

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD
LITIGATION

Master Docket No. 1:18-cv-6658 (JSR)

MELANIE L. CYGANOWSKI, AS
RECEIVER,

Case No. 1:18-cv-12018 (JSR)

Plaintiff,

v.

BEECHWOOD RE LTD., et al.,

Defendants.

SENIOR HEALTH INSURANCE
COMPANY OF PENNSYLVANIA,

Crossclaimant,

v.

BEECHWOOD RE LTD., et al.,

Crossclaim Defendants.

SENIOR HEALTH INSURANCE
COMPANY OF PENNSYLVANIA,

Third-Party Plaintiff,

v.

PB INVESTMENT HOLDINGS LTD., et al.,

Third-Party Defendants.

**OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS
TO DISMISS CROSSCLAIMS AND THIRD-PARTY COMPLAINT OF
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA**

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Senior Health Insurance Company of Pennsylvania (“SHIP”) submits this brief in opposition to the motions to dismiss filed by the following Crossclaim or Third-Party Defendants:

1. Bernard Fuchs (ECF No. 450)¹
2. Murray Huberfeld (ECF No. 456)
3. Daniel Saks (ECF No. 464)
4. David Ottensoser (ECF No. 469)²
5. David Bodner (ECF No. 471)
6. Beechwood Re Investments LLC Series C (“BRILLC Series C”), Beechwood Trusts Nos. 7-14, Monsey Equities LLC (“Monsey Equities,” and collectively, the “Bodner Instrumentalities”) (ECF No. 473)
7. Kevin Cassidy and Michael Joseph Nordlicht (“Michael Nordlicht”) (ECF No. 475)
8. B Asset Manager LP, B Asset Manager II LP, BAM Administrative Services LLC, Beechwood Re Ltd., Beechwood Re Holdings, Inc., Beechwood Bermuda Ltd., Beechwood Bermuda International Ltd., the Feuer Family Trust, and the Taylor-Lau Family Trust, and Third-Party Defendants B Asset Manager GP LLC, B Asset Manager II GP, LLC, MSD Administrative Services LLC, N Management LLC, Beechwood Global Distribution Trust, Feuer Family 2016 ACQ Trust, Taylor-Lau Family 2016 ACQ Trust, and Beechwood Capital Group LLC (collectively, the “Moving Beechwood Defendants”) (ECF No. 477)
9. Will Slota (ECF No. 479)
10. Hokyong Kim a/k/a Stewart Kim (No. 18-cv-12018, ECF No. 291)³

¹ Unless otherwise noted, citations to the docket refer to the case captioned *In Re Platinum Beechwood Litigation*, No. 1:18-cv-6658-JSR. All terms not defined herein shall have the same meaning ascribed to them in SHIP’s Crossclaims and Third-Party Complaint (the “TPC”) (ECF No. 374). The moving parties may be referred to in this memorandum as “Defendants” or “Moving Defendants.”

² Ottensoser moves to dismiss only SHIP’s unjust enrichment claim. ECF No. 470, Ottensoser Br. at 1.

³ Kim’s motion was untimely filed and without the Court’s permission and should be denied.

I. INTRODUCTORY STATEMENT

Not one of the ten motions to dismiss filed by the Moving Defendants argues that Platinum and Beechwood did not defraud SHIP. Each Moving Defendant instead attempts to pass the buck on responsibility for the egregious mishandling of \$320 million of SHIP's funds. Each Moving Defendant relies on scattershot, poorly reasoned arguments that fail to account for the law and for large portions of the detailed facts alleged in SHIP's TPC.

The TPC demonstrates that the Beechwood Entities were mere instrumentalities and convenient vehicles to perpetrate the fraud imagined and engineered by Platinum's founders, owners, and managers. Each individual played a material part, and each entity served its purpose. The ultimate goal was to acquire money from entities like SHIP on fraudulent premises and by fraudulent means, which would then be surreptitiously funneled into Platinum, the artificially-inflated hedge fund that was in the midst of collapsing under the weight of investor redemption requests and its mushrooming fraudulent scheme. By using Beechwood as a front, the Platinum founders swindled hundreds of millions of dollars from unsuspecting insurers like SHIP. Pooling their skills, resources, and networks, the Platinum founders planned and executed a scheme to exploit these insurers, which barely kept their hedge fund afloat for a couple of years longer. The scheme also allowed the Platinum insiders and related parties to line their pockets by claiming illusory profits.

