UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-JSR
MELANIE L. CYGANOWSKI, AS EQUITY RECEIVER FOR PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND, et al., Plaintiff, v. BEECHWOOD RE LTD., et al., Defendants.	Case No. 1:18-cv-12018-JSR

MEMORANDUM OF LAW BY DEFENDANTS SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA AND FUZION ANALYTICS, INC. IN SUPPORT OF PARTIAL MOTION TO DISMISS THE PPCO RECEIVER'S FIRST AMENDED COMPLAINT

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INTRODUCTORY STATEMENT

Counts one through four, six, seven, and eighteen brought against defendants Senior Health Insurance Company of Pennsylvania ("SHIP") and Fuzion Analytics, Inc. ("Fuzion") in the First Amended Complaint ("FAC") filed by plaintiff Melanie L. Cyganowski, as Receiver (the "Receiver") for the above-captioned Platinum funds (the "PPCO Funds") should be dismissed because the Receiver lacks standing to bring these claims, all of which are purportedly brought on behalf of investors in the PPCO Funds (the "Investor Claims") and all of which sound in fraud.[1] Settled law under the *Wagoner* rule establishes that a receiver appointed at the request of the Securities and Exchange Commission to pursue claims on behalf of investors defrauded by their financial advisors "stands in the shoes" of those advisors who perpetrated the fraud for purposes of pursuing substantive claims alleging wrongdoing by others. Based on principles akin to the doctrine of *in pari delicto*, a receiver standing in the shoes of fraudsters lacks subject matter jurisdiction pursuant to Rule 12(b)(1) to pursue such claims.

Even if standing were not an absolute bar, these seven claims should be dismissed for failure to state a claim against SHIP and Fuzion pursuant to Rule 12(b)(6) because the Receiver's expansively drawn FAC does little more in connection with SHIP and Fuzion than to blame the victims for Platinum and Beechwood's bad conduct. Each of these claims requires that SHIP and Fuzion be shown to possess fraudulent intent or that they knowingly participated in a fraudulent scheme, a threshold the Receiver cannot come close to satisfying.

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[1] Counts 1-3 are for civil RICO violations; count 4 is for securities fraud under Section 10(b); count 6 is for aiding and abetting breach of fiduciary duty; count 7 is for aiding and abetting fraud; and count 18 is for unjust enrichment. Count 5 does not name SHIP or Fuzion as a defendant. SHIP (but not Fuzion) is also named in claims alleging fraudulent conveyances and seeking a declaratory judgment invalidating valid liens, in Counts 8-17. SHIP believes these claims also will ultimately be shown to be entirely without merit after full discovery. Only counts 1-4 and 6-7 are asserted against Fuzion, which accordingly seeks dismissal of all claims asserted against it.

In the primary thrust of the FAC, the Receiver details with strong factual support a massive fraud orchestrated by the Platinum Fund insiders, where the "object of the fraudulent scheme was the personal enrichment of the Platinum Fund insiders through the extraction of significant management and incentive fees." FAC ¶ 3. The Receiver explains how Platinum secretly created Beechwood as a vehicle to victimize insurers in order to "gain access to hundreds of millions of dollars in insurance assets," because Platinum itself could not get its hands on such assets directly. *Id.* ¶¶ 5, 104, 107. These insurance assets were used to "infuse the Platinum Funds and their distressed portfolio companies," while the Platinum insiders were able to "charge millions of dollars in investment management fees." *Id.* ¶¶ 5-6. She even points out how Beechwood wrongly made off with $30 million or more from defendant SHIP in performance fees based, at least in part, on overvalued assets held in the Platinum Funds. *Id.* ¶ 6.

The Receiver's story becomes far-fetched when she attempts to expand the scheme beyond its natural boundaries and suggests that SHIP willingly participated in its own harm by knowingly permitting the Beechwood Defendants to squander SHIP's funds in order to injure PPCO. While advocating such a counter-intuitive theory, the Receiver admits that SHIP got "burned in the end," (*id.* ¶ 13), but she nevertheless posits that it was SHIP's own fault because it was in on it. This theory, stripped of its pretense, is based on speculation, innuendo, and the twisting of benign background facts into a nefarious plot without any reliable foundation. Not a shred of evidence exists to substantiate that SHIP and Fuzion not only knew about the fraud, but actively participated in it. Even though the Receiver has access to all of Platinum's emails and records, she cannot quote a single document demonstrating any knowledge on the part of SHIP or Fuzion, and she does not identify any statements or actions properly attributable to them.

In truth, SHIP invested over $300 million with Beechwood, its fiduciary in a discretionary relationship. SHIP did not control or even understand everything that Beechwood did. What SHIP did understand was that the Beechwood Defendants guaranteed it a 5.85% annual return and promised to invest in SHIP's best interests, in well-collateralized investment opportunities, and in a manner consistent with SHIP's restrictions and guidelines as a regulated insurer. SHIP also understood, based on the Beechwood Defendants' repeated false representations, that Beechwood was an independent business owned and controlled by the principals who were SHIP's primary contacts and that they were well capitalized and able to stand behind their guarantees.

Based on these false premises, the Beechwood Defendants seized control over SHIP's funds and then diverted a large share of those funds to its own uses and the uses of Platinum, which – entirely undisclosed to SHIP – helped control and manage Beechwood's affairs in order to perpetuate its own Ponzi scheme. The Receiver would have this Court believe that SHIP had knowledge of the fraud and actively participated in it, even while the Receiver acknowledges that the core purpose of the scheme was to defraud insurers in order to (i) extract performance, management, and incentive fees, and (ii) save the Ponzi scheme from falling apart – both of which are directly against SHIP's interests. The Receiver conveniently ignores the fact that many of the performance, management, and incentive fees came directly out of SHIP's pocket. The Receiver also admits that Beechwood was specifically created to bail out Platinum by wrongfully gaining access to hundreds of millions of dollars from insurers, because Platinum – being a risky hedge fund – could not do so itself. *See* FAC ¶¶ 104, 107. This explains why the Platinum Insiders tried so hard to keep the deep and conflicting connections between Platinum and Beechwood a secret. If Platinum's intimate involvement with Beechwood were so obvious, as the Receiver offers, the scheme would not have taken off in the first place.

