UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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PRELIMINARY STATEMENT

Everyone agrees that a fraud was afoot, including the United States Attorney's Office for the Eastern District of New York, the Securities and Exchange Commission, Defendants Bankers Conseco Life Insurance Company ("BCLIC") and Washington National Insurance Company ("WNIC"), and numerous others. And everyone agrees that the fraudsters are the Platinum and Beechwood Insiders and their dark web of interrelated companies.[1] Two of them (Huberfeld and Manela) have already pleaded guilty. Others are under indictment. Until the Receiver filed this case, everyone, including, most notably, the criminal enforcement authorities, agreed that BCLIC and WNIC were the victims of the fraud perpetrated by Platinum-Beechwood.

The Receiver (on behalf of PPCO) now sues BCLIC and WNIC as knowing accomplices in a fraud scheme designed by PPCO's managers to loot BCLIC and WNIC. And, she accuses them of perpetrating a fraud *on the Platinum fraudsters themselves*. In her original complaint, the Receiver cited *no facts* to support this outlandish theory. BCLIC and WNIC moved to dismiss on Rule 9(b) and other dispositive grounds. In her Amended Complaint, the Receiver now drops the common law fraud claims against BCLIC and WNIC entirely, but doubles down on the other claims by peppering the Amended Complaint with conclusory allegations about unspecified "misrepresentations" and what BCLIC and WNIC "must have known" about the fraud Platinum and Beechwood engineered. These superficial additions do not cure the deficiencies of the original complaint. The Receiver's allegations are still implausible on their face. BCLIC and WNIC did not defraud themselves.

[1] Unless separately defined here, defined terms have the same meaning as in the Receiver's Amended Complaint. For purposes of this motion only, WNIC and BCLIC accept as true the Receiver's non-conclusory allegations of fact.

The villains here, the Platinum and Beechwood Insiders, knew and hid from BCLIC and WNIC (and many others) that Platinum and its founders had established Beechwood[2] to provide Platinum with the liquidity it so desperately needed.[3] Throughout 2013, as the Beechwood Defendants were trying to induce BCLIC and WNIC to enter into reinsurance agreements, under which BCLIC and WNIC would entrust hundreds of millions of dollars to Beechwood, Beechwood misrepresented to BCLIC and WNIC that it had no connection to hedge funds or private equity firms (like Platinum). As the Receiver acknowledged in her original complaint, that was false. Beechwood lied because BCLIC and WNIC would never have entered into reinsurance agreements had they known of Platinum's control of Beechwood.

Further, Beechwood represented to BCLIC and WNIC that it would invest the Beechwood Reinsurance Trusts' assets prudently, safeguarding them for the payment of policyholders' claims. That was also a lie. From the outset, the plan was to hand over BCLIC and WNIC funds to Nordlicht and others at Platinum to alleviate Platinum's liquidity crisis and further Platinum's Ponzi-esque scheme. Beechwood was designed to be, and was in fact, a vehicle for Platinum's self-dealing. The Receiver admits this. FAC ¶¶ 3–5.[4] And, it is confirmed by the email in which Bodner, Huberfeld, and other co-conspirators confess that that they "weren't exactly honest" with BCLIC and WNIC when they surreptitiously plowed their reinsurance assets "into platinum with its illiquid investments" that "didn't exactly fit [BCLIC's and WNIC's] investment objective." First Am. Compl., *Trott v. Platinum Management (NY) LLC*, 1:18-cv-10936-JSR (Jan. 25, 2019),

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

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

[4] References to the First Amended Complaint will be referred to as "FAC ¶ __." References to the Receiver's original complaint will be referred to as "OC ¶ __."

Ex. 31 (Dkt. No. 159-3) ("*Trott* FAC") (consolidated with this case). Damningly, Beechwood also hid from BCLIC and WNIC that "beechwood and platinum really are integrated." *Id.*

The Receiver's theory that BCLIC and WNIC overlooked a fraud that was hidden from them to keep their long-term care liabilities off of their corporate parent's (CNO) balance sheet is implausible nonsense. In entering into the reinsurance agreements, BCLIC and WNIC agreed to transfer to Beechwood approximately *$600 million* that secured future policy liabilities (known as "statutory reserves" in insurance parlance). That money was placed in reinsurance trusts ("Trusts") controlled by Beechwood and subject to state regulation. In exchange, Beechwood promised to manage that money prudently and pay policyholder claims with it. Those Trusts would be depleted if Beechwood diverted assets to further Platinum's fraud. BCLIC and WNIC would then be required to post additional reserves to replace the money Beechwood squandered.[5] Because BCLIC and WNIC remained liable to policyholders throughout the entire agreement, their only incentive was to ensure that Beechwood maintained sufficient assets to pay policyholder claims. Put simply, the Receiver's theory that BCLIC and WNIC engaged in a scheme to defraud themselves is implausible, and this Court should not permit BCLIC and WNIC to be victimized all over again. The Receiver has not asserted, nor can she assert through yet another amendment, a factually plausible or legally cognizable claim against BCLIC and WNIC.[6]

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

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

STATEMENT OF FACTS

I. OVERVIEW OF THE PLATINUM AND BEECHWOOD FRAUDSTERS.

The Receiver brings this action on behalf of various Platinum Funds, which were controlled by a group of now indicted, convicted, or otherwise malfeasant individuals. Those individuals, the Platinum Insiders, orchestrated a massive, Ponzi-esque scheme. FAC ¶¶ 17–20.

In 2013, the Platinum Insiders, facing a "severe liquidity crisis," created Beechwood Re Ltd, a reinsurance company, with the Beechwood Insiders. FAC ¶¶ 5, 91, 107–08. Beechwood's purpose was to gain access to hundreds of millions of dollars in insurance assets, and then funnel those assets to Platinum to give it "much-needed cash while also satisfying redemption requests." FAC ¶¶ 5, 107. To do so, Beechwood purported to be an independent company, even though it was secretly owned and controlled by the Platinum Insiders. FAC ¶ 110. These machinations kept PPCO afloat so its fraud could continue. FAC ¶ 178.

