher*, 171 F. Supp. 2d 192, 201 (S.D.N.Y. 2001) (emphasis added); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1172 (2d Cir. 1993). Accordingly, this criticism is also baseless.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

Dated: New York, New York
March 22, 2019

Respectfully submitted,

OTTERBOURG P.C.

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CERTIFICATE OF SERVICE

It is hereby certified that on this 22nd 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.

Respectfully submitted,

OTTERBOURG P.C.

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