UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	18-cv-06658 (JSR)
MELANIE L. CYGANOWSKI, Plaintiff, -v- BEECHWOOD RE LTD., et al., Defendants.	:	18-cv-12018 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF THE BEECHWOOD DEFENDANTS' PARTIAL MOTION TO DISMISS

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Attorney for Defendants Beechwood Re Ltd., Beechwood Re Investments, LLC, B Asset Manager LP, B Asset Manager II LP, Beechwood Re Holdings, Inc., Beechwood Bermuda International, Ltd., Beechwood Bermuda Ltd., BAM Administrative Services LLC, Mark Feuer, and Scott Taylor

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Defendants Beechwood Re (In Official Liquidation) ("BRE"), Beechwood Re Investments, LLC ("BRILLC"), B Asset Manager LP ("BAM"), B Asset Manager II LP ("BAM II"), Beechwood Re Holdings, Inc. ("BRE Holdings "), Beechwood Bermuda International, Ltd. ("BBIL"), Beechwood Bermuda Ltd. ("BBL"), BAM Administrative Services LLC ("BAM Admin"), Mark Feuer, and Scott Taylor (together, the "Beechwood Parties"), by and through their undersigned counsel, respectfully submit this brief in support of their partial motion to dismiss the First Amended Complaint by 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 (together, "PPCO"), for lack of subject-matter jurisdiction and for failure to state a claim for which relief can be granted.

PRELIMINARY STATEMENT

In this lawsuit, the SEC-appointed Receiver for Platinum Credit Management L.P. and the PPCO funds asserts claims against Beechwood and others for harm that the PPCO funds allegedly suffered as a result of a "massive fraud" that was supposedly "orchestrated" by their own former officers and directors, several of whom are now on trial in a criminal action pending in the U.S. District Court for the Eastern District of New York.

The First Amended Complaint ("FAC") is a poster child for application of the *Wagoner* Rule and the doctrine of *in pari delicto*. The Receiver has acknowledged that she "stand[s] in the shoes" of PPCO, and the principal wrongdoers are alleged to be a group of "Platinum Fund insiders," whose conduct is imputed to PPCO itself. This imputation is fatal to most nearly all of the Receiver's claims as it deprives her of standing to sue third-party lenders like Beechwood.

The Receiver understands the threat that these doctrines pose to her claims, so she has tried everything in her power to evade them. She seeks to invoke the "adverse interest exception" to the *Wagoner* Rule and the *in pari delicto* doctrine, making conclusory allegations that Platinum's principals acted for their own enrichment and against the interests of PPCO. But the adverse interest exception to the *Wagoner* Rule does not salvage the Receiver's claims because the FAC alleges that the Platinum insiders' fraud actually propped up Platinum, without which "PPCO would have faced liquidity issues which would have led to an inability to satisfy any non-ordinary course redemption requests." Thus, far from totally abandoning the interests of PPCO, the Receiver affirmatively alleges that the Platinum insiders relied on this scheme to sustain the fund—conduct that clearly falls outside the scope of the adverse interest exception.

Nor is the Receiver saved by the fact that the FAC purports to identify certain "innocent insiders" at Platinum. New York courts have repeatedly concluded that there is no *independent* innocent insider exception. Rather, it is an exception to the (sole actor) exception to the (adverse interest) exception. And because the adverse interest exception is inapplicable here, there is no need to even consider the innocent insider exception. Moreover, even if that were not the case, the Receiver's allegations are still deficient. The Receiver fails to plead facts showing that these individuals had any authority, ability, or willingness to derail the purported scheme.

The above principles bar the Receiver's common law, securities fraud, and civil RICO claims—that is, all claims other than fraudulent conveyance (Counts Eight through Seventeen) and declaratory judgment (Count Nineteen). But other defects in the FAC are also fatal to most of the Receiver's claims:

- The Receiver's civil RICO claims—added to seek treble damages—are barred by the RICO amendment to the Private Securities Litigation Reform Act ("PSLRA"), which precludes the assertion of any civil RICO claims based in whole or in part on securities

fraud. Here, the civil RICO claims must be dismissed because the Receiver expressly relies on securities fraud as a predicate offense for her claims.

- The Receiver's claims under § 10(b) of the Securities Exchange Act and Rule 10b-5 should be dismissed because she fails to plead either an actionable misstatement or an omission. More than that, the Receiver fails to allege justifiable reliance as she offers no explanation as to how Beechwood could possibly have misled PPCO—the perpetrator of the alleged fraud—as to the value of Platinum's own portfolio companies. In addition, because claims under § 20(a) of the Securities Exchange Act require "a primary violation" under § 10(b), and the Receiver has failed to plead one, the Receiver's § 20(a) claims against Feuer and Taylor also must be dismissed.
- The Receiver's aiding and abetting claims should be dismissed because the Receiver fails to plead actual knowledge or a viable theory of reliance.
- The Receiver's unjust enrichment claim against BAM Admin should be dismissed because the Receiver fails to plead unjust enrichment outside of PPCO's contracts with that BAM Admin. The Receiver fails to explain how BAM Admin was actually enriched.

In sum, all of the Receiver's claims besides the ones for fraudulent conveyance and declaratory relief should be dismissed against the Beechwood Parties. And, since the Receiver does not assert any fraudulent conveyance or declaratory judgment claims against BRE, BRILLC, BAM, BAM II, BRE Holdings, BBIL, BBL, Feuer, or Taylor, the FAC should be dismissed in its entirety against each of those parties.

STATEMENT OF FACTS

I. THE PARTIES

This is one of several actions pending in this Court arising out of the failure of Platinum Partners, formerly a highly-regarded hedge fund manager, whose principals are now subject to various civil and criminal proceedings.[1] (ECF No. 83, FAC ¶¶ 2, 18.)