In the absence of direct factual support, the Receiver also argues that SHIP was desperate and on the verge of collapse and that the Platinum/Beechwood Ponzi scheme was its "white knight." *Id.* ¶ 115. The Receiver, of course, does not explain how participation in the scheme would save SHIP or Fuzion. SHIP invested roughly 10% of its assets with Beechwood, and Fuzion invested nothing. If this plan were the Hail Mary the Receiver claims it was, why so little? And how would the plan work? It is not plausible that SHIP would pay Beechwood a massive amount of fees to participate in a Ponzi scheme with the hope that Beechwood would keep its promise to get SHIP a 5.85% return. What is compelling, by contrast, is that SHIP believed Beechwood was a legitimate fiduciary offering an attractive guarantee. This is particularly so given that a 5.85% return was not out of the norm during that time. Indeed, the other 90% of SHIP's statutory reserves portfolio performed comparably to the promised Beechwood return during this period. SHIP was experimenting at the margins in the Beechwood relationship, not acting in desperation. The Receiver simply does not provide any explanation that could give her wild reach plausibility. She only claims – without evidence and in conclusory fashion – that SHIP knew of and participated in the Ponzi scheme in order to "achieve their goal" of getting a 5.85% return in order to save the company. Ironically, the Receiver does not even allege that SHIP actually received any return on its investment. It is simply fanciful to believe, without more, that SHIP would knowingly submit itself as a pawn in such a Ponzi scheme.

The FAC alleges that SHIP knowingly misrepresented values in transactions orchestrated by Platinum and Beechwood, but the Receiver offers no factual support for that speculation. In truth, SHIP had no involvement in the structuring of transactions. Beechwood exercised complete investment discretion as a fiduciary, and SHIP's understanding of asset valuations depended

entirely on what Beechwood or its agents represented to SHIP. SHIP had neither the access nor expertise to evaluate such matters, and the Receiver does not even attempt to allege to the contrary.

The Receiver alleges that certain records available to SHIP indicated that the Beechwood Defendants were investing certain SHIP funds through Platinum, but that is not the fraud here; the fraud is that the Beechwood Defendants represented themselves to be honest brokers who were operating an independent new business to serve SHIP's best interests when they in fact were controlled by others and were seeking to enrich themselves and their related parties, including Platinum, at SHIP's expense. Remarkably, the Receiver alleges that SHIP knowingly participated in the defrauding of PPCO through Beechwood's manipulations in December 2015 and March 2016 – ignoring the fact that, as set forth in detail in SHIP's own complaint (that the Receiver otherwise heavily relies upon), these transactions resulted in massive losses to SHIP.[2]

While the Receiver at least tries – and fails – to state claims against SHIP, the FAC simply names Fuzion as a defendant and then never really even endeavors to explain how it might have a claim against the claims administrator that invested no funds and played no direct role whatsoever.

Once the Receiver's FAC is given full consideration, SHIP and Fuzion remain where they were before the Receiver's fanciful interpretations were offered: SHIP is a victim of the Platinum-Beechwood fraudulent scheme who has lost hundreds of millions of dollars, and Fuzion is largely an immaterial bystander with regard to the details spun forth in the FAC. Neither SHIP nor Fuzion ever had a direct relationship with Platinum, let alone PPCO, and the Receiver's claims in counts

[2] Tellingly, the Receiver's initial complaint contained wildly expansive allegations of SHIP's participation in the Platinum-Beechwood scheme, including with regard to the 2016 PEDEVCO transactions changes that subordinated SHIP's existing interests unfairly and the June 2016 Agera transactions that took well over $50 million from SHIP to support Beechwood and Platinum's manipulations. While the FAC is far less ambitious, it is no less futile.

one through four, six, seven, and eighteen should be dismissed for reasons legal and procedural, as set forth in this memorandum.

SUMMARY OF RELEVANT ALLEGATIONS

A. The Parties

The Receiver was appointed at the SEC's request in 2017 to pursue claims on behalf of various entities, collectively defined in the FAC as the "PPCO Funds," that were operated in furtherance of a "massive fraud orchestrated by certain of the Platinum Fund insiders," a sprawling hedge fund operation that imploded when the truth began to be revealed in 2016. FAC ¶¶ 2-6, 17-20. The Receiver acknowledges that she stands in the shoes of the PPCO Funds and asserts claims to "recover and/or conserve Receivership Property." *Id.* ¶ 23. The Receiver's stated objective is to "recover, liquidate, marshal, and preserve all assets of the [PPCO Funds]." *Id.*

The PPCO Funds were "marketed" as a single-strategy group of funds under the Platinum umbrella by a group of individuals that the FAC defines as the "Platinum Insiders": Mark Nordlicht, Murray Huberfeld, David Bodner, David Levy, Daniel Small, Uri Landesman, and Joseph SanFilippo. *Id.* ¶ 65-81. The Platinum Insiders, many of whom have been indicted or convicted on a range of federal charges that include bribery and various forms of fraud in connection with the scheme, *see id.* ¶¶ 17-19, are not parties to this lawsuit.

The Receiver alleges that, in connection with the fraudulent scheme, several of the Platinum Insiders conspired to create the "Beechwood Entities," a collection of entities that posed as a reinsurance company "with the objective of entering into one or more reinsurance treaties with insurance companies, so that they could take control of reinsurance trust fund assets and use those assets to benefit Platinum, thereby enriching Platinum's and Beechwood's owners." *Id.* ¶ 108.

Individual Defendants Feuer and Taylor served as front men for Beechwood and helped form the Beechwood entities in order to defraud insurers like SHIP. *Id.* ¶¶ 108-10.