SHIP brought a separate action, in its own right, for redress of its loss from the Beechwood individuals and entities with whom SHIP dealt directly in investing its funds. In the TPC, SHIP focuses on the parties who did not necessarily deal directly with SHIP, but who orchestrated, directed, and controlled the individuals and entities who knowingly participated in the commission of the Platinum-Beechwood Scheme and related fraudulent activity. The web of

individuals and entities who assisted in this effort is staggering, and the facts implicating these individuals and entities are damning.

The TPC contains sufficient facts to state claims against all Moving Defendants by any reasonable standard, whether under Federal Rule of Civil Procedure 8(a) or 9(b). SHIP details a massive, intricate fraud that involved numerous individuals, several of whom are concurrently facing criminal charges, along with their alter-ego entities. SHIP refers to specific statements, documents, communications, and transactions that implicate each Moving Defendant. Against this backdrop, each Moving Defendant's efforts to deny, minimize, or sanitize their role in the illegal scheme ring hollow. Many of the arguments made by the Moving Defendants essentially argue that SHIP's TPC is untrue. But as the Court knows full well, the allegations in SHIP's TPC must be accepted as true at this stage. Under that standard, the Moving Defendants' arguments fall apart. The Moving Defendants also seek to invoke doctrines such as group pleading and *in pari delicto*, but neither provides any assistance to them here.⁴ For these reasons, all ten of the motions to dismiss should be denied in their entirety.

II. THE WELL-PLED ALLEGATIONS AS TO THE MOVING DEFENDANTS

The Court is well aware of the factual allegations in this matter, and SHIP does not repeat them all here. The TPC is specifically tailored to claims arising out of the larger conspiracy conceived by Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor and executed by a group of self-serving and complicit corporate insiders. TPC ¶ 1. The Platinum-Beechwood Scheme focused on the formation by Platinum of the Beechwood enterprise, consisting of reinsurance

⁴ If the Court believes additional facts are required as to any Moving Defendant, SHIP alternatively seeks leave to amend the TPC. The Moving Defendants have had access to their own documents for years and have hidden many details from SHIP. SHIP only recently received full access to the millions of Beechwood and Platinum documents and, therefore, is confident that, if necessary, additional facts can be supplied as to any of the Moving Defendants.

companies and related investment management and servicing entities that *appeared* to be wholly independent of Platinum, but were, in reality, Platinum's puppets. TPC ¶ 2.

Beechwood and Platinum shared many employees, and the two companies were essentially (and admittedly) integrated with many employees working for both companies at the same time, including Nordlicht, Huberfeld, Bodner, Levy, Manela, Saks, Beren, Kim, Eli Rakower, Ottensoser, Thomas, David Leff, Paul Poteat, Small, and Slota. *See e.g.*, TPC ¶¶ 24, 103, 104, 114, 119-122, 124-125. Beechwood and Platinum themselves did not necessarily distinguish between the many companies. TPC ¶¶ 114, 125. As a former employee of BAM and Platinum alleged in a draft arbitration complaint, "while employed by Platinum, Leff, with other Platinum employees, made a presentation to a potential client for BAM (i.e., CNO) and were represented to CNO to be employees of BAM." TPC ¶ 125. The cross-over and overlapping employment of so many of the Platinum Insiders and Beechwood Insiders ensured that these Insiders had knowledge that: (1) Beechwood and Platinum had mutual ownership, (2) Platinum's founders, Nordlicht, Huberfeld, and Bodner (along with Levy), controlled Beechwood, (3) it was critically important that the fact that Platinum and Beechwood were one in the same be kept quiet, (4) the mission of Beechwood was to divert funds to Platinum and Platinum-related investments to serve the interests of Platinum, Beechwood, and their related parties over the interests of Beechwood's clients, such as SHIP, and (5) the valuations Beechwood and Platinum placed on its investments and portfolios were fraudulently inflated. TPC ¶ 126.