II. BCLIC AND WNIC CEDE NEARLY $600 MILLION TO BEECHWOOD.

In 2013, BCLIC and WNIC sought to reinsure certain long-term care policies. FAC ¶ 135. Through a broker, the companies were put in touch with Beechwood, the company set up by the Platinum Insiders to prop up their fraudulent activities. FAC ¶ 136. Ultimately, BCLIC and WNIC entered into reinsurance agreements under which they ceded $553 million in future policy liabilities (statutory reserves) and transferred $592 million in assets to the Trusts controlled by Beechwood. FAC ¶ 142; *see also* Kaiser Decl., Ex. A, BCLIC Reinsurance Agreement; Kaiser Decl., Ex. B, WNIC Reinsurance Agreement (collectively, the "Reinsurance Agreements"). Those funds were intended to cover future insurance claims and were placed in the Trusts pursuant to state regulatory requirements. FAC ¶ 142. Wilmington Trust was the trustee of the Trusts. FAC ¶ 147. These are standard reinsurance agreements in which an insurer cedes policyholder liabilities—and the necessary assets to cover those liabilities—to a reinsurer.

If Beechwood successfully invested the Trust assets, so that the trust amounts exceeded 107% of state statutory reserve requirements, it could withdraw the surplus. Conversely, Beechwood was responsible for covering any shortfalls resulting from paid insurance claims, expenses or investment losses. FAC ¶ 151. But WNIC and BCLIC "would still be responsible for any unsatisfied claims to the extent Beechwood Re failed to replenish the Beechwood Reinsurance Trusts." FAC ¶ 151. So, if Beechwood became insolvent—or was used as a piggy bank to prop up Platinum's massive fraud scheme—WNIC and BCLIC would be exposed on the $592 million in assets they transferred *and* be stuck paying off future insurance claims.

III. THE MECHANICS OF THE BEECHWOOD REINSURANCE TRUSTS.

Once BCLIC and WNIC transferred nearly $600 million to Beechwood (through the Trusts), Beechwood—and it alone—managed the Trusts' investments.[7] The Receiver admits this. *See, e.g.*, FAC ¶¶ 177–80, 184, 193; OC ¶¶ 134, 137–38, 302. As is plain from the Reinsurance Agreements, BCLIC and WNIC had no ability to direct investments of Trust assets, and no right to veto any investment. In fact, BCLIC and WNIC were only entitled to receive quarterly reports from valuation companies valuing the Trust assets (BCLIC and WNIC did not value anything) to confirm that the Trusts held assets sufficient to satisfy state statutory reserve requirements. *See, e.g.*, Kaiser Decl., Exs. A & B § 4.5.

Because WNIC and BCLIC remained ultimately responsible for paying policyholder claims and had exposure on the almost $600 million they transferred, BCLIC and WNIC were

[7] *See* Kaiser Decl., Exs. A & B § 4.2(c) ("Reinsurer [Beechwood] will . . . direct the trustee to invest or reinvest the trust assets in accordance with the Investment Guidelines."); *id.*, Exs. D & E § 3.2(b) ("Grantor [Beechwood] may appoint an investment manager [BAM] . . . to make investment decisions in compliance with the Investment Guidelines with regard to the Assets held by Trustee in the Reinsurance Trust Account . . . Grantor, or the Asset Manager, acting on behalf of Grantor, may instruct Trustee to invest Assets in the Reinsurance Trust Account . . . . Grantor shall be responsible for ascertaining whether investments are 'Eligible Assets' . . . . ").

granted a "first priority security interest" in the Trusts under the Reinsurance Agreements. *See* Kaiser Decl., Exs. A & B § 4.2(i). That is, BCLIC and WNIC were *secured creditors* of the Trusts, with creditor rights but no right to control any of the Trusts' investments. BCLIC and WNIC were at the mercy of Beechwood and, by extension, its cash-starved principals at Platinum, not to misuse Trust assets, just as a mortgagee would be at the mercy of the mortgagor not to destroy a house in which the mortgagee had a security interest.

Beechwood—which was supposed to invest the assets prudently—immediately began using the funds to prop up the Platinum funds. FAC ¶ 169.[8] Ultimately, on September 29, 2016, BCLIC and WNIC terminated the Reinsurance Agreements at the direction of state regulators. In so doing, WNIC and BCLIC, as secured parties to the Trusts, took possession of the Trust assets (just as a bank foreclosing on a mortgage would take possession of a house), and along with them, the responsibility for paying policyholder claims directly. *See, e.g.*, Kaiser Decl., Exs. A & B §§ 4.2(e), 4.4 and 9.3.

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

The Amended Complaint provides substantial detail about how the Platinum and Beechwood Insiders fleeced investors for their benefit. But the Amended Complaint says nothing about how BCLIC and WNIC allegedly harmed PPCO. Starting at ¶ 194, the Receiver instead makes a handful of conclusory allegations about what BCLIC and WNIC allegedly did wrong.

First, the Receiver alleges that BCLIC and WNIC knew as early as 2014 that Beechwood was investing in Platinum assets and suspected some relationship existed between Beechwood and

[8] To that end, Beechwood lied to BCLIC and WNIC to further the fraud, for example, by falsifying periodic investment reports and "appl[ying] artificial values" to its investments so that it did not have to cover losses in the Trusts. OC ¶ 276. Because those truthful allegations further show that BCLIC and WNIC are victims and not fraudsters, the Receiver—in her efforts to shake down insurance companies—deleted them from the FAC.

Platinum. *See* FAC ¶¶ 195–99. But the Receiver alleges no facts showing that BCLIC or WNIC knew that Platinum and Beechwood were perpetrating a fraud or that Beechwood's investments were part of it. Obviously, the fraudsters did not share their nefarious plot with BCLIC or WNIC, as they needed the assets BCLIC and WNIC transferred to prolong the fraud, and BCLIC and WNIC would not willingly entrust to fraudsters $600 million needed to pay policyholder claims.