SHIP is a Pennsylvania-domiciled long-term care insurance company with its principal place of business in Carmel, Indiana. *Id.* ¶ 50. As alleged in the FAC, and as described more fully below, SHIP is one of a host of entities and individuals who were severely damaged as victims of the fraudulent scheme perpetrated by the PPCO Funds, their Platinum affiliates, and the Beechwood Defendants. SHIP is pursuing claims against various Beechwood-related entities and individuals, including Individual Defendants Feuer and Taylor, in a separate litigation currently pending before this Court (the "SHIP Action"). *Id.* ¶ 2.

Fuzion is a Delaware corporation headquartered in Carmel, Indiana. *Id.* ¶ 51. The FAC alleges that Fuzion was formed in 2012 to provide insurance claim data analytics and to serve as a third-party claims administrator for SHIP. *Id.* ¶ 121. Beyond the services Fuzion provided to SHIP, Bankers Conseco Life Insurance Company, and Washington National Insurance Company during the relevant time period, the FAC does not specify what role Fuzion is purported to have played, if any, in the events that it describes.

B. The Receiver's Claims

In the interest of brevity, SHIP and Fuzion assume the Court's familiarity with the general background of this litigation and recite here only the factual allegations relevant to resolution of this motion. Indeed, the Receiver's FAC borrows heavily from the allegations in the SHIP Action – which has already been the subject of several rounds of motion practice before this Court – and essentially outlines the same fraudulent scheme orchestrated by Platinum, Beechwood, the Individual Defendants, and the Platinum Insiders.

The Receiver's FAC departs dramatically from the SHIP Action, however, in twisting the allegations of that pleading to advance a factually unsupported and false narrative that SHIP and Fuzion somehow were complicit in the very fraud that claimed SHIP as its victim. *Id.* ¶¶ 7-16. At bottom, the Receiver's theory is factually and logically inconsistent with the remainder of her pleading and cannot provide an adequate basis to maintain any claim against a fraud victim, let alone the aggressive, knowledge-based claims that the Receiver seeks to assert here.

Based on this rickety factual foundation, the Receiver asserts claims against several defendants, who are lumped together in a group that includes SHIP and Fuzion:

- Common law claims for aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and unjust enrichment (Sixth, Seventh, and Eighteenth Claims For Relief);
- Federal claims for violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 and violations of RICO (First through Fourth Claims For Relief); and
- New York statutory claims for fraudulent conveyance and a declaratory judgment for invalidation of liens (Eighth through Seventeenth and Nineteenth Claims For Relief).

ARGUMENT

I. The Investor Claims Should Be Dismissed for Lack of Subject Matter Jurisdiction Because the Receiver Lacks Standing to Assert Them

Because the Receiver must "stand in the shoes" of the fraudulent entities in pursuing the Investor Claims against SHIP and Fuzion, and those fraudulent PPCO entities may not recover for frauds in which they participated, the Investor Claims should be dismissed for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1).

A. Applicable Legal Standard

"'Federal courts are courts of limited jurisdiction' that 'possess only that power authorized by Constitution and statute.'" *Hendrickson v. United States*, 791 F.3d 354, 358 (2d Cir. 2015) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675

(1994)). As a result, "[a] district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction" where, as here, "the plaintiff lacks constitutional standing to bring the action." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.A.R.L.*, 790 F.3d 411, 416-17 (2d Cir. 2015). Because their jurisdiction is circumscribed, "federal court[s] must presume[] that a cause lies outside [their] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 385 (S.D.N.Y. 2014) (internal quotations omitted). The court accordingly does not grant the complaint's jurisdictional allegations every favorable inference, *Arbitron, Inc. v. 3 Cities, Inc.*, 438 F. Supp. 2d 216, 217 (S.D.N.Y. 2006), and the plaintiff bears "the burden of proving by a preponderance of the evidence that [jurisdiction] exists." *Crye Precision LLC v. Duro Textiles, LLC*, 112 F. Supp. 3d 69, 75 (S.D.N.Y. 2015) (quoting *Mastafa v. Chevron Corp.*, 770 F.3d 170, 177 (2d Cir. 2014)).

B. The *Wagoner* Rule Bars the Receiver From Asserting the Investor Claims

The Receiver concedes that the Investor Claims all arise out of the intentional and criminal misconduct of the PPCO Funds' principals, including Mark Nordlicht, Murray Huberfeld, and David Levy. That fact is made unmistakably clear in the very first page of the FAC, in which the Receiver announces that she "is not alone in concluding that a massive fraud was orchestrated by certain of the Platinum Fund insiders starting in or about 2012 …." FAC ¶ 2. The Receiver explicitly states that her ultimate objective in bringing this action is to "[seek] redress for the innocent investors and creditors [of the PPCO Funds]." *Id.* ¶ 1. Settled precedent, however, prohibits the Receiver from asserting claims on behalf of investors for wrongs in which the entities she represents participated.

The Second Circuit held nearly 30 years ago that "[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty

corporation." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991). For that reason, a receiver—who stands only in the shoes of the receivership entities—is barred "from suing to recover for a wrong that he himself essentially took part in."[3] *Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000); *accord In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54, 63-64 (2d Cir. 2013) (dismissing various claims asserted against defendants alleged to be "complicit in Madoff's fraud," because the trustee "st[ood] in the shoes of BLMIS and may not assert claims against third parties for participating in a fraud that BLMIS orchestrated"); *In re Mediators, Inc.*, 105 F.3d 822, 826 (2d Cir. 1997) (trustee barred from bringing claim for aiding and abetting breach of fiduciary duty that "belong[ed] to creditors *qua* creditors").

The *Wagoner* rule applies the logic of the *in pari delicto* doctrine and proceeds "from the fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation." *Wight*, 219 F.3d at 86; *see also In re Parmalat Sec. Litig.*, 477 F. Supp. 2d 602, 609 n.45 (S.D.N.Y. 2007) (the *Wagoner* rule "is [ ] quite similar to that of *in pari delicto*, but *Wagoner* is a rule of standing, rather than a defense to liability."). That misconduct "is imputed to the [receiver] because, innocent as [she] may be, [she] acts as the [receivership entities'] representative." *In re Bernard L. Madoff*, 721 F.3d at 63.[4]

This Court applied the *Wagoner* rule in *Picard v. HSBC Bank PLC*, 454 B.R. 25 (S.D.N.Y. 2011), *aff'd sub nom. In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54 (2d Cir. 2013), to dismiss

[3] While *Wagoner* was decided in the context of a bankruptcy proceeding, "the *Wagoner* rule applies to [an SEC equity] receiver because he fulfills a role sufficiently analogous to that of a bankruptcy trustee." *Cobalt Multifamily Inv'rs I, LLC v. Arden*, 857 F. Supp. 2d 349, 362 (S.D.N.Y. 2011) (internal quotation marks omitted).