The Receiver brings this suit on behalf of the PPCO family of funds, Platinum's second-largest group of hedge funds. (*Id.* ¶¶ 25-31.) The funds were founded by Murray Huberfeld, Mark Nordlicht, and David Bodner. (*Id.* ¶¶ 57-60, 65.) They were managed by a single management company, Platinum Credit Management LP, which was run by Nordlicht and David Levy. (*Id.* ¶¶ 15, 80.) Nordlicht and Levy, through their roles at Platinum Credit Management, were the funds' Co-Chief Investment Officers and were "jointly and solely" responsible for the funds' investment decisions. (*Id.* ¶ 80.)

PPCO was marketed as a single-strategy group of funds whose business was to "originate short and medium term, high yield, debt secured by collateral, and/or equity investments." (*Id.* ¶ 66.) PPCO originated loans and made equity investments in various industries, including consumer finance, litigation, metals and mining, oil and gas, alternative energy, retail energy, life settlements and asset-based finance. (*Id.*) From the outside looking in, Platinum appeared to be a wild success: As the Receiver has acknowledged, in 2014, "from all outward appearances Platinum was an extraordinarily successful investment enterprise." (ECF No. 68 at 4.)

Distinct from Platinum, the Beechwood entities are a group of reinsurance companies and asset managers that were formed in 2013. (FAC ¶¶ 4-5.) Mark Feuer was Beechwood's Chief Executive Officer and Scott Taylor was its President. (*Id.* ¶ 110.) The Beechwood entities'

[1] Factual allegations in the Complaint are taken as true solely for purposes of this motion.

initial investors included trusts established for the benefit of the family members of certain Platinum-related individuals. (*Id.* ¶¶ 263, 305.) Beechwood's first Chief Investment Officer, Levy, came to Beechwood from Platinum in 2014, but rejoined Platinum shortly thereafter as Co-Chief Investment Officer of the Platinum Funds. (*Id.* ¶ 58.)

CNO and SHIP were two of Beechwood's clients. (*Id.* ¶ 8.) In 2014, Beechwood entered into reinsurance agreements with two of CNO's subsidiaries under which the subsidiaries ceded blocks of long-term care insurance policies to Beechwood. (*Id.* ¶ 141.)[2] Later, Beechwood entered into three Investment Management Agreements with SHIP under which Beechwood agreed to invest certain funds on behalf of SHIP. (*Id.* ¶ 165.) CNO and SHIP were fully aware of Beechwood's ties to Platinum when they entered into these agreements. (*Id.* ¶ 112, 174.) Moreover, both companies also played an active role in overseeing their investments through Beechwood and had full knowledge that Beechwood had invested in transactions related to Platinum. (*See, e.g.*, *id.* ¶¶ 174, 200, 203, 208-10.)

II. THE ALLEGED PLATINUM PONZI SCHEME

In June 2016, news reports first broke about a potential fraud scandal involving Platinum and its principals, including founder Murray Huberfeld and Co-Chief Investment Officers Mark Nordlicht and David Levy. That same month, Huberfeld was arrested in connection with a bribe to a pension official in exchange for investing in a fund owned and operated by Platinum. (*Id.* ¶¶ 17, 85.) In December 2016, Nordlicht, Levy, and other Platinum-related individuals were charged with securities fraud by the U.S. Attorney's Office for the Eastern District of New York. (*Id.* ¶¶ 18-19.) The U.S. Securities and Exchange Commission brought parallel charges against

[2] Although Beechwood did not launch until February 2014, the reinsurance agreements have an effective date of October 2013.

these individuals, as well as against Platinum Credit Management. (*Id.* ¶ 20.) Among other things, the government accused them of engaging in a scheme to defraud investors and prospective investors in Platinum-managed funds through the overvaluation of assets and the concealment of severe cash-flow problems at Platinum's signature funds. (*Id.* ¶ 19.)

Shortly after Platinum Credit Management was charged with securities fraud, it was placed into Receivership along with the PPCO funds. (*Id.* ¶ 21.) Two years later, the SEC-appointed Receiver brought this action on behalf of the PPCO funds against the Beechwood Parties, CNO, SHIP, and affiliates of those companies.[3] Notably, although the government has been investigating Platinum's activities since at least early 2016, none of the Beechwood Parties has been indicted for any conduct or sued by any governmental agency in connection with Platinum's alleged fraud.

III. THE CLAIMS AGAINST BEECHWOOD

At its core, the FAC describes a large-scale Ponzi-like scheme designed to keep the Platinum funds afloat. (*Id*. ¶¶ 107, 178-80, 193.) The Receiver alleges that certain Platinum insiders "orchestrated" a "massive fraud" to mask a severe liquidity crisis at Platinum's flagship hedge funds. (*Id*. ¶¶ 2, 91, 101-107.) At the heart of the scheme, the Receiver claims, was the overvaluation of illiquid and distressed assets at PPVA and PPCO. (*Id*. ¶¶ 3, 19, 91, 100, 335.)

The Receiver maintains that PPVA's and PPCO's investment portfolios were concentrated in illiquid positions (*id.* ¶¶ 3-4, 91-93, 100-103, 178); that this lack of liquidity created problems when investors sought to redeem their investments from the PPCO funds (*id.* ¶¶ 105-106); and that, to deal with this problem, Platinum's top management relied upon subscriptions from new investors to pay redemptions (*id.* ¶¶ 19, 100, 105). The Receiver alleges

[3] Platinum Credit Management is a Receivership entity. However, it is not a party to this action.

that PPCO was near-insolvent, but that as a result of the conduct described above, it was able to continue to operate at a time when it should have been winding down its business. (*Id.* ¶ 193.)

The Receiver brings six counts against all the Beechwood Parties, for (*i*) civil RICO violations under 18 U.S.C. § 1962(c), (*ii*) civil RICO violations under 18 U.S.C. § 1962(a), (*iii*) civil RICO violations under 18 U.S.C. § 1962(d), (*iv*) securities fraud under § 10(b) of the Securities Exchange Act and Rule 10b-5, (*v*) aiding and abetting the Platinum insiders' breach of their fiduciary duty, and (*vi*) aiding and abetting the Platinum insiders' common-law fraud. The Receiver brings one additional count against Feuer and Taylor alone for control-person liability under § 20(a) of the Securities Exchange Act, and additional counts against BAM Admin for unjust enrichment, declaratory relief regarding certain liens, and fraudulent conveyance under the New York Debtor and Creditor Law.