Second, the Receiver alleges that in 2016 BCLIC and WNIC engineered fraudulent transactions that took cash from PPCO in exchange for over-valued assets. *See* FAC ¶ 207. The Receiver alleges that, during those transactions, the "CNO Defendants" misrepresented the value of the assets they transferred to PPCO. *See* FAC ¶ 248. But the Receiver alleges no *facts* showing that BCLIC or WNIC either engineered the allegedly fraudulent transactions or misrepresented the value of assets transferred to PPCO. Nor can she: BCLIC and WNIC were not parties to those transactions. Receiver's Opp. to BCLIC/WNIC Motion to Dismiss, Dkt. No. 70 ("Receiver's Opp."), Exs. A–G. Instead, those transactions were structured by a Beechwood entity and involved PPCO, the Beechwood-controlled Trusts, and others. *Id.* The Receiver pleads no facts showing that BCLIC and WNIC instructed Beechwood to engage in any transactions with Platinum (or anyone else), and they had no power to do so.

From these conclusory allegations, the Receiver concocts theories that BCLIC and WNIC engaged in a RICO conspiracy, aided and abetted fraud and a breach of fiduciary duty, committed securities fraud, and engaged in fraudulent conveyances. But the Receiver does not allege a single fact (and there are none) to support the fundamental allegation that BCLIC or WNIC *knew* that Platinum was perpetuating a massive Ponzi-esque scheme with their money, much less that they were complicit in it. They were not. The Receiver herself repeatedly acknowledges that it was

the *Beechwood and Platinum Insiders* (not BCLIC or WNIC) who directed the fraud and orchestrated the transactions the Receiver now tries to unwind. For example, the Receiver alleges:

- "The Beechwood Defendants and the Platinum insiders structured and implemented numerous non-arms' length non-commercial transactions . . . through the accounts held on behalf of the CNO Defendants and SHIP." FAC ¶ 170; *see also* FAC ¶ 179 (the "Beechwood Defendants structured, negotiated and implemented several transactions to facilitate the fraud," including "a combination of debt and equity transactions, substantially all of which were consummated at inflated valuations.").

- Nordlicht, Levy, Feuer, and Taylor "steered" or were otherwise "at the helm" of the investments made by Beechwood into the Platinum Funds. FAC ¶¶ 171–74.

- "Beginning in early 2014 through 2016, the Platinum insiders and Beechwood directed the Beechwood Reinsurance Trusts and the SHIP IMA accounts to purchase limited partnership interests in the Platinum Funds and invest hundreds of millions of dollars mostly into PPVA portfolio companies that were being carried at inflated valuations." FAC ¶ 177.

ARGUMENT

I. THE AMENDED COMPLAINT STILL FAILS TO SATISFY THE MOST BASIC PLEADING STANDARDS.

First, the Receiver explains that her allegations are based on "INFORMATION AND BELIEF" derived from a "variety of sources." FAC ¶ 24. That is not allowed in a fraud case.[9] The OC expressly admitted in the opening paragraph that the entire complaint was based "on information and belief," but after WNIC and BCLIC pointed out that such pleading violated Rule 9(b), the Receiver sought to cure that fatal defect by simply deleting that allegation. Nonetheless, the Receiver's pleading scalpel failed to remove her other admission—now on page 9 of the FAC—that her pleading is indeed based on information and belief, so despite the Receiver's feeble

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

pleading gamesmanship, the FAC still violates Rule 9(b).[10] *See also* FAC ¶ 257 ("upon information and belief, those assets [ ] that WNIC and BCLIC recaptured" included portions of the sale of PPCO Master Fund's loan obligations [at issue in each fraudulent conveyance claim]).

What's more, the FAC is still a montage of inconsistent theories and conclusory fact-unadorned allegations. For example, the Receiver speculates (without any factual support whatsoever) that the PPCO Loan Transactions and Securities Purchases were "designed solely" to benefit the CNO Defendants. FAC ¶¶ 329, 336. And yet, the Receiver repeatedly states and pleads facts showing that Platinum Insiders and Beechwood directed these transactions, not WNIC or BCLIC. *See, e.g.*, FAC ¶¶ 3, 4, 171–73, 177–78.

Second, "[t]he Court must be especially vigilant in applying Rule 9(b) where a complaint is made against multiple defendants" because "the complaint should inform each defendant of the nature of his alleged participation in the fraud." *Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 388 (S.D.N.Y. 2016) (quotations omitted). Group pleading, of course, is forbidden. Yet the Receiver continues to lump the CNO Defendants together, both amongst each other and with the other named Defendants—including Beechwood (which the Receiver says was Platinum's alter ego)—

[10] The Receiver's efforts to save her pleading by removing facts she pleaded in the OC and *knows to be true* smack of bad faith. For example, she simply deleted allegations that Beechwood misled BCLIC and WNIC about everything (among other things, the Receiver alleged that Beechwood lied about: its capitalization; its intentions to invest prudently; its "true ownership structure and purpose," which it "conceal[ed] and affirmatively misrepresent[ed];" and its ties to and control by Platinum and Platinum Insiders). *See* OC ¶ 551. The Receiver excises these allegations in an attempt to bolster her claims against BCLIC and WNIC, but a "party cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories." *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984).

so it is impossible to discern what WNIC is being accused of that is different from what Beechwood (or even Platinum) allegedly did.[11]

Third, to adequately plead a claim sounding in fraud, the Receiver must "set forth the who, what, when, where and how of the alleged fraud." *Lipow v. Net 1 UEPS Techs., Inc.*, 131 F. Supp. 3d 144, 157 (S.D.N.Y. 2015). No such detail is provided here. The Receiver does not allege *any facts*, much less well-pleaded facts, showing that BCLIC and WNIC did anything wrong.

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

II. THE RECEIVER HAS NOT—AND CANNOT—STATE PLAUSIBLE SECURITIES FRAUD, AIDING AND ABETTING, OR RICO CLAIMS.

Aside from application of Rule 9(b), a complaint will survive a motion to dismiss under Rule 12(b)(6) only if it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The Receiver's claims against WNIC and BCLIC are implausible nonsense.