[4] The principles of *in pari delicto* underpinning the *Wagoner* rule apply equally to the Receiver's federal law claims. *See, e.g.*, *Republic of Iraq v. ABB AG*, 768 F.3d 145, 162-63 (2d Cir. 2014) (affirming dismissal of RICO claim on the pleadings on grounds of *in pari delicto*); *Ross v. Bolton*, 904 F.2d 819, 824-26 (2d Cir. 1990) (affirming dismissal of securities fraud claim on *in pari delicto* grounds).

the trustee's claims for lack of standing, emphasizing that the trustee's "complaint [was] replete with allegations of Madoff's role as the 'mastermind [ ]' of the fraud," quoting the first paragraph of the complaint. *Id.* at 37. The Court concluded that "the *Wagoner* rule bars the Trustee as 'successor in interest' to Madoff and Madoff Securities, from bringing common law fraud claims," and stands as a bar to "all of the Trustee's common law claims except perhaps for his contribution claim" (which the Court ultimately dismissed as well in any event). *Id.* at 37-38.

The relevant parallels between *Picard* and the Receiver's allegations here compel the same result. One need look no further than the introductory paragraphs of each of the complaints, which employ the terms "mastermind" and "orchestrate" to describe the misconduct of the individuals responsible for the alleged fraud. *Compare id.* at 37 (Madoff was "the 'mastermind [ ]' of the fraud" perpetrated by his investment firm, as alleged in paragraph 1 of the complaint) *with* FAC ¶ 2 (fraud was "orchestrated by certain of the Platinum Fund insiders"). The Receiver's FAC focuses on wrongdoing committed by individuals operating in their capacity as principals or executives of the PPCO Funds. For example, the FAC alleges that Nordlicht and Levy as co-chief investment officers of PPCO were "jointly and solely responsible for the investment decisions of PPCO Master Fund." *Id.* ¶ 80. The FAC also details numerous actions taken at the direction of the "Platinum Insiders" on behalf of the PPCO Funds and allegedly to the detriment of the PPCO Funds' investors. *See, e.g., id.* ¶¶ 80, 85, 96-97, 100, 106, 324.[5]

[5] The Receiver cannot avoid application of the *Wagoner* rule by way of the "adverse interest" exception, which "is narrow and applies only when the agent has totally abandoned the principal's interests." *Wight*, 219 F.3d at 87 (internal quotation marks omitted); *see also Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466, 912 N.Y.S.2d 508, 519 (2010) (where agent commits fraud for own benefit *and* benefit of corporation, "application of the exception would be precluded"). Here, the Receiver alleges numerous actions taken by PPCO's principals not just for their own benefit, but for PPCO's benefit as well. *See, e.g.*, FAC ¶ 179 (funds obtained from SHIP and others used "to prop up the Platinum Funds and their portfolio companies").

All of the Investor Claims are "claim[s] against a third party for defrauding a corporation with the cooperation of management" that belong to the PPCO Funds' creditors and investors, not to the PPCO Funds themselves. *Wagoner*, 944 F.2d at 120. The Receiver, "standing in the shoes" of the fraudsters, lacks standing to bring these claims, and they should be dismissed with prejudice.

II. The Investor Claims Should Be Dismissed for Failure to State a Claim in Any Event

Even assuming the Receiver had standing to pursue the Investor Claims, those claims should be dismissed as against SHIP and Fuzion under Rule 12(b)(6) for failure to state a claim. To survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *AVRA Surgical Robotics, Inc. v. Gombert*, 41 F. Supp. 3d 350, 357 (S.D.N.Y. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009)); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). While a court accepts a plaintiff's factual allegations as true and draws all reasonable inferences in favor of the non-moving party, the "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965, and the pleading is not sufficient "if it tenders 'naked assertions' devoid of further factual enhancement.'" *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966).

In addition, "[a] complaint should 'give the adverse party fair notice of the claim[s] asserted so as to enable him to answer and prepare for trial.'" *Taylor v. N.Y. Life Ins. & Annuity Corp.*, No. 16-cv-06121, 2017 WL 2773699, at *3 (S.D.N.Y. June 26, 2017) (quoting *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988)). This standard is not met where the complaint "lump[s] all the defendants together in each claim and provid[es] no factual basis to distinguish their conduct …." *Id.* (quoting *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001)); *accord Patrico v. Voya Fin., Inc.*, No. 16 Civ. 7070, 2017 WL 2684065, at *5 (S.D.N.Y. June 20, 2017) (dismissing claims against defendants that were affiliated with party to agreement underlying the

dispute); *Ochre LLC v. Rockwell Architecture Planning & Design, P.C.*, No. 12-cv-2837, 2012 WL 6082387, at *6 (S.D.N.Y. Dec. 3, 2012).

Finally, "[c]laims sounding in fraud," like those the Receiver asserts here, "must satisfy not only Rule 12(b)(6), but also Rule 9(b)," and thus "cannot be based upon information and belief." *Warren v. John Wiley & Sons, Inc.*, 952 F. Supp. 2d 610, 616 (S.D.N.Y. 2013) (quoting *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987)). To satisfy Rule 9(b), the plaintiff must "(1) detail the statements or omissions that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, 783 F.3d 395, 403 (2d Cir. 2015) (quotation omitted). A plaintiff alleging fraud cannot make "blanket references to acts or omissions by all of the defendants"; instead, "each defendant named in the complaint is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged." *Ritani, LLC v. Aghjayan*, 970 F. Supp. 2d 232, 250 (S.D.N.Y. 2013) (quoting *Red Ball Interior Demolition Corp. v. Palmadessa*, 874 F. Supp. 576, 584 (S.D.N.Y. 1995)).