APPLICABLE LEGAL STANDARD

To survive a motion to dismiss, a complaint must satisfy Rule 8(a) by stating a claim for relief that is plausible on its face. Fed. R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (citation omitted). Furthermore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

The Receiver's claims based on allegedly fraudulent conduct (*e.g.*, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, securities fraud, and civil RICO) must also be pleaded with specificity under Rule 9(b). Fed. R. Civ. P. 9(b). To satisfy the specificity requirement, the Receiver must "(1) specify the statements that [it] contends [are] fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993).

Moreover, it is well settled that a party does not comply with Rule 9(b) when it engages in "group pleading"—making allegations against a group of defendants generally instead of pleading the specifics of a fraud claim against each defendant individually. *See id.* at 1175; *Javier v. Beck*, 2014 WL 3058456, at *12 (S.D.N.Y. July 3, 2014).

ARGUMENT

I. THE RECEIVER'S COMMON LAW CLAIMS, SECURITIES FRAUD CLAIMS, AND CIVIL RICO CLAIMS ARE BARRED BY THE *WAGONER* RULE AND THE DOCTRINE OF *IN PARI DELICTO*.

A. Under The *Wagoner* Rule, The Receiver Lacks Standing to Bring Common Law Claims, Securities Fraud Claims, and Civil RICO Claims against the Beechwood Defendants.

The *Wagoner* Rule provides that, under New York law, a bankruptcy trustee may only "assert claims held by the bankrupt corporation itself," and lacks standing to assert "[a] claim against a third party for defrauding a corporation with the cooperation of management" on behalf of "the guilty corporation." *Shearson Lehman Hutton Inc. v. Wagoner*, 944 F.2d 114, 118, 120 (2d Cir. 1991). The Rule "derives from the fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation." *In re Grumman Olson Indus., Inc.*, 329 B.R. 411, 423 (Bankr. S.D.N.Y. 2005) (internal marks and citations omitted). "[M]anagement's misconduct is imputed to the corporation, and because a trustee stands in the shoes of the corporation, the *Wagoner* rule bars a trustee from suing to recover for a wrong that he himself essentially took part in." *Id.* at 423-24.

While the *Wagoner* case itself addressed the claims of a Chapter 11 trustee, the Rule applies equally to a receiver who similarly stands in the shoes of the debtors. *See Cobalt Multifamily Inv'rs I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 440 (S.D.N.Y. 2012) (applying *Wagoner* Rule to claims brought by court-appointed receiver); *cf. Bullmore v. Ernst & Young*

Cayman Islands, 861 N.Y.S.2d 578, 581 (Sup. Ct. N.Y. Cty. 2008) (applying *Wagoner* Rule to claims brought by Joint Official Liquidators of Cayman Islands hedge fund).

Where a complaint's allegations demonstrate that a trustee or receiver lacks standing to sue under the *Wagoner* Rule, the complaint should be dismissed on a Rule 12 motion. Because *Wagoner* is framed as a rule of standing, it should be resolved at the earliest opportunity. *Wagoner*, 944 F.2d at 117. Courts accordingly have not hesitated to apply *Wagoner* to dismiss deficient claims on their pleadings. *See*, *e.g.*, *Picard v. HSBC Bank PLC*, 454 B.R. 25, 37 (S.D.N.Y. 2011) (Rakoff, J.), *amended by In Re Bernard L. Madoff Inv. Sec. Inc.*, 2011 WL 3477177 (S.D.N.Y. Aug. 8, 2011), *aff'd*, 721 F.3d 54 (2d Cir. 2013).

Dismissal is required here as well. All of the Receiver's claims against the Beechwood Defendants are expressly premised on the theory that Platinum insiders "orchestrated" a "massive fraud" to mask a severe liquidity crisis at Platinum's flagship hedge funds, PPVA and PPCO. (FAC ¶¶ 2, 91, 101-107.) Specifically, she alleges that Nordlicht and Levy served as Co-Chief Investment Officers of the PPCO funds through their positions at Platinum Credit Management. In this role, she alleges that Nordlicht and Levy were "jointly and solely" responsible for PPCO's investments decisions. (*Id.* ¶ 80.) The Receiver's claims thus fall squarely within the prohibitions of the *Wagoner* Rule.

1. The "adverse interest" exception is inapplicable because PPCO derived a benefit from the wrongdoing.

New York recognizes a narrow "adverse interest" exception to the *Wagoner* Rule and the *in pari delicto* doctrine. *In re 1031 Tax Grp., LLC*, 420 B.R. 178, 199 (Bankr. S.D.N.Y. 2009) (*Wagoner*); *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 952 (N.Y. 2010) (*in pari delicto*). Under the adverse interest exception, an agent's wrongful conduct will not be imputed to his principal under a limited set of circumstances: "To come within the exception, the agent must have *totally*

abandoned his principal's interests and be acting *entirely* for his own or another's purposes." *Kirschner*, 938 N.E.2d at 952 (emphasis added) (quoting *Ctr. v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 784–85 (1985)). Thus, where the agent's alleged misconduct, as here, "enables the business to survive—to attract investors and customers and raise funds for corporate purposes—[the adverse interest] test is not met." *Id.* at 953. The adverse interest exception does not apply where an agent acts with mixed motives; "[i]t cannot be invoked merely because [the agent] has a conflict of interest or because he is not acting primarily for his principal." *Id.* at 952 (quoting *Ctr. v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 785 (1985)).

Courts in New York addressing facts similar to those alleged here routinely reject the adverse interest exception. *See New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 41 N.Y.S.3d 1, 10 (1st Dept. 2016) (exception inapplicable where alleged misconduct "enabled the funds to continue to survive and to attract investors"); *Concord Capital Mgmt., LLC v. Bank of Am., N.A.*, 958 N.Y.S.2d 93, 94 (1st Dep't 2013) (exception inapplicable where alleged scheme "brought millions of dollars into plaintiffs' coffers and allowed plaintiffs to survive for a few years"); *Balanced Return Fund Ltd. v. Royal Bank of Can.*, 2014 N.Y. Misc. LEXIS 6380, at *44 (Sup. Ct. N.Y. Cty. Oct. 30, 2014) (exception inapplicable where director of family of investment companies participated in scheme to inflate net asset values); *Walker, Truesdell, Roth & Assocs., Inc., Tr. of Greenwich Sentry, L.P. Litig. Tr. v. Globeop Fin. Servs. LLC*, 2013 WL 8597474, at *7 (Sup. Ct. N.Y. Cty. May 27, 2013) ("The Funds' general partner's receipt of compensation does not satisfy the requirement of the adverse interest exception that the corporate officer or agent have acted solely for its own benefit.")

The reasoning in those cases applies equally here. The Receiver affirmatively alleges that PPCO benefited from the Platinum insiders' wrongful conduct. Among other things, the Receiver alleges that Platinum was a "house of cards built by the Platinum insiders" and that it

"would have collapsed" but for the alleged fraud. (*Id.* ¶ 193). Indeed, the Receiver alleges that, were it not for the purported scheme, "PPCO would have faced liquidity issues which would have led to an inability to satisfy any non-ordinary course redemption requests." (*Id.* ¶ 178.) Thus, far from "totally abandoning" PPCO's interests, the FAC alleges that the conduct of the Platinum insiders sustained the funds. Accordingly, any suggestion that the insiders' conduct was totally adverse to PPCO is insupportable, and the adverse interest exception does not apply.

In addition to the numerous allegations that remain in the FAC, the Receiver is saddled with a number of damning admissions from her initial pleading, which alleged that the purported scheme was "masterminded" by Platinum's principals to "prop up the … PPCO Funds" and "prolong their Ponzi-like scheme" thereby allowing PPCO to "continue[] to operate." (Lipsius Decl., Ex. 1 ¶¶ 5, 127-129, 275 379, 456, 459, 516.) These allegations may as well have been ripped straight from the pages of *Kirschner*. *See* 938 N.E.2d at 468 ("So long as the corporate wrongdoer's fraudulent conduct enables the business to survive . . . this test is not met"). Realizing the import of this language, the Receiver has scrubbed it from the FAC. However, these admissions remain binding on the Receiver. *See Bellefonte Re Ins. Co. v. Argonaut Ins*. Co., 757 F.2d 523, 528 (2d Cir. 1985) ("A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding."); *Walker, Truesdell, Roth & Assocs., Inc.*, 2013 WL 8597474, at *11 ("It is well settled that admissions in a pleading may constitute documentary evidence for purposes of a motion to dismiss.").

Additionally, the gravamen of the Receiver's complaint—that the Platinum insiders were engaged in a Ponzi-like scheme that allowed PPCO to stay afloat—echoes allegations that have been made in publicly-filed complaints by CNO, SHIP, the Joint Official Liquidators for the Platinum Partners Value Arbitrage funds, and the SEC. (Lipsius Decl., Exs. 2-5.) The Receiver relies on these documents. She makes clear, definite, and substantial references to each of them,

explicitly identifying them in the FAC and, in many cases, quoting them at length. *See Alexander v. Possible Prods., Inc.*, 336 F. Supp. 3d 187, 194 n.3 (S.D.N.Y. 2018) (citation omitted) (document incorporated by reference where there was a "clear, definite, and substantial reference" to the document in the complaint); *Gagnon v. Alkermes PLC*, 2019 WL 1388700, at *5 (S.D.N.Y. Mar. 28, 2019) (holding that news articles that were identified and quoted in the complaint were incorporated by reference). In doing so, she has incorporated them by reference and tethered herself to the allegations contained within—even the inconvenient ones.

2. New York law does not recognize an independent "innocent insider" exception that stands alone from the adverse interest exception.

Even if the adverse interest exception were applicable here, which it is not, the *Wagoner* doctrine would still apply. That is because "[c]ourts have recognized an exception to the adverse interest exception where the principal and agent are one and the same—the sole actor rule." *In re Arbco Capital Mgmt., LLP*, 498 B.R. 32, 47 (Bankr. S.D.N.Y. 2013). The sole actor rule applies "when there is only one person in charge of a fraud riddled company . . . because the company is imputed with all of the knowledge and intent of that sole bad actor." *Id.* Put another way, it applies in situations like this one where the FAC alleges that Nordlicht and Levy were "jointly and solely" responsible for the funds' investment decisions. (FAC ¶¶ 80, 193.)

In certain situations, a party may avoid the sole actor rule (*i.e.*, the exception to the exception) by specifying innocent insiders who could and would have stopped the wrongdoing, had they known about it. Here, however, the Court does not even need to reach this issue, as "New York law does not recognize 'innocent insider' as an independent exception that stands alone from the adverse interest exception." *In re Arbco Capital Mgmt., LLP*, 498 B.R. at 48 (citing *1031 Tax Grp., LLC*, 420 B.R. at 203); *see also In re Lehr Constr. Corp.*, 528 B.R. 598, 613 (Bankr. S.D.N.Y. 2015) (the innocent insider exception is not a stand-alone exception to the

general rules of imputation), *aff'd*, 551 B.R. 732 (S.D.N.Y. 2016, *aff'd*, 666 F. App'x 66 (2d Cir. 2016). As discussed in detail above, because the Platinum insiders are alleged to have acted, at least in part, to provide liquidity to PPCO and sustain the PPCO funds, they cannot be said to have "totally abandoned" PPCO's interests. (*See id*. ¶¶ 107, 178-80, 193.) Thus, it is immaterial whether innocent insiders existed; the "adverse interest" exception is inapplicable, and the actions of the Platinum insiders must be imputed to PPCO.

Even if the adverse interest exception applied, to invoke the innocent insider exception, the Receiver must do more than merely "identify the allegedly innocent insider[s] . . . ." She must plead specific facts "explain[ing] how those persons could and would have been able to end the fraud . . . ." *In re 1031 Tax Grp., LLC*, 420 B.R. at 206. The Receiver has not done so here.

The existence of one or more "innocent" officers who "might have in some metaphysical sense [have] stopped the fraud" does not change the *Wagoner* analysis. *In re Bennett Funding Grp., Inc.*, 336 F.3d 94, 101 (2d Cir. 2003) (rejecting a "would-a, could-a, should-a" test). But would-a, could-a, should-a is all the Receiver alleges in this action. Although the FAC identifies certain "Innocent Insiders at the PPCO Funds," it provides no factual basis whatsoever to conclude that these individuals had any authority, ability, or willingness to derail the insiders' purported scheme. (FAC. ¶¶ 90 (i)-(v).) Tellingly, two of the individuals identified in the complaint—Daniel Mandelbaum and Saurabh Shah—are alleged to have worked at Platinum for less than a year, and the Receiver makes no effort to explain what their powers and responsibilities were. (*Id.* ¶ 90 (ii)-(iii).) Similarly, with respect to the third individual, Brian Jedwab, the Receiver simply asserts by *ipse dixit* that "he had the corporate authority to stop any fraudulent activity he might have become aware of." (*Id.* ¶ 90 (i).) The other "innocent insiders" are not even identified by name. (*Id.* ¶ 90 (iv)-(v).) Without any specific allegations regarding the individuals' authority, it is impossible to conclude that they could have or would have

prevented the alleged fraud. Mere speculation cannot defeat the *Wagoner* Rule. *See Bennett Funding*, 336 F.3d at 101.

B. The Common Law, Securities Fraud, and Civil RICO Claims Against the Beechwood Parties Are Barred By The Doctrine of *In Pari Delicto.*

Even if the Receiver had standing to assert common law claims or civil RICO claims against the Beechwood Defendants, those sets of claims would still be barred by the doctrine of *in pari delicto.* "New York law defines the *in pari delicto* defense extremely broadly . . . and the New York Court of Appeals has held that even though it is an affirmative defense, 'in pari delicto may be resolved on the pleadings . . . in an appropriate case.'" *Picard*, 454 B.R. at 37 (quoting *Kirschner*, 938 N.E.2d at 963 n.3). The Second Circuit has held that "[e]arly resolution is appropriate where (as here) the outcome is plain on the face of the pleadings." *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 65 (2d Cir. 2013).

That is the situation presented by this lawsuit. *In pari delicto* is triggered by the Receiver's own well-pleaded allegations that PPCO (through its agents) acted wrongfully. Indeed, the Complaint details at some length the Receiver's theory that Platinum's insiders "orchestrated" a "massive fraud" to generate liquidity for PPVA and PPCO. (*See generally* FAC ¶¶ 2, 80, 91, 101-107.) In light of these allegations, the doctrine of *in pari delicto* bars the Receiver's common law claims and civil RICO claims against the Beechwood Defendants.

II. THE RECEIVER'S CIVIL RICO CLAIMS ARE BARRED BY THE PSLRA (COUNTS 1-3)

As set forth above, the Receiver's civil RICO claims are barred by the *Wagoner* Rule and the doctrine of *in pari delicto*. *Republic of Iraq v. ABB AG*, 768 F.3d 145, 162 (2d Cir. 2014) (affirming dismissal of civil RICO claims on the basis of *in pari delicto*). Beyond that, the Receiver's civil RICO claims should be dismissed for an additional, independent reason: They are barred by the PSLRA. This Court has already dismissed similar claims brought by SHIP.

The Receiver's civil RICO claims are expressly based on a purported securities fraud, and therefore cannot serve as predicate acts for civil RICO claims. The PSLRA bars any civil RICO action predicated on the purchase or sale of securities. 18 U.S.C. § 1964(c). This prohibition is broad. "[I]f the alleged conduct could form the basis of a securities fraud claim against any party – be it against, or on behalf of, the plaintiff, defendants or a non-party – it may not be fashioned as a civil RICO claim." *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 644 (S.D.N.Y. 2017). The Supreme Court has held that this provision should be interpreted "not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (citations omitted).

In her own articulation of the predicate acts for civil RICO, the Receiver repeatedly invokes securities transactions. The Receiver alleges that the predicate acts include "transmit[ting] communications and documents which assisted . . . in perpetuating a fraud on the investors and creditors of the Platinum Funds" (FAC ¶ 283(ii)), "participat[ing] in the structuring and consummation of the fraudulent conveyance [securities] transactions in or about December 2015 and March 2016" (*id.* ¶ 283(iii)), and "transmit[ting] communications and documents that facilitated the PPCO Loan Transactions and Securities Purchases . . . . " (*id.* ¶ 283(iv)). This conduct falls squarely within the PSLRA's exclusion. 18 U.S.C. § 1964(c).

This alone would be sufficient grounds to dismiss the civil RICO claims, but the Receiver goes even further. The Receiver runs headlong into the PSLRA exception by suing the Beechwood Parties *for securities fraud* for conduct in connection with the very same transactions (*see* Fourth Claim for Relief, FAC ¶¶ 309-316, and Fifth Claim for Relief, *id.* ¶¶ 317-321). According to this Court, "[i]t is clear from the plain language of the RICO Amendment that a complaint expressly alleging violations of the federal securities laws cannot form the basis for a RICO claim." *Picard v. Kohn*, 2011 WL 10894857, at *3 (S.D.N.Y. Sept. 6, 2011) (Rakoff, J.);

see also Picard v. Kohn, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012) (Rakoff, J.) (dismissing RICO claim based on allegation that defendants "kept Madoff Securities' Ponzi Scheme alive"). For this reason alone, the Receiver's civil RICO claims should be dismissed with prejudice against all Beechwood Defendants.

The civil RICO claims also fail because they are too narrow in number of victims, time, and purpose to constitute a continuous pattern of racketeering. In order to adequately plead the existence of a RICO pattern, the Receiver must allege facts giving rise to an inference of either "closed-ended" or "open-ended" continuity. *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240-41 (1989). The former refers to a "closed period of repeated conduct," while the latter refers to "past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Here, the Receiver has not adequately alleged either.

In essence, the Receiver identifies a singular scheme to misrepresent the value of assets and a singular victim, "the PPCO Funds." (*See, e.g.*, FAC ¶ 285.) Further, the FAC only identifies five alleged predicate acts, all of which were alleged to have been in connection with the purchase or sale of securities and all of which appear to have occurred during a two-and-a-half year period.[4] (*Id.* ¶¶ 262, 283, 304.) Such allegations fall short of alleging the "kind of broad-based unlawful activity that RICO was designed to address." *Feirstein v. Nanbar Realty Corp.*, 963 F. Supp. 254, 260 (S.D.N.Y. 1997) (four predicate acts over a three-year period did not satisfy the continuity factor to establish a RICO claim); *accord Lefkowitz v. Bank of N.Y.*, 2003 WL 22480049, at *8 (S.D.N.Y. Oct. 31, 2003) (no closed-ended continuity where small

[4] To the extent that the Receiver purports to rely on performance fees allegedly paid to Beechwood by SHIP, it is noteworthy that those fees were only paid out over a 22-month period and that a substantial portion of those fees were paid in kind in the form of PPVA limited partnership interests, which themselves are securities.

number of parties engaged in activities with a narrow purpose directed at a single or at most three victims), *rev'd in part on other grounds*, 528 F.3d 102 (2d Cir. 2007). Accordingly, the Court should dismiss the Receiver's civil RICO claims in their entirety.

III. THE RECEIVER'S CLAIMS AGAINST THE BEECHWOOD PARTIES FOR SECURITIES FRAUD SHOULD BE DISMISSED

The Receiver asserts a securities fraud claim against all of the Beechwood Parties under §10(b) of the Securities Exchange Act and Rule 10b-5. (FAC ¶¶ 309-16.) The allegations arise out of the PPCO Loan Transactions and Securities Purchases, a series of transactions the Receiver alleges that PPCO entered into with Defendants between December 21, 2015 and March 21, 2016. (*Id.*) The Receiver asserts an additional securities fraud claim under § 20(a) of the Securities Exchange Act against Feuer and Taylor as control persons. (*Id.* ¶¶ 317-21.) As discussed above, both of these causes of action are barred by the *Wagoner* Rule. They should also be dismissed under Rules 12(b)(6) and 9(b).

A. The FAC Fails to State a Claim under Section 10(b) or Rule 10b-5

To state a claim under § 10(b) or Rule 10b-5, "a plaintiff must plead that the defendant (1) made a false material representation or omitted a material fact, (2) with scienter, and (3) that the plaintiff's reliance on defendant's action caused plaintiff injury." *Newman v. Family Mgmt. Corp.*, 530 F. App'x 21, 24 (2d Cir. 2013) (quoting *Starr ex. rel. Estate of Sampson v. Georgeson Shareholder, Inc.*, 412 F.3d 103, 109 (2d Cir. 2005).) As set forth below, the Receiver fails to satisfy those elements here.

As a threshold matter, the Receiver fails to allege that Feuer or Taylor made a single misrepresentation or omission in connection with the PPCO Loan Transactions and Securities Purchases, as that term is defined in the FAC. (*See* FAC ¶ 311 (referring to misrepresentations

and omissions by "Beechwood, CNO, and SHIP").) For that reason alone, the Complaint fails to state a claim under § 10(b) and Rule 10b-5, and the claim against them must be dismissed.

1. The Receiver Does Not Plead An Actionable Misstatement

The Receiver fails to plead a viable claim based on a fraudulent statement against any of the Beechwood Parties. The Receiver alleges that it was induced to enter the PPCO Loan Transactions and Securities Purchases based on misrepresentations "that the true value of the Purchased Securities was their par value as set forth in the transaction documents . . . ." (FAC ¶ 311.) But this alleged misrepresentation—the sole representation identified by the Receiver—is insufficient to support a fraudulent inducement claim.

To begin with, this allegation is attributed to Beechwood generally and thus violates the group pleading doctrine and particularity requirements of Rule 9(b). *See U.S. Capital Partners, LLC v. Stanwich Capital Advisors, LLC*, 2015 WL 4388421, at *4 (S.D.N.Y. July 17, 2015) (dismissing fraud claims where complaint did not "attribute any one representation to any one individual"); *Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001) (complaint must "specify the statements [plaintiff] claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." (citation omitted)).

This allegation also fails to meet Rule 9(b)'s heightened pleading requirements because the Receiver fails to point to any statement equating the par value of any security with its "true value." The Receiver does not identify the speaker, where and when the statements were allegedly made, or any other context for this allegation. Instead, the FAC appears to rely solely on values implied by transaction documents related to the PPCO Loan Transactions and

Securities Purchases. (*See* FAC ¶ 311.) Thus, to the extent the Receiver purports to rely on any misstatements of fact to support her securities fraud claims, the claims must be dismissed.

2. The Receiver Fails to Plead an Actionable Omission

The Receiver also fails to plead an actionable omission. The Receiver alleges that the Beechwood Parties "knowingly omitted or concealed that the true value of the Purchased Securities was only a fraction of par value." (*Id.*) But an omission is only actionable if the defendant had an affirmative duty to disclose the information to the plaintiff. *See SNS Bank, N.V. v. Citibank, N.A.*, 777 N.Y.S.2d 62, 66 (1st Dep't 2004) ("[A]n omission does not constitute fraud unless there is a fiduciary relationship between the parties."); *accord Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 74 (S.D.N.Y. 2010), *aff'd*, 485 F. App'x 461 (2d Cir. 2012). And here the Receiver does not allege—nor is it the case—that PPCO had a fiduciary relationship with any of the Beechwood Parties. Thus, there was no duty to disclose.

Beyond that, to plead a fraudulent omission under Rule 9(b), the Receiver must allege: (1) the specific omission; (2) who was responsible for the failure to disclose; (3) the context of the omission and the manner in which it was misled; and (4) what each Defendant obtained through the fraud. *Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, 842 F. Supp. 2d 502, 513 (S.D.N.Y. 2012). Here, in violation of the group pleading doctrine and Rule 9(b), the Receiver fails to plead which Beechwood Parties should have made the disclosures or when. *See Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 294 (S.D.N.Y. 2000) (dismissing fraud claim where plaintiff had not "distinguished which of the six parties . . . was specifically responsible for the failure to disclose"), *aff'd*, 2 F. App'x 109 (2d Cir. 2001).

3. The Receiver Fails to Plead Justifiable Reliance

Even if the Receiver had pleaded an actionable misstatement or omission, she cannot plead justifiable reliance. And "reliance is the critical element in private actions under Rule 10b-

5." *Saltz v. First Frontier, L.P.*, 485 F. App'x 461, 465 (2d Cir. 2012) (quoting *Pacific Inv. Management Co. LLC v. Mayer Brown LLP*, 603 F.3d 144, 156 (2d Cir.2010)).

Here, the Receiver alleges that PPVA and PPCO were both under the common control of Nordlicht and Levy, a group of insiders who allegedly "orchestrated" the fraudulent scheme at issue in the FAC. (FAC ¶¶ 2, 57-58, 80.) At the same time, the Receiver alleges that each of the Purchased Securities was a Platinum portfolio company. (*See id.* ¶¶ 180-81, 226, 249.) These allegations, taken together, are fatal to the Receiver's fraud claims. The Receiver cannot allege that PPCO relied on any representations or omissions concerning the "true value" of the Purchased Securities when her own agents—the purported "masterminds" of the fraudulent scheme—were in a much better position than any of the Beechwood Parties to evaluate the performance of Platinum's portfolio companies and their ability to satisfy their debt obligations.

Because the Receiver's own allegations make clear that PPCO's agents had superior knowledge regarding information that would shed light on the "true value" of the Purchased Securities, there can be no justifiable reliance, and her fraud claims should be dismissed.

B. The Complaint Fails to State a Claim under § 20(a)

The FAC also fails to state a claim under § 20(a) against Feuer or Taylor. To state such a claim, a plaintiff must allege (1) a primary violation by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in a meaningful sense, a culpable participant in the controlled person's fraud. *See, e.g.*, *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472 (2d Cir. 1996). The Receiver fails to satisfy any of these elements.

First, as discussed above, the Receiver has failed to plead facts sufficient to establish "a primary violation" under § 10(b). On that basis alone, the § 20(a) claim should be dismissed.

Second, taking the Receiver's allegations as true for the purposes of this motion, the Receiver has not alleged that the Beechwood entities were controlled by Feuer and Taylor. To

the contrary, she has alleged (incorrectly) that "ultimate control of Beechwood was held by Nordlicht, Huberfeld, Bodner and Levy," and that Feuer and Taylor had only "nominal management authority." (FAC ¶ 110.) Accordingly, the Receiver has failed to plead that Feuer or Taylor had control of the primary violator and has failed to state a claim.

Third, the Receiver has failed to plead any facts regarding Feuer's or Taylor's involvement in the PPCO Loans and Securities Purchases, which form the basis of the Receiver's purported claim under § 20(a). (*See* FAC ¶ 319.) Indeed, the FAC does not include a single reference to either Feuer or Taylor in connection with any of the PPCO Loans and Securities Purchases. The Receiver has, therefore, failed to allege that Feuer and Taylor were culpable participants in the purported scheme to defraud the PPCO Funds in connection with the purchase and sale of the Purchased Securities, and the § 20(a) claim must be dismissed.

IV. THE RECEIVER'S AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AND AIDING AND ABETTING FRAUD CLAIMS SHOULD BE DISMISSED

The Receiver asserts two duplicative aiding and abetting claims against the Beechwood Defendants. First, the Receiver alleges that Nordlicht and Platinum Credit Management, who oversaw the management, operation, valuation, and administration of the PPCO funds, breached fiduciary duties that they owed to PPCO by engaging in certain "fraudulent schemes." (FAC ¶¶ 324, 335.) The Receiver alleges that the Beechwood Defendants aided and abetted the Platinum insiders' breach by participating in various transactions with PPCO that helped further the scheme. (*Id.* ¶ 329.) Second, the Receiver alleges that the Beechwood Defendants aided and abetted the same "fraudulent scheme" by participating in the same series of transactions with PPCO. (*Id.* ¶ 336.) On either of the bases set forth in Point I—the *Wagoner* Rule or the *in pari delicto* doctrine—the Receiver's aiding and abetting claims should be dismissed. Moreover, the

Receiver's aiding and abetting causes of action should also be dismissed for failure to state a claim under Rule 12(b)(6) and 9(b).

A. The Receiver Fails to State a Claim for Aiding and Abetting Breach of Fiduciary Duty

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege: (a) a breach of fiduciary obligations to another; (b) that the aider and abettor knowingly induced or participated in the breach; and (c) that the plaintiff suffered damages as a result of the breach. *Pope v. Rice*, 2005 WL 613085, at *12 (S.D.N.Y. Mar. 14, 2005). "Actual knowledge, as opposed to merely constructive knowledge," is necessary to establish knowing participation, and "a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty." *Bullmore v. Ernst & Young Cayman Islands*, 846 N.Y.S.2d 145, 148 (1st Dep't 2007) (quotation omitted).

Here, the allegations in the FAC are not sufficient to establish that the Beechwood Parties "knew or should have known about the primary breach of fiduciary duty." *Id.* at 145. At its core, the Receiver's aiding and abetting claim is premised on the Beechwood Parties' alleged knowledge that Nordlicht and Platinum Credit Management were operating Platinum in a Ponzi-like fashion. Without knowledge of that fact, the Beechwood Parties could not have been aware that loaning money to PPCO would somehow be harmful to the funds. And the FAC offers absolutely no support for the claim that the Beechwood Parties had such knowledge.

Moreover, "in asserting claims of fraud—including claims for aiding and abetting fraud or a breach of fiduciary duty that involves fraud—a complaint is required to plead the circumstances that allegedly constitute fraud 'with particularity'" under Rule 9(b). *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014). Specifically, Rule 9(b) requires a plaintiff to: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3)

state where and when the statements were made, and (4) explain why the statements were fraudulent. *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). Plaintiffs must also allege the elements of aiding and abetting with particularity. *See Krys v. Klejna*, 658 F. App'x 1, 4-5 (2d Cir. 2016) (affirming dismissal for lack of particularity as to the knowledge element).

Here, the Receiver's aiding and abetting breach of fiduciary claim sounds in fraud. Indeed, the Receiver alleges that Nordlicht and Platinum Credit Management breached their fiduciary obligations of care and loyalty to the PPCO funds by engaging in certain "fraudulent schemes," which consisted of causing the PPCO funds to make loans, purchase and sell securities, and overvalue the net asset value of the PPCO funds. (FAC ¶ 324.) But the Receiver fails to plead the elements of the purported fraudulent scheme with sufficient particularity under Rule 9(b). For example, the FAC does not include any allegations that Feuer or Taylor had knowledge concerning PPCO's net asset value, the PPCO Loan Transactions and Securities Purchases, or the Black Elk transaction. (*Id.*)

In sum, the Complaint's allegations of actual knowledge are insufficient, and the Receiver has failed to satisfy the pleading requirements of Rule 9(b). As a result, the Receiver's claims against the Beechwood Parties should be dismissed.

B. The Receiver Fails to State a Claim for Aiding and Abetting Fraud

To establish a claim for aiding and abetting fraud, the Receiver must plead specific facts supporting "(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." *Ritchie Capital Management, L.L.C. v. General Electric Capital Corp.*, 121 F. Supp. 3d 321, 338 (S.D.N.Y. 2015), *aff'd*, 821 F.3d 349 (2d Cir. 2016) (quotation omitted). In federal court, such facts must be pled in compliance with the heightened standard of Rule 9(b). For the reasons discussed above, Plaintiffs cannot satisfy the actual knowledge requirements here.

As for the underlying fraud, the Complaint fails to plead facts establishing PPCO's justifiable reliance on any material misrepresentation or actionable omission by the Platinum insiders, an essential element of any fraud claim. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976, 979 (N.Y. 2009) (fraud requires justifiable reliance).

As explained in Point I, the knowledge of Nordlicht and Levy—PPCO's top managers—is imputed to PPCO. And imputation is fatal to the Receiver's aiding and abetting claims because the Receiver alleges that PPCO's own agents "orchestrated" the purported scheme. (FAC ¶ 2.) There is no basis for the Receiver, standing in the shoes of PPCO, to assert claims against the Beechwood Parties for helping PPCO deceive *itself*. *See In re AlphaStar Ins. Grp. Ltd*., 383 B.R. 231, 267 (Bankr. S.D.N.Y. 2008) ("[Plaintiff] could not have relied to its detriment on its own misleading financial statements); *Serino v. Lipper*, 846 N.Y.S.2d 138, 145 (1st Dep't 2007) (dismissing fraud claim against accountants where manager had access to valuations underlying financial statements).

The Receiver does not allege a viable theory of reliance. While she appears to assert that various PPCO funds were misled, she does not explain who at these funds were actually misled, how they were misled, or on what exactly they relied. Moreover, her theory of reliance appears to be contradicted by her position that the Platinum insiders' fraudulent scheme was so obvious and pervasive that Beechwood, CNO, and SHIP all should have been aware of it. (FAC ¶¶ 7-9.)

V. THE RECEIVER'S UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED

Finally, the Receiver's unjust enrichment claim fails for two independent reasons. First, it is long settled that an unjust enrichment claim cannot stand where an express agreement governs the rights at issue. *SCM Grp., Inc. v. McKinsey & Co.*, 2011 WL 1197523, at *6 (S.D.N.Y. Mar. 28, 2011) ("Where, as here, it is undisputed that an express and valid contract governs the right at issue, unjust enrichment claims are precluded"); *see also SmartStream*

Techs., Inc. v. Chambadal, 2018 WL 1870488, at *7 (S.D.N.Y. Apr. 16, 2018) ("It is well settled that 'the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter.'") (citation omitted). This is true for both signatories and non-signatories alike. *Vitale v. Steinberg*, 764 N.Y.S.2d 236, 239 (1st Dep't 2003). Here, the Receiver's unjust enrichment claim against BAM Admin is expressly limited to the PPCO Loan Transactions and Securities Purchases (FAC ¶ 418), each of which is connected to a structured agreement. (*See id.*, Ex. B ¶ 53.)

Second, merely alleging a general, non-specific benefit is insufficient to plead an unjust enrichment claim. *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 533 (S.D.N.Y. 2018) (citation omitted) (allegations that parties were "enriched" were "entirely conclusory" and "not entitled to be assumed true"). "Relief for unjust enrichment 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.* at 532 (internal marks and citations omitted). Here, the Receiver fails to explain how BAM Admin, a collateral agent for CNO and SHIP, was purportedly enriched by any of these transactions. Accordingly, the unjust enrichment claim should be dismissed.

CONCLUSION

For the foregoing reasons, the Beechwood Parties respectfully request that the Court enter an order dismissing, with prejudice, all of the claims asserted against BRE, BRILLC, BAM, BAM II, BRE Holdings, BBIL, BBL, Feuer, and Taylor, as well as the common law claims, securities fraud claims, and civil RICO claims against BAM Admin, and granting the Beechwood Parties such other and further relief as this Court deems just and proper.

Dated: May 15, 2019
Kew Gardens, New York

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