A. The Receiver's theory that BCLIC and WNIC allowed the Platinum fraudsters to steal Trust assets is implausible.

The Receiver explains, consistently with what the DOJ, the SEC, BCLIC and WNIC have alleged, that the Platinum Insiders created Beechwood to steal from insurance companies like BCLIC and WNIC. FAC ¶¶ 107–08, 179–80. The Receiver thus contends that BCLIC and WNIC

[11] As just one (particularly egregious) example, the Receiver identifies the "specific predicate acts" for her RICO claim as four different actions "committed by the Defendants" without reference to which Defendant committed which act. FAC ¶ 283.

eagerly joined a scheme that put $600 million of WNIC's and BCLIC's funds at risk, all so that the Platinum and Beechwood fraudsters could pilfer those funds to prop up Platinum and its Ponzi-esque scheme. The Receiver argues that it made sense for BCLIC and WNIC to commit financial suicide because it allowed them to unload insurance liabilities from CNO's balance sheet. *See* FAC ¶¶ 127, 132. But that ignores the fact—acknowledged by the Receiver herself—that when the Platinum Ponzi-esque scheme collapsed (as all such schemes eventually do), BCLIC and WNIC, as the direct insurers, would remain responsible to policyholders for those liabilities. FAC ¶¶ 151–52.

That is, if Beechwood mismanaged the Trusts and lost money it could not repay, BCLIC and WNIC would be forced to pay any policyholder liabilities Beechwood could not cover. FAC ¶¶ 151–52. BCLIC and WNIC (and by extension, CNO and 40|86 Advisors) therefore had every incentive to ensure that Beechwood prudently managed the Reinsurance Trusts. Throughout the FAC, the Receiver *admits that BCLIC and WNIC did just that*, reviewing the valuation reports that Beechwood provided—which had been falsely over-valued to make it appear as if the investments were performing—and speaking with Beechwood about its investments. *See, e.g.*, FAC ¶¶ 197, 199, 200, 203, 204. The Receiver's theory that BCLIC and WNIC knowingly and intentionally committed financial suicide by handing over $600 million to fraudsters to help them steal BCLIC and WNIC's money to further a Ponzi scheme is implausible on its face.[12]

[12] The Receiver knows full well that it was BCLIC and WNIC who, in 2016, exercised their audit rights under the Reinsurance Agreements, sought (with the assistance of counsel and experts) information from Beechwood, terminated the Reinsurance Agreements at the direction of state regulators, and sued Beechwood and its principals for fraud. BCLIC and WNIC did this *months before* the SEC or prosecutors brought any action. BCLIC and WNIC first brought this fraud to the public's attention, by filing a lawsuit. Yet, the Receiver accuses BCLIC and WNIC of being complicit in the fraudsters' efforts to conceal the fraud.

Against this backdrop, the Receiver claims, based on only conclusory allegations, that because BCLIC and WNIC entered into Reinsurance Agreements, they "must have known" of every bad act the Platinum Insiders committed.[13] Implausibly, the Receiver alleges that, once they supposedly discovered the fraud and while they still retained ultimate liability on the insurance policies, WNIC and BCLIC decided to actively participate in the fraud. That is simply absurd. As one court recently concluded, "[w]hile greed may cloud judgment, it is not plausible that the average financial professional owing fiduciary duties to its own clients and investors would knowingly invest their money in a Ponzi scheme that is doomed to collapse." *Picard v. Legacy Capital Ltd.*, 548 B.R. 13, 32 (Bankr. S.D.N.Y. 2016).

B. The Receiver has failed to plead any facts to support her implausible fraud, RICO, and aiding/abetting claims.

The Receiver cites no facts supporting her implausible claim that BCLIC and WNIC assisted the Platinum and Beechwood fraudsters in siphoning money away from the Trusts and into the pockets of the Platinum Insiders. As a result, the Receiver's securities fraud, aiding and abetting, and RICO claims all fail. Each claim requires the Receiver to allege *facts* (not legal conclusions) showing that BCLIC and WNIC participated in the Platinum-Beechwood schemes:

- For securities fraud (Count 4), the Receiver must allege with particularity (among other requirements) a misrepresentation of material fact *by each* of BCLIC and WNIC *to PPCO*. 15 U.S.C. § 78u-4(b).[14]

[13] This logic is especially galling since the SEC conducted an extensive examination of Platinum in 2014 and 2015, which included Platinum's relationship with Beechwood, and came up with nothing. Yet now, the SEC's Receiver claims that a cedent to a reinsurance agreement with no investigatory powers should have figured out what the SEC could not.

[14] To adequately plead a securities fraud claim, the Receiver must not only meet Rule 9(b)'s requirements, but the Private Securities Litigation Reform Act's ("PSLRA") as well. The PSLRA requires both particularized pleading as to the misrepresentation made and the defendant's state of mind. To that end, the Receiver must "specify each statement alleged to have been misleading, . . . and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed" and "state with

- For aiding and abetting fraud or breach of fiduciary duty (Counts 6–7), the Receiver must allege with particularity that BCLIC and WNIC (1) had actual knowledge of Beechwood's fraud (or breach of fiduciary duty); and (2) provided substantial assistance in perpetrating the fraud. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 201–02 (S.D.N.Y. 2006).

- For RICO (Counts 1–3), the Receiver must allege with particularity that each Defendant engaged in at least two predicate racketeering acts with "the same or similar purposes, results, participants, victims or methods of commission . . . ." *Merrill Lynch, Pierce, Fenner & Smith v. Young*, 1994 U.S. Dist. LEXIS 2929, at *85 (S.D.N.Y. Mar. 15, 1994). The Receiver cannot rely on deficient claims of mail or wire fraud to state a RICO claim. *See, e.g.*, *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 530–31 (S.D.N.Y. 2018) (Rakoff, J.).

In her original complaint, the Receiver speculated that BCLIC and WNIC turned a "blind eye" to "red flags" of possible fraud. But the law clearly forecloses liability on alleged inaction.[15] The Receiver does no better in her Amended Complaint.

1. The Receiver again does not identify any misrepresentations by BCLIC or WNIC or engineered transactions designed to harm PPCO.

The Receiver concludes that BCLIC and WNIC (either solely or together with other unspecified "Defendants") took cash from PPCO in exchange for assets, and that BCLIC and WNIC misrepresented the value of those assets to PPCO. FAC ¶¶ 234, 248, 311. But the Receiver identifies no assets that BCLIC or WNIC transferred to PPCO. Beechwood made any alleged

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particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b). Mere speculation or conclusory rhetoric will not suffice. *Bond Opportunity Fund v. Unilab Corp*., 87 F. App'x 772, 773–74 (2d Cir. 2004). For substantially the reasons identified in Section II.B of SHIP and Fuzion's memorandum of law in support of their partial motion to dismiss, Dkt. No. 325, (incorporated by reference herein) as well as the reasons set forth here, the Receiver's securities fraud claim against WNIC and BCLIC necessarily fails.