A. The Threadbare Allegations Against Fuzion Are Insufficient to Support Any Cognizable Cause of Action

Before turning to the Investor Claims against SHIP, the absence of any well-pled factual allegations to support the Receiver's decision to include claims against Fuzion bears specific mention. Apart from identifying Fuzion as a claims administrator for certain parties and as an affiliate of SHIP, the Receiver's FAC does precious little to attempt "to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965, or to satisfy Rule 9(b)'s stringent pleading requirements, *Putnam Advisory Co.*, 783 F.3d at 403. As such, the Court should dismiss the claims asserted against Fuzion in their entirety.

Of the FAC's 426 paragraphs, Fuzion is mentioned in a total of 17. Most of these references contain only irrelevant or inflammatory factual matter. *See* FAC ¶¶ 7, 8, 10, 11, 51, 121-22, 149-50, 154, 157, 160-162, 221, 324, 335. In the only seven paragraphs that even arguably contain allegations relevant to the Receiver's claims, the Receiver provides:

- unadorned statements that SHIP was "advised by Fuzion," *id.* ¶¶ 7, 10, 11;
- conclusory allegations that Fuzion needed SHIP to succeed for it to survive, *id.* ¶¶ 8, 221; and
- bald assertions that the security provided in the PPCO Loan Transactions and Securities Purchases was for the sole benefit of Fuzion, *id.* ¶¶ 324, 335.

On the basis of these barebones allegations, the Receiver purports to assert six Investor Claims, all sounding in fraud, against Fuzion: federal claims for violations of RICO and Section 10(b) of the Exchange Act, and New York common law claims for aiding and abetting fraud and breach of fiduciary duty. The allegations specific to Fuzion are simply inadequate to support any of the Investor Claims. The Receiver does not identify a single alleged material misstatement or omission by Fuzion, a fundamental requirement of its Exchange Act claim. Nor does the Receiver allege any action that Fuzion specifically took in connection with any of the transactions described in the FAC. The FAC is entirely devoid of any allegations to support *any* inference – let alone a plausible or strong one – that Fuzion acted with an intent to defraud. The Receiver instead begins with Fuzion's status as a claims administrator, skips any factual allegations in between, and ends with claims sounding in fraud. The FAC should be dismissed as against Fuzion on this basis alone.

B. The Receiver Does Not State a Claim for Securities Fraud

The Receiver seeks to assert a securities fraud claim against SHIP and Fuzion under Section 10(b) of the Exchange Act and Rule 10b-5. *See* FAC ¶¶ 309-16. The FAC's insubstantial and conclusory allegations with respect to SHIP and Fuzion do not satisfy the exacting pleading standards applicable to such claims. To state an actionable claim under Section 10(b) and Rule

10b-5, a complaint must allege: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *GAMCO Inv'rs, Inc. v. Vivendi Universal, S.A.*, 838 F.3d 214, 217 (2d Cir. 2016) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)). Because claims under Section 10(b) sound in fraud, they must satisfy Rule 9(b), which specifically "requires that a securities fraud claim based on misstatements," like the Receiver's claim here, "identify: (1) the allegedly fraudulent statements, (2) the speaker, (3) where and when the statements were made, and (4) why the statements were fraudulent." *Pehlivanian v. China Gerui Advanced Materials Grp., Ltd.*, 153 F. Supp. 3d 628, 642 (S.D.N.Y. 2015).

In addition to Rule 9(b)'s pleading requirements, claims under Section 10(b) are further subject to the strict pleading requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which requires a complaint to: (i) "specify each statement alleged to have been misleading, and the reason or reasons why the statement is misleading"; and (ii) "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind." *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009) (quoting 15 U.S.C. § 78u-4(b)(1)-(2)) (emphasis added).

With respect to the first requirement, it bears emphasis here that for liability to attach at all, there must be "an actual *statement*, one that is either 'untrue' outright or 'misleading' by virtue of what it omits to state." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239 (2d Cir. 2016) (emphasis in original). As for the second requirement, the Supreme Court requires plaintiffs to show that their desired inference that the defendant acted with intent to defraud "is 'more than merely plausible or reasonable—it must be cogent and *at least as compelling as* any opposing

inference of nonfraudulent intent.'" *In re PetroChina Co. Ltd. Sec. Litig.*, 120 F. Supp. 3d 340, 363 (S.D.N.Y. 2015) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314, 127 S. Ct. 2499, 2504-05 (2007)) (emphasis in original). This strong inference must be established "with respect to each defendant" individually, *In re Electrobras Sec. Litig.*, 245 F. Supp. 3d 450, 466 (S.D.N.Y. 2017), and is generally established in one of two ways: "(a) by alleging facts to show that defendants had both the motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Christine Asia Co. v. Alibaba Grp. Holding Ltd.*, 192 F. Supp. 3d 456, 479 (S.D.N.Y. 2016) (quoting *IKB Int'l S.A. v. Bank of Am. Corp.*, 584 F. App'x 26, 27-28 (2d Cir. 2014)). The FAC comes nowhere close to satisfying these threshold pleading requirements.

First, the Receiver's scienter allegations against SHIP and Fuzion fall well short of the PSLRA's requirement that the inference of fraudulent intent "be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *In re PetroChina Co. Ltd. Sec. Litig.*, 120 F. Supp. 3d at 363 (internal quotation marks omitted). As an initial matter, because SHIP and Fuzion are corporate entities, the Receiver is required to allege facts "that create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scienter." *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 191, 195 (2d Cir. 2008). The Receiver has alleged no such facts. The FAC makes passing reference to SHIP or Fuzion executives in a grand total of *two* paragraphs, neither of which addresses those executives' state of mind vis-à-vis any securities transaction alleged to be fraudulent. *See* FAC ¶¶ 155-56.