In order to execute the Platinum-Beechwood Scheme with respect to SHIP, Beechwood (1) made numerous misrepresentations to induce SHIP into the IMAs (TPC ¶¶ 137-161), (2) continued to make knowing misrepresentations to SHIP, particularly concerning the value of SHIP's investment accounts—largely based on Platinum's valuations—inducing them to

continue the IMAs (TPC ¶¶ 321-344), (3) took unearned performance fees for themselves and their investment managers based on these fraudulent valuations (TPC ¶¶ 345-366), and (4) continued to conceal their relationship with Platinum at all costs in order to keep SHIP from pulling its money out of Beechwood's and Platinum's clutches (TPC ¶¶ 367-372). Throughout the Platinum-Beechwood Scheme, Beechwood completely disregarded their fiduciary duties to SHIP by (1) placing SHIP almost exclusively in distressed, Platinum-related investments (TPC ¶¶ 235-248), (2) failing to conduct those transactions at arm's length (*see e.g.*, TPC ¶ 240), and (3) putting the interests of CNO, another client, over SHIP's by transferring numerous Platinum-related investments to SHIP in order to maintain the ruse that Beechwood and Platinum were not interrelated (TPC ¶¶ 373-378). The Moving Defendants each played a critical and knowing role in furtherance of, and benefited directly from, the Platinum-Beechwood Scheme. TPC ¶ 5. The allegations sufficient to substantiate the claims against each of the Moving Defendants are compiled below for the benefit of the Court.

A. Individual Moving Defendants

1. Platinum and Beechwood Insiders

The TPC references the "Platinum Insiders"—a group of high-level corporate insiders within the Platinum organization that includes Moving Defendants Huberfeld, Bodner, Saks, Ottensoser, Slota, Fuchs, and Kim—to assert allegations common to each member of this group of Third-Party Defendants. As alleged, each member of the Platinum Insiders: (1) knew about the elements of the Platinum-Beechwood Scheme (TPC ¶¶ 99, 126, 245), (2) treated Platinum and Beechwood as integrated organizations, with little regard for corporate formalities or structure (TPC ¶¶ 104, 106, 126, 319), (3) actively concealed the truth about Platinum and Beechwood's integration (TPC ¶¶ 126, 160), (4) acted to control the actions of Beechwood Re, BBIL, and BAM in order to use the funds entrusted to the Beechwood companies in ways

contrary to SHIP's best interests (TPC ¶¶ 162, 237, 240, 244, 245, 304, 416), (5) participated in the overvaluation of investments into which SHIP was placed (TPC ¶¶ 240(a), 338), and (6) acted to enrich themselves at the expense of SHIP, and other Beechwood clients (TPC ¶¶ 104, 178, 181, 198, 215, 237, 245).

The TPC also references the "Beechwood Insiders"—a group of high-level corporate insiders within the Beechwood organization that includes Moving Defendants Huberfeld, Bodner, Saks, and Kim—to assert allegations common to each member of this group of Third-Party Defendants. As alleged each member of the Beechwood Insiders: (1) knew about the elements of the Platinum-Beechwood Scheme (TPC ¶¶ 99, 126, 245), (2) treated Platinum and Beechwood as integrated organizations, with little regard for corporate formalities or structure (TPC ¶¶ 104, 106, 126, 319), (3) actively concealed the truth about Platinum and Beechwood's integration (TPC ¶¶ 126, 156, 160), including by making material misrepresentations and omissions to clients such as CNO (see e.g., TPC ¶ 133) and SHIP (see e.g., TPC ¶ 232), (4) acted to control the actions of Beechwood Re, BBIL, and BAM in order to use the funds entrusted to the Beechwood companies in ways contrary to SHIP's best interests (TPC ¶¶ 162, 237, 240, 244, 245, 257, 266, 304, 416), (5) participated in the overvaluation of investments into which SHIP was placed (TPC ¶¶ 240(a), 338), and (6) acted to enrich themselves at the expense of SHIP, and other Beechwood clients (TPC ¶¶ 104, 178, 181, 198, 215, 237, 245).