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

transfers, on behalf of the Trusts that Beechwood alone controlled. FAC ¶ 240. The Receiver has filed copies of these PPCO agreements with the Court, and *none* of them even mention BCLIC, WNIC, or the other CNO Defendants. Receiver's Opp., Exs. A–G.

The Receiver does not allege any facts plausibly suggesting that BCLIC and WNIC—strangers to those transactions—"actively negotiated and consummated" them. FAC ¶ 254. BCLIC and WNIC had no contractual right to make or control investments of Trust assets (Kaiser Decl., Exs. D & E § 3.2(b) ("Grantor [Beechwood] may appoint an investment manager [BAM] . . . to make investment decisions in compliance with the Investment Guidelines with regard to the Assets held by Trustee in the Reinsurance Trust Account . . . Grantor, or the Asset Manager, acting on behalf of Grantor, may instruct Trustee to invest Assets in the Reinsurance Trust Account . . . . Grantor shall be responsible for ascertaining whether investments are 'Eligible Assets' . . . . "")), and the Receiver alleges no facts suggesting otherwise. Nor does the Receiver allege facts showing that BCLIC or WNIC engineered those transactions or made any representations (false or otherwise) to PPCO. To the contrary, she admits that "the Beechwood Defendants, led by Levy, working together with the Platinum Funds, led by Nordlicht" orchestrated these transactions. FAC ¶ 179. BCLIC and WNIC could not orchestrate PPCO's own fraud when the Receiver herself admits that PPCO's Nordlicht was orchestrating the fraud.

2. The Receiver does not allege that BCLIC or WNIC had "actual knowledge" of any fraud or that they provided substantial assistance to the Platinum or Beechwood fraudsters.

To aid and abet a fraud or breach of fiduciary duty, one must know it exists. "New York law requires that the alleged aider and abettor have 'actual,' as opposed to merely constructive, knowledge of the primary wrong." *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 546 (S.D.N.Y. 2007). Allegations that, as here, one "should have known" do not suffice. *Id.* Indeed, "even alleged ignorance of obvious warning signs of fraud will not suffice to adequately

allege 'actual knowledge.'" *Id*. In analogous contexts, "allegations that a bank disregarded . . . . suspicious circumstances which might have well induced a prudent banker to investigate do not suffice to state a claim for aiding and abetting." *Id*. at 547 (citation omitted).

Here, the Receiver merely alleges that BCLIC and WNIC suspected that Beechwood and Platinum were somehow related. FAC ¶¶ 196–99. Even if true, knowledge that Beechwood was somehow related to Platinum is a far cry from "actual" knowledge that Beechwood and Platinum were operating a massive fraud scheme. The Receiver alleges no *facts* showing that BCLIC or WNIC had any knowledge of that.

Moreover, aiding and abetting liability requires "substantial assistance" in the fraud. *Chemtex*, 490 F. Supp. 2d at 547. Such assistance must be "affirmative" because "[m]ere inaction is insufficient to sustain a claim for aiding and abetting fraud unless the defendant has an independent duty to [] plaintiff." *Id.* Here, the Receiver claims that BCLIC and WNIC assisted the Platinum-Beechwood fraud by (1) not winding down the Trusts' investments in Platinum assets from 2014 through 2016; and (2) later demanding that the Trusts unwind those investments. FAC ¶¶ 202–07. So, the Receiver takes issue with the manner in which BCLIC and WNIC, as cedents and secured creditors, exercised their contractual rights under the Reinsurance Agreements (as the Receiver erroneously interprets those rights).[16] That theory is deficient as a matter of law.

The Second Circuit has affirmed dismissal of an aiding and abetting claim under practically identical circumstances. In *Sharp International Corp. v. State St. Bank & Trust Co.*, 403 F.3d 43

[16] To be sure, under the plain terms of the Reinsurance Agreements, BCLIC and WNIC did *not* have the right to veto any Trust investment made by Beechwood or require Beechwood to sell Trusts assets they did not like. Rather, BCLIC and WNIC only had the right to insist that Beechwood comply with the Investment Guidelines in the Reinsurance Agreements. Any disputes over the Investment Guidelines would be subject to lengthy arbitration before a panel of three arbitrators. *See, e.g.*, Kaiser Decl., Ex. A § 10.1. The idea that BCLIC and WNIC could have snapped their fingers to unwind the investments at any time is belied by the contracts.

(2d Cir. 2005), a company's shareholders falsely inflated profits to obtain loans and investments from unsuspecting third parties (like Platinum and Beechwood did with BCLIC, WNIC, and PPCO investors). *Id.* at 46–47. The shareholders (like the Platinum/Beechwood fraudsters) stole the cash to enrich themselves. *Id.* The company went bankrupt and the trustee sued one of the banks that had loaned money to the bankrupt company. *Id.* at 47. The trustee argued that the bank knew the shareholders were engaged in fraud, but rather than blowing the whistle, the bank "arranged quietly for the [shareholders] to repay the State Street loan from the proceeds of new loans from unsuspecting lenders." *Id.* This is akin to what the Receiver alleges here: that BCLIC and WNIC knew Beechwood was engaged in fraud, but kept quiet and engineered an escape route while other PPCO investors would be left holding the bag.

The Second Circuit flatly rejected the trustee's aiding and abetting claim, concluding that the "complaint says no more than that [the bank] relied on its own wits and resources to extricate itself from peril, without warning persons it had no duty to warn." *Sharp*, 403 F.3d at 51. Like BCLIC's and WNIC's rights under the Reinsurance Agreements, "the demand for repayment of a bona fide debt is not a corrupt inducement that would create aider and abettor liability." *Id.* BCLIC and WNIC were secured creditors under the Reinsurance Agreements, and even if one assumes—as implausible and conclusory as the allegations are—that BCLIC and WNIC unearthed the fraud scheme and did not blow the whistle on it to gain some advantage, that would not give rise to liability, as *Sharp* demonstrates.