That threshold failure aside, the Receiver's overarching theory that SHIP and Fuzion possessed the requisite scienter in light of an alleged business motivation to avoid financial ruin is insufficient to produce the required "strong inference" of fraudulent intent. Indeed, the Receiver's

scienter allegations amount to nothing more than a claim that SHIP and Fuzion were "highly motivated" to transact business with Beechwood for financial reasons. *See* FAC ¶¶ 159-60. Courts in this Circuit all agree, however, that generic allegations of a financial or profit motive are "insufficient to establish scienter." *Schwab v. E*TRADE Fin. Corp.*, 258 F. Supp. 3d 418, 435 (S.D.N.Y. 2017); *see, e.g.*, *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 573 (S.D.N.Y. 2014) ("Allegations limited to the type of 'corporate profit' motive possessed by most corporate directors and officers do not suffice."). Perhaps most important, the FAC itself establishes that SHIP was a *victim*, not a perpetrator, of the fraud. *See, e.g.*, FAC ¶ 5. The Receiver alleges that after Beechwood received SHIP's $270 million, it "immediately began investing into the Platinum Funds and/or their portfolio companies" with the intent to "generate much needed cash for the PPVA Funds while maintaining the fiction of inflated valuations." *Id.* ¶¶ 168-70. Put another way, Beechwood fraudulently converted SHIP's funds for its and Platinum's uses before the ink on the IMAs was even dry. Nowhere does the Receiver allege that SHIP or Fuzion was actually aware of the true purpose of these "investments" or the many deliberately concealed connections between Beechwood and Platinum executives. It would hardly be cogent or rational to infer that a victim of a fraud could also be a knowing participant in the scheme, without more, and the Receiver offers nothing factual to support a supposition that SHIP moved from victim to perpetrator.[6]

Second, the Receiver improperly attempts to rely on alleged misstatements made by *Beechwood* in connection with various transactions that Beechwood consummated on SHIP's behalf to state a claim against SHIP. Under well-settled law, the "maker" of a misstatement for

[6] Finally, insofar as the Receiver attempts to establish that SHIP and Fuzion had an opportunity to commit fraud because "the PPCO Portfolio Manager had completely abdicated" its fiduciary responsibilities, FAC ¶ 310, there is not a single allegation in the FAC even suggesting that either SHIP or Fuzion was aware of that alleged abdication and sought to took advantage of it.

purposes of Section 10(b) is limited to "the person or entity with ultimate authority over the [mis]statement, including its content and whether and how to communicate it." *McIntire v. China MediaExpress Holdings, Inc.*, 927 F. Supp. 2d 105, 136 (S.D.N.Y. 2013) (quoting *Janus Capital Grp., Inc. v. First Deriv. Traders*, 564 U.S. 135, 144, 131 S. Ct. 2296, 2303 (2011)). "The mere identification of a secondary actor as being involved in a transaction" is "alone insufficient" to hold that alleged secondary actor liable for a statement. *Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 155 (2d Cir. 2010). Rather, "a plaintiff's claim against a secondary actor must be based on that actor's own articulated statement, or on statements made by another that have been *explicitly* adopted by the secondary actor." *Id.* (internal quotes omitted) (emphasis in original).

Here, the Receiver's own allegations establish that SHIP did not have ultimate authority over any statement that Beechwood might have made during the course of any particular transaction. As the Receiver acknowledges, SHIP granted Beechwood complete authority "to invest SHIP's funds as it saw fit," subject only to Beechwood's compliance with SHIP's investment guidelines. *See* FAC ¶ 167. Any alleged misstatements made or actions taken by Beechwood in connection with transactions it entered on SHIP's behalf thus were Beechwood's and Beechwood's alone. At best, the FAC alleges SHIP's secondary involvement in the subject transactions, which is insufficient to attribute any particular statement to SHIP. The FAC alleges no statements made by Fuzion. And in truth, the Receiver cannot even establish that SHIP was aware of what statements Beechwood may have been making.

Third, even if SHIP or Fuzion could be deemed the maker of any of the alleged misstatements that the Receiver wishes to attribute to it, the FAC's allegations lack the specificity required under Rule 9(b) and the PSLRA. The Receiver improperly relies on generic group pleading to lump all defendants together with conclusory allegations. *E.g.*, *Aghjayan*, 970 F. Supp.

2d at 250. For example, the Receiver generally alleges that "the Beechwood, CNO and SHIP Defendants [a group of 18 defendants] … did materially misrepresent to the PPCO Funds that the true value of the Purchased Securities was their par value … and knowingly omitted or concealed that the true value of the Purchased Securities was only a fraction of par value." FAC ¶ 311. The FAC provides no detail as to who at SHIP or Fuzion allegedly made misstatements, when and where the misstatements were made, or why the misstatements were fraudulent. *E.g.*, *Pehlivanian*, 153 F. Supp. 3d at 642. SHIP and Fuzion also were not insiders to the Beechwood-Platinum day-to-day operations. These pleading failures are alone sufficient to require dismissal. And they run headlong into the fact that SHIP, as alleged in its own complaint, was duped by Beechwood into paying tens of millions in unearned performance fees on the basis of the very false valuations that the Receiver would now have the Court believe SHIP knew about and knowingly endorsed, even though doing so would obviously work to SHIP's financial detriment.

Finally, any Section 10(b) claim is barred by the two-year limitations period after discovery. *See, e.g.*, *Arco Capital Corp. v. Deutsche Bank AG*, 986 F. Supp. 2d 296, 303 (S.D.N.Y. 2013). The allegedly fraudulent securities transactions on which the Receiver bases this claim were completed in December 2015 and March 2016. *See* FAC ¶¶ 223, 310. As participants in the fraud, the entities the Receiver represents necessarily "discovered" the fraud at the time of the transactions. *See, e.g.*, *Gavin/Somonese LLC v. D'Arnaud-Taylor*, 639 F. App'x 664, 666-67 (2d Cir. 2016) (Section 10(b) claim brought by bankruptcy trustee on behalf of investors time-barred where "a substantial portion of the information alleged in the complaint and integral documents was either known or freely available to investors before September 11, 2011.").

C. The Receiver Does Not State a Claim for Aiding and Abetting Fraud

In the FAC, the Receiver realizes how futile her initial common law fraud claim was against SHIP and Fuzion, and she now drops that direct claim. She cannot circumvent those pleading

failures in her direct fraud claims by asserting a derivative claim for aiding and abetting fraud. To state such a claim, a plaintiff must allege "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476, 883 N.Y.S.2d 486, 489 (1st Dep't 2009). Claims for aiding and abetting fraud, like fraud claims underlying them, are subject to Rule 9(b)'s pleading requirements. *See, e.g.*, *Krause v. Forex Exch. Market, Inc.*, 356 F. Supp. 2d 332, 338 (S.D.N.Y. 2005); *see also Weinstein v. CohnReznick, LLP*, 144 A.D.3d 1140, 1141, 43 N.Y.S.3d 387, 389 (2d Dep't 2016) (dismissing claim). These requirements are more strictly enforced in aiding and abetting claims. *See Nat'l Westminster Bank, U.S.A. v. Weksel*, 124 A.D.2d 144, 149, 511 N.Y.S.2d 626, 631 (1st Dep't 1987), *lv denied*, 70 N.Y.2d 604, 519 N.Y.S.2d 1027 (Table) (1987) ("Where liability for fraud is to be extended beyond the principal actors . . . it is especially important that the command of [New York's analogous provision of the CPLR] be strictly adhered to."). The Receiver has not alleged either knowledge or substantial assistance on the part of SHIP or Fuzion.

First, the Receiver does not plausibly or with particularity allege SHIP or Fuzion's knowledge of any alleged fraud. "Conclusory allegations that the defendant 'knew or should have known' of the fraud without specific facts to support the conclusions are insufficient to overcome a motion to dismiss a cause of action for aiding and abetting fraud." *See VFP Invs. I LLC v. Foot Locker, Inc.*, 49 Misc. 3d 1210(A), 2015 N.Y. Slip Op. 51554(U), *5 (Sup. Ct., N.Y. Cty. 2015) (citing *Gregor v. Rossi*, 120 A.D.3d 447, 448-49, 992 N.Y.S.2d 17, 19 (1st Dep't 2014)). That is precisely what the Receiver does here, as she simply asserts that SHIP, Fuzion, and others "had actual knowledge that the conduct by Nordlicht and the PPCO Portfolio Manager was fraudulent," because Nordlicht was conflicted in each transaction and the PPCO Portfolio Manager was

directing the PPCO Funds to enter into transactions which were not in their best interests. FAC ¶ 337. This boils down not to a claim of actual knowledge, but rather a claim that SHIP and Fuzion *should have* realized that fraud was afoot. The FAC does not offer elsewhere any concrete facts to support that conclusion. This failure to plead knowledge is particularly egregious here, where other allegations establish that SHIP was actually defrauded by its fiduciary who exercised discretionary powers and others, as noted in this memorandum. *See id.* ¶ 5.[7]

Second, the Receiver's allegations of "substantial assistance" have no support. "Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Stanfield*, 64 A.D.3d at 476, 883 N.Y.S.2d at 489. In pleading "substantial assistance," the nature of each defendant's alleged participation in the fraud must be detailed. *In re Woodson*, 136 A.D.3d 691, 693, 24 N.Y.S.3d 706, 708 (2d Dep't 2016) (dismissing claim).

The FAC's allegations as to SHIP and Fuzion fall well short of that standard, as they focus almost exclusively on actions taken by the Platinum and Beechwood Insiders and their affiliates, and not on any actions taken by anyone at SHIP or Fuzion in furtherance of the fraud. The Receiver

[7] To the extent that the Receiver alleges that SHIP willfully blinded itself to the truth, such a theory is sustainable only where the allegations are such that "it can almost be said that the defendant actually knew because he or she suspected a fact and realized its probability, but refrained from confirming it in order later to be able to deny knowledge." *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 368 (S.D.N.Y. 2007) (internal quotation marks omitted); *see also In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 517 (S.D.N.Y. 2011) (Rakoff, J.) ("The difference [] between actual knowledge and 'it can almost be said that the defendant actually knew' . . . is [] a narrow one."). The complaint accordingly still must allege that the defendant possessed "a culpable state of mind . . . ." *Fraternity Fund*, 479 F. Supp. 2d at 368. As discussed in detail throughout this memorandum, the FAC does not plausibly allege that either SHIP or Fuzion acted with fraudulent intent. If SHIP or Fuzion had encountered such knowledge, the only plausible inference is that SHIP or Fuzion would have tried to extricate themselves, not double down.

stretches to rely on SHIP's passive participation in allegedly fraudulent transactions, through the Beechwood Defendants' actions as SHIP's fiduciary acting with discretionary authority, as evidence that SHIP and Fuzion "provided substantial assistance in connection with" the schemes. *See* FAC ¶ 336. These attenuated and conclusory allegations are insufficient as a matter of law to establish the kind of "substantial assistance" necessary to support an aiding and abetting claim.

D. The Receiver's Claim for Aiding and Abetting Breach of Fiduciary Duty Also Fails

To sustain a claim for aiding and abetting breach of fiduciary duty, the plaintiff must allege (1) a breach by a fiduciary of obligations, (2) that the defendant knowingly induced or participated in the breach, and (3) damages resulting therefrom. *Kaufman v. Cohen*, 307 A.D.2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dep't 2003). Although a plaintiff does not have to allege an intent to harm, there "must be an allegation that such defendant had actual knowledge of the breach of duty." *Id.* Constructive knowledge of the breach of duty by another is "legally insufficient to impose aiding and abetting liability." *Id.* "Extremely sparse and wholly conclusory" allegations of knowledge of breach are insufficient. *Id.* The First Department in *Kaufman* noted that a "single statement," alleging that defendants "were aware of the breach," was not sufficient to support a claim for aiding and abetting. *Id.* The First Department has also held that a person "knowingly participates" in a breach of fiduciary duty only when they "provide substantial assistance to the primary violator," which only occurs "when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Id.* at 126 (internal citations omitted).

Like her claim for aiding and abetting fraud, the Receiver fails to offer anything other than conclusory allegations regarding SHIP or Fuzion's alleged actual knowledge of the Nordlicht and PPCO Portfolio Manager's breaches of fiduciary duty. Also like her aiding and abetting fraud claim, the Receiver relies solely on SHIP's passive participation in allegedly fraudulent

transactions, through the Beechwood Defendants' actions as SHIP's fiduciary acting with discretionary authority, as evidence that SHIP "substantially assisted and participated" in the breach of fiduciary duty. *See* FAC ¶ 329. As in *Kaufman*, the Receiver's bare conclusion that SHIP and Fuzion substantially assisted in and had actual knowledge of the breach of fiduciary duty is insufficient to sustain such a claim, particularly in light of the theory's illogic.

E. The Receiver's RICO Claims Are Statutorily Barred by the RICO Amendment and Substantively Deficient

The Receiver cannot hold SHIP and Fuzion responsible by way of the RICO statute for the fraud. In attempting to plead simultaneously claims under the Exchange Act, the Receiver brings her RICO claims within the scope of the RICO Amendment, which bars the assertion of RICO claims "alleging predicate acts of securities fraud …." *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 (2d Cir. 2011); *see also Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 650 (S.D.N.Y. 2017) (RICO Amendment applied where "an integral component of th[e] scheme to loot included pillaging portfolio companies of their equity re-directing Zohar's equity interests for Defendants' benefit, and diverting the equity distributions into Defendants' coffers – all actions coinciding with the purchase or sale of securities."); 18 U.S.C. § 1964(c). Pleading RICO claims, the Receiver relies directly on the allegedly fraudulent securities transactions as the requisite predicate acts of racketeering activity. *See* FAC ¶¶ 221-58 (describing various securities transactions, including the PPCO Loan Transactions and the Purchased Securities); *id.* ¶ 283(i)-(iv), 304(i)-(iv) (relying on same as predicate acts). The Receiver's own allegations leave no doubt that the RICO Amendment forecloses these claims.[8]

[8] Should the Receiver argue that dismissal of its RICO claims pursuant to the RICO Amendment would be premature because SHIP and Fuzion also have moved to dismiss her deficient Exchange Act claim, such an argument is without legal basis. This Court recently dismissed RICO claims that **SHIP** sought to assert in its separate action against Beechwood, finding that they were barred by the RICO Amendment even though SHIP did not assert a claim for securities fraud. *See In re*

In any event, the Receiver's RICO claims regarding SHIP and Fuzion fail to meet the stringent pleading standards applicable to such claims. To state a claim under 18 U.S.C. § 1962(c), the FAC must allege: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Williams v. Affinion Grp., LLC*, 889 F.3d 116, 123-24 (2d Cir. 2018) (quoting *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983)). The required elements of a claim under § 1962(a) are essentially the same. *See Moss*, 719 F.2d at 17. Predicate acts that sound in fraud, as the alleged acts do here, "are subject to the heightened pleading requirement of Rule 9(b)." *Angermeir v. Cohen*, 14 F. Supp. 3d 134, 145 (S.D.N.Y. 2014) (internal quotation marks and alterations omitted). As explained above, the Receiver has not adequately pled any allegedly fraudulent act committed by SHIP or Fuzion with the requisite specificity. These claims should be dismissed on that basis alone. Finally, to state a claim for RICO conspiracy under § 1962(d), "a plaintiff must allege 'the existence of an agreement to violate RICO's substantive provisions.'" *Williams*, 889 F.3d at 124. (quoting *United States v. Sessa*, 125 F.3d 68, 71 (2d Cir. 1997)). The Receiver has not pled a substantive RICO violation and thus cannot maintain a conspiracy claim.

F. The Receiver's Unjust Enrichment Claim Fails

In order to establish a claim for unjust enrichment, a plaintiff must demonstrate: "(1) a party was enriched, (2) at the other party's expense, and (3) that it is against equity and good

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Platinum-Beechwood Litig., No. 18-cv-6658, ECF No. 292, MTD Op. at 20-24. The Court held that the relevant inquiry is simply whether "the conduct giving rise to [the alleged] predicate offenses amounts to securities fraud," regardless of how those predicate offenses are styled in the complaint. *Id.* at 23 n.3 (quoting *Blythe v. Deutsche Bank AG*, 399 F. Supp. 2d 274, 278 (S.D.N.Y. 2005)). The predicate offenses described in the Receiver's complaint easily meet that standard.

conscience to permit the other party to retain what is sought to be recovered." *Buonasera v. Honest Co., Inc.*, 208 F. Supp. 3d 555, 567 (S.D.N.Y. 2016) (citing *Mahoney v. Endo Health Sols., Inc.*, No. 15 Civ. 9841, 2016 WL 3951185, at *11 (S.D.N.Y. July 20, 2016)). A claim for unjust enrichment, however, "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Id.* (citing *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 296 (S.D.N.Y. 2015)). In addition, if the plaintiff is simply restating a contract or tort claim, then unjust enrichment is not available. *See Mahoney*, 2016 WL 3951185, at *11 ("'Unjust enrichment is not a catchall cause of action' and it 'is not available where it simply duplicates, or replaces, a conventional contract or tort claim.'"); *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 290 (S.D.N.Y. 2014) ("Yet, an unjust enrichment claim cannot survive 'where it simply duplicates, or replaces, a conventional contract or tort claim.'"). The Receiver's claim does not provide for an unusual situation where its tort claims would not provide the requested relief. The unjust enrichment claim is duplicative and should be dismissed.

Even if it is not dismissed on that basis, the Receiver's claim for unjust enrichment also fails because it provides no detail of any benefit that SHIP received. It merely states that the Receiver believes it would be unjust for SHIP to retain any benefit of the transactions, without more. FAC ¶ 418. The Receiver does not actually allege that SHIP received any benefit – because, of course, SHIP was victimized and received no benefit except the loss of millions of dollars.

CONCLUSION

For all these reasons, SHIP and Fuzion respectfully submit that these seven causes of action, the Investor Claims, should be dismissed as against Fuzion and SHIP.

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