The TPC makes further specific allegations regarding each of the Platinum and Beechwood Insider Moving Defendants to support SHIP's claims against them.

a. Murray Huberfeld

Moving Defendant Murray Huberfeld ("Huberfeld") is both a Platinum Insider and Beechwood Insider, he is a founder of Platinum Management, and he was instrumental in Beechwood's creation. TPC ¶¶ 4 n.7, 23, 29 n.16, 53, 62-64. Huberfeld was also responsible for

the solicitation of the initial funds that seeded Beechwood. TPC ¶¶ 23, 66, 72. Huberfeld was a direct or indirect owner of Beechwood at all relevant times through, among other vehicles, several of the BRILLC Series Entities and Beechwood Trust Nos. 15-19. TPC ¶¶ 23, 26, 29-31, 85-87, 90, 96, 380, 388, 392, 393, 413, 422. Huberfeld maintained an office, phone line, and computer at Beechwood's offices and was provided a full-time secretary. TPC ¶¶ 23, 111, 112. Huberfeld directed many of the private loans into which Beechwood invested SHIP's assets, including to business and social acquaintances. TPC ¶¶ 23, 113, 241. Huberfeld was one of the masterminds of the Platinum-Beechwood Scheme, had knowledge of all aspects of the scheme, and took material steps to further the Platinum-Beechwood Scheme to the detriment of SHIP. TPC ¶¶ 23, 55, 63, 64, 66, 72, 74, 78, 85, 111-113. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] TPC ¶ 64.

Huberfeld beneficially owned and controlled several corporate entities and trusts that served as his alter egos, allowing him to exert control over Beechwood and further the Platinum-Beechwood Scheme. TPC ¶¶ 23, 26, 29-31, 85-87, 90, 96, 380, 388, 392, 393, 413, 422. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Each of these trusts and entities is an alter ego of Huberfeld, having been dominated and controlled by him for the purpose of concealing his ownership and control of Beechwood Holdings and BBL. TPC ¶¶ 12, 14, 23, 26, 30, 31, 34, 96. The BRILLC Series Entities and the BRILLC Series Members collectively owned all of the preferred stock in Beechwood Re, BBL, BBIL, and BAM. TPC ¶¶ 29, 30.

Each of the BRILLC Series Entities served as an alter ego of Nordlicht, Bodner, or Huberfeld—or some combination of them—and were used for the purpose of concealing their ownership interests in Beechwood. TPC ¶¶ 31, 96. Huberfeld created the trusts and entities as asset protection vehicles for use in siphoning off and secreting the ill-gotten gains from the Platinum-Beechwood Scheme in order to place them beyond the reach of his creditors. TPC ¶¶ 12, 14, 15, 18, 20, 21, 26, 31, 34. Huberfeld caused Beechwood Trust Nos. [REDACTED]

[REDACTED] TPC ¶¶ 34, 388-396, 436, 450, 462.

Huberfeld was arrested on June 8, 2016 in connection with attempting to bribe a union official to invest in Platinum. TPC ¶¶ 23, 385. His arrest created a domino effect that eventually led to the revelation of the Platinum-Beechwood Scheme. TPC ¶¶ 23, 385, 390, 391. Unfortunately, by the time the deceptions became apparent, SHIP had already been significantly harmed. TPC ¶ 23. On May 25, 2018, Huberfeld pled guilty to the charge of conspiracy to commit wire fraud. *Id.* On February 12, 2019, Huberfeld was sentenced to 30 months in prison, three years of supervised release, and ordered to pay restitution of \$19 million. *Id.*

b. David Bodner and the Bodner Instrumentalities

Moving Defendant David Bodner (“Bodner”) is both a Platinum Insider and a Beechwood insider and also a founder of Platinum Partners. TPC ¶¶ 4 n.7, 24, 29 n.16, 53. Like Huberfeld, Bodner played a key role in Beechwood’s formation. TPC ¶¶ 24, 62, 63, 72, 80, 412. Bodner was a direct or indirect owner of Beechwood at all relevant times. TPC ¶¶ 12, 14, 24, 26, 29, 30. In particular, Bodner maintained ownership interests in Beechwood Holdings through Beechwood Trust Nos. 7-14, each of which named one of Bodner’s eight children as the beneficiary, granting Bodner beneficial ownership. TPC ¶¶ 24, 26, 85, 87, 392. Bodner also indirectly owned preferred shares in Beechwood Re through Beechwood Re Investments, LLC

[REDACTED]

[REDACTED] TPC ¶¶ 24, 30. Bodner maintained control of Beechwood discreetly, generally using his secretary to communicate his instructions. TPC ¶¶ 24, 114. [REDACTED]

[REDACTED] TPC ¶ 24. Saks dutifully agreed to the meeting. *Id.*

Bodner had significant involvement in several of the investments in which Beechwood placed SHIP's assets. TPC ¶¶ 24, 114, 241, 378. [REDACTED]