C. The Receiver's RICO claims are barred as a matter of law.

As an initial matter, the Receiver's RICO claims should be dismissed because—as shown herein—the Receiver has not adequately pleaded that BCLIC and WNIC engaged in any unlawful predicate acts. Without the necessary factual allegations, the Receiver cannot show that BCLIC or WNIC "participa[ted] 'in the operation or management'" of the enterprise. *RD Mgmt. Corp. v.*

Samuels, 2003 U.S. Dist. LEXIS 9013, at *20–21 (S.D.N.Y. May 28, 2003) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993)). Nor does the Receiver specifically identify any racketeering income that *BCLIC and WNIC* received (or how they unlawfully reinvested it). *See Pyke v. Laughing*, 1998 U.S. Dist. LEXIS 884, at *20–21 (S.D.N.Y. Jan. 22, 1998) (requiring plaintiff to allege facts showing racketeering income for 1962(a) claim). Beechwood, acting for the Trusts—and not WNIC or BCLIC—made all decisions as to how the Trust assets were invested. And the Receiver does not allege facts showing any conspiratorial agreement. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990) (merely alleging that the defendants "conspired" or "agreed" with one another insufficient for 1962(d) claim).

But, more fundamentally, the Receiver's RICO claims are barred because they relate to the "purchase or sale of securities." The RICO statute expressly prohibits civil suits that "rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities." 18 U.S.C. § 1964(c). In a transparent attempt to avoid this very clear rule, the Receiver purportedly brings her securities fraud claim "in the alternative" to the RICO claims. That makes no difference. As the Second Circuit has explained:

> [W]hen Congress stated that "no person" could bring a civil RICO action alleging conduct that would have been actionable as securities fraud, it meant just that. It did not mean "no person except one who has no other actionable securities fraud claim." It did not specify that the conduct had to be actionable as securities fraud by a particular person to serve as a bar to a RICO claim by that same person.

MLSMK Inv. Co. v. JP Morgan Chase & Co., 651 F.3d 268, 278 (2d Cir. 2011) (citations and quotations omitted); *see also Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F. Supp. 2d 267, 283 (S.D.N.Y. 2009). Here, each of the so-called "predicate acts" involve the purchase or sale of securities, a fact that the Receiver readily *admits*. FAC ¶ 182 ("Each of these investments in the PPCO Funds and the PPVA Funds, and in the companies in

which they made investments, *constitute securities transactions*.") (emphasis added). All three of the Receiver's RICO claims must be dismissed on this basis alone.

III. THE RECEIVER'S CLAIMS, BOTH STATE AND FEDERAL, ARE BARRED BY IN PARI DELICTO.

New York law strictly prohibits wrongdoers (or those standing in their shoes) from suing other alleged wrongdoers. *See In re ICP Strategic Income Fund Ltd.*, 730 F. App'x 78, 81 (2d Cir. 2018) ("The in pari delicto doctrine prevents a party from seeking to recover against others for a wrong in which the party participated or is deemed through 'imputation' to have participated."). "Indeed, the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be weakened by exceptions." *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010) (internal quotation marks omitted). And where, as here, the application of in pari delicto is readily apparent on the face of a complaint, resolving the issue on a motion to dismiss is appropriate. *See, e.g.*, *In re Lehr Constr. Corp.*, 528 B.R. 598 (Bankr. S.D.N.Y. 2015); *In re Haven Indus., Inc.*, 462 F. Supp. 172 (S.D.N.Y. 1978).

Just as a wrongdoer cannot profit from his own misconduct, a receiver cannot pursue damages when the entity in receivership engaged in the misconduct.[17] The Receiver repeatedly identifies the Platinum Insiders as those who caused or "orchestrated" the scheme and acknowledges that PPCO was founded and controlled by the Platinum Insiders. *See* FAC ¶¶ 2–5, 108, 110. In light of New York's strong preference for robust application of in pari delicto, the

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

Receiver should not be allowed to pursue these bogus claims. The *Wagoner* rule similarly deprives the Receiver of standing to bring suit. *See Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991); *see also In re ICP*, 730 F. App'x at 82 ("According to the *Wagoner* rule, followed in New York, the *in pari delicto* doctrine applies to successors in interest of wrongdoers, including bankruptcy trustees and foreign liquidators"); *Picard v. HSBC Bank PLC*, 454 B.R. 25, 29–30 (S.D.N.Y. 2011) (Rakoff, J.) (explaining that "prudential considerations deprive a bankruptcy trustee of standing to even bring a claim that would be barred by *in pari delicto*").

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

BCLIC's and WNIC's first motion to dismiss laid bare the fundamental defect dooming each of the Receiver's fraudulent conveyance claims: *there were no transfers between BCLIC or WNIC and the Receivership Entities*. The Receiver attempts to plead around this immutable fact with daisy-chain allegations of responsibility (*e.g.*, BAM Administrative, acting on behalf of Beechwood, acting on behalf of the Reinsurance Trusts, acting for the benefit of WNIC/BCLIC, transferred funds to PPCO Master Fund). She claims that the transfers among the fraudsters—none involving WNIC or BCLIC—collapse into the *only* transfer involving BCLIC or WNIC: its recapture of the assets and liabilities from the Trusts in September 2016. But as described below, the recapture cannot under settled law be a fraudulent conveyance.

A. WNIC and BCLIC are immunized from liability because they were secured creditors taking trust assets to satisfy an antecedent obligation.

Under New York law, no transfer may be deemed "fraudulent" where the transferee gives "fair consideration" for whatever is transferred to it by the transferor. *See* N.Y. Debt. & Cred.

Law ("NYDCL") § 278(1).[18] A transferee (or, as here, a subsequent transferee) for value is immunized from liability under New York law. *Chemtex*, 490 F. Supp. 2d at 544 ("Courts have recognized this special protective carve-out for innocent purchasers for value under the New York statute.").

Here, the Receiver does not, because she cannot, allege *any* transfers between BCLIC and WNIC, and any Receivership Entity or Beechwood. Rather, BCLIC and WNIC were merely *subsequent transferees*, with the *Trusts* as the transferors. WNIC and BCLIC came into possession of the disputed assets only when they recaptured the assets from the Trusts—in which they were secured parties—on September 29, 2016. That transfer of assets to BCLIC and WNIC (the *only* transfer to them—the recapture of the Trust assets) was clearly for fair consideration because when BCLIC and WNIC exercised their secured creditor rights and recaptured the Trust assets, they also recaptured all of the policyholder liabilities (thus relieving Beechwood of the obligation to pay policyholder claims). While the Receiver may (or may not) have claims against *Beechwood* that *Beechwood* did not give "fair consideration" to PPCO Master Fund for any specific transaction engineered by the fraudsters, BCLIC and WNIC, as subsequent transferees for value, cannot be liable for those transfers. *See* NYDCL § 278(1).

Significantly, BCLIC and WNIC were in fact *secured parties* under the Reinsurance Agreements, and were granted a "first priority security interest" on the Trust assets. *See* Kaiser

[18] Under New York law, a transaction can be either actually fraudulent or constructively fraudulent. To be actually fraudulent, the transfer must be made with the "actual intent . . . to hinder, delay or defraud either present or future creditors." NYDCL § 276. To be constructively fraudulent, the transfer must be made "without fair consideration" and one of the following conditions must be met: (1) the transferor is insolvent or will be rendered insolvent by the transaction (NYDCL § 273); (2) the debtor has unreasonably small capital to justify the transfer (NYDCL § 274); or (3) the debtor believes it will not be able to repay the debt (NYDCL § 275). The Receiver's kitchen sink pleading alleges every transaction was both constructively and actually fraudulent.

Decl., Exs. A & B § 4.2(i). Upon recapture, BCLIC and WNIC did nothing more than foreclose on its security interests, as they were entitled to do. *See id.*, §§ 4.2(e), (i). It is settled law that, in these very circumstances, a secured party foreclosing on its security interest cannot be held liable under fraudulent transfer law, *even if* it is aware of its debtor's fraud and the fact that the foreclosure may harm the debtor's other creditors. That is, secured creditors are privileged to protect their security and are immunized from liability under the NYDCL when they take a debtor's property to enforce an antecedent debt. As the Second Circuit has ruled, "[u]nder New York law, an insolvent debtor 'may properly assign assets to a creditor as security for an antecedent debt although the effect of the transfer will be to prefer that creditor.' Moreover, it is also irrelevant under New York law whether [the secured creditor] knew that [the debtor] was insolvent or that the consolidation had the effect of preferring [the secured creditor] over [the debtor's] other creditors." *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 964 (2d Cir. 1998) (internal citation omitted).

The Second Circuit's decision in *Sharp International Corp.* is again dispositive. As described above, in that case, a bankruptcy trustee sued a debtor's secured creditor, State Street, under common law theories and the NYDCL, alleging State Street was aware that the debtor (Sharp) was being looted by fraudsters but nonetheless caused Sharp to borrow money from other creditors so that State Street would be repaid on its secured loan. The Second Circuit affirmed the dismissal of the Trustee's aiding and abetting and fraudulent transfer claims, holding that, even though "State Street was in a position to blow the whistle on the [ ] fraud, but did not," and instead "arranged to extricate itself from the risk," there was no liability because, as a secured creditor, State Street was privileged to protect itself. *Sharp*, 403 F.3d at 53.

As the Second Circuit made clear, "the preferential repayment of pre-existing debts to some creditors does not constitute a fraudulent conveyance" and would not constitute a fraudulent conveyance *even if* the subsequent transferee knew that the funds to repay it were "fraudulently obtained."[19] *Sharp*, 403 F.3d at 54–55. Simply stated, where the secured creditor is taking repayment pursuant to an antecedent debt, there is fair consideration as a matter of law. *Id*. The secured creditor's "knowledge of the [ ] fraud, without more, does not allow an inference that [it] received the [ ] payment in bad faith." *Id*. at 55–56; *see also id.* at 54 (further noting that any implied requirement that the transferee act in good faith would necessarily be satisfied where the conveyance at issue discharges an antecedent debt). Accordingly, the Trustee's constructively fraudulent transfer claim against State Street failed *as a matter of law*. The Trustee's actual fraudulent transfer claim failed against State Street for similar reasons: while Sharp's new loans from other creditors may have been fraudulent transfers, Sharp's subsequent payment of part of those proceeds to State Street to discharge an antecedent debt was not. State Street was a legitimate secured creditor, and it is not a fraudulent transfer for a debtor to prefer one creditor over another. *Id*. at 56–57. The only recognized exception is where, unlike here, the transferee is an insider like a shareholder or director of the transferor. *Id.* at 54. The cases applying these principles are legion.[20]

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[19] The rationale for the rule is straightforward: if secured creditors could be held liable for foreclosing on collateral, banks would cease loaning money (or would demand exorbitant interest) because the collateral could come under attack by the borrower's other creditors, who could claim that the satisfaction of a secured debt was a "fraudulent transfer" if it left the borrower unable to pay other creditors. Immunizing secured creditors from fraudulent transfer claims so they may resort to collateral to pay a debt is a basic and necessary pillar of secured lending—it is what makes a creditor "secured."

[20] *See, e.g.*, *Chemtex, LLC*, 490 F. Supp. 2d at 548 ("[A] secured lender has the right to protect its own interests when making decisions to enforce its contractual foreclosure rights and

Applying these principles here, WNIC and BCLIC, as secured parties under the Reinsurance Agreements, had every right to enforce the terms of those Agreements—each executed years before the fraudulent transfers alleged in the Amended Complaint—to recapture the Trust assets to satisfy Beechwood's antecedent debt to them to return the Trust assets upon recapture.[21] Under *Sharp* and other cases, BCLIC and WNIC cannot be held liable under fraudulent transfer law, *even if* they were aware (they were not) of the Platinum-Beechwood fraud and the fact that the recapture might harm other creditors.[22]

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such decisions cannot give rise to a claim that the lender substantially assisted its borrower's alleged fraud upon another party."); *Ultamar Energy Ltd. v. Chase Manhattan Bank, N.A.*, 599 N.Y.S.2d 816, 819 (N.Y. App. Div. 1st Dep't 1993) (no fraudulent conveyance where Chase foreclosed on its security interests in Drexel's accounts receivable, knowing that Drexel was insolvent and that its foreclosure meant Drexel's other creditors would not be paid: "[A] conveyance which satisfies an antecedent debt made while the debtor is insolvent is neither fraudulent nor otherwise improper, even if its effect is to prefer one creditor over another . . . Thus, even if Chase had not had a security interest in the accounts receivable, even if it had known of Drexel's financial difficulties and even if Chase had known that such assignment would result in Ultramar's not getting paid, Chase would have been within its rights in taking accounts receivable in satisfaction of Drexel's debt."); *Am. Metal Finishers, Inc. v. Palleschi*, 391 N.Y.S.2d 170, 171 (N.Y. App. Div. 2d Dep't 1977).

[21] Apart from the recapture, the Receiver does not allege a single transfer to or from BCLIC or WNIC. Instead, the Receiver seeks avoidance of the March 2016 transfers *from Beechwood/the Reinsurance Trusts* into the PPCO Master Fund, and vice-versa. *See* FAC ¶¶ 246–48. None of these transactions involve transfers to or from BCLIC or WNIC, however. This is fatal to her claims. The law in New York is clear: "there is no cause of action for aiding and abetting a fraudulent conveyance . . . ." *BBCN Bank v. 12th Ave. Rest. Grp.*, 150 A.D.3d 623, 623–24 (N.Y. App. Div. 1st Dep't 2017). Further, "[p]roviding assistance to an alleged transferee does not state a claim sounding in fraudulent conveyance . . . ." *Shefner v. Beraudiere*, 127 A.D.3d 442, 442 (N.Y. App. Div. 1st Dep't 2015). Therefore, even accepting the Receiver's conclusory, baseless, and false allegations that BCLIC and WNIC participated in the alleged March 2016 fraudulent transfers by somehow directing Beechwood, on behalf of the Reinsurance Trusts, to transfer funds to or from PPCO Master Fund, it would still be insufficient to state fraudulent conveyance claims against BCLIC or WNIC under New York law.

[22] Of course, as WNIC and BCLIC never had any dealings at all with any Platinum entity, there would be no reason for WNIC or BCLIC to even suspect that the recapture might harm Platinum's creditors. And, as for Beechwood, the only assets recaptured were those in the Trusts, which by law and contract were to be used exclusively to pay policyholder claims, so recapturing

Moreover, for a conveyance to be actually fraudulent (NYDCL § 276), the *transferor* must intend to defraud its creditors. *Sharp*, 403 F.3d at 56. The Receiver has not pled any actual intent to defraud creditors on the part of the transferor with respect to the only transfer involving WNIC and BCLIC (the recapture). Nor could leave to replead enable her to cure this deficiency, since the transferor in the recapture—the Trusts—had *no intent at all* because it was WNIC and BCLIC that effectuated the transfers when they exercised their rights under the Reinsurance Agreements to enforce their security interests and recapture the Trust assets. Neither Beechwood nor the Trusts participated in that decision. For that reason, too, the fraudulent transfer claims make no sense.

B. The Receiver is not a "Creditor" of the NPA Guarantors or the MSA PPCO Subsidiaries entitled to sue under New York's fraudulent conveyance statutes.

A party to a fraudulent transfer may not sue to set it aside under New York law. *Eberhard v. Marcu*, 530 F.3d 122, 133 (2d Cir. 2008) ("transferor [ ] may not bring an action to set aside his own fraudulent conveyance"). *See also Levy v. Braverman*, 260 N.Y.S.2d 681 (N.Y. App. Div. 1st Dep't 1965). Because a receiver stands in the shoes of the receivership entity, this means—in a Ponzi scheme case such as this—that a receiver may only sue under the NYDCL to set aside a fraudulent transfer if the receiver has *also* been appointed receiver over entities that are creditors of the alleged transferor. *Eberhard*, 530 F.3d at 133–34 (SEC receiver lacked standing to set aside fraudulent conveyance because he could only bring claims of the receivership entities, none of which were creditors in the Ponzi scheme).

Here, each of the Receiver's fraudulent transfer claims seek to set aside "all transfers made by, liens given by, and obligations incurred by PPCO Master Fund and/or the NPA Guarantors and/or the MSA PPCO Subsidiaries (if any) to the Noteholders . . . ." FAC ¶ 381. The Receiver,

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those assets should have had no impact on Beechwood's other creditors (and it did not). But even if it did and even if WNIC and BCLIC believed the recapture would impact other creditors, it would not matter because the transfer—the recapture—was for value to satisfy an antecedent debt.

however, alleges only that she stands in the shoes of creditors of *PPCO Master Fund*. *See, e.g.*, FAC ¶ 380. She does *not* allege that any of the Receivership Entities are creditors of any other NPA Guarantors or MSA PPCO Subsidiaries. Because the Receiver has not pled standing to recover any transfers from such entities, all of her fraudulent conveyance claims relating to transfers by entities other than PPCO Master Fund should be dismissed for lack of standing.

C. The Receiver's new claim under NYDCL § 277 should be dismissed because WNIC and BCLIC are not "partners" of any alleged transferor entity.

In Count 17 of the Amended Complaint, the Receiver asserts new claims under NYDCL § 277, but NYDCL § 277(a) applies only to the conveyance of "partnership property . . . to a partner . . . ." The Receiver seeks to avoid transfers made by "PPCO Master Fund and/or the NPA Guarantors and/or the MSA PPCO Subsidiaries." FAC ¶ 405. However, the only entity alleged to be a partnership is PPCO Master Fund. FAC ¶ 26. Thus, the Receiver's claims under NYDCL § 277 relating to transfers from entities other than PPCO Master should be dismissed. Additionally, the Receiver makes no allegation—nor could she—that BCLIC and WNIC were "partners" of PPCO Master Fund. Because NYDCL § 277(a) only applies to transfers made "to a partner," the Receiver's claims against BCLIC and WNIC are nonsensical. The Receiver's claims under NYDCL § 277(b) asserting constructive fraudulent conveyances of partnership property should be dismissed for the reasons stated above. As such, Count 17 should be dismissed in its entirety.[23]

CONCLUSION

The Receiver's claims against Bankers Conseco Life Insurance Company and Washington National Insurance Company should be dismissed with prejudice.

[23] For all of the reasons set forth in this Memorandum, the Receiver's unjust enrichment and declaratory judgment claims—which seek the exact same relief as her fraudulent conveyance claims—should be dismissed.

Dated: May 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on this 15th day of May, 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this adversary proceeding.

Dated: May 15, 2019

Respectfully submitted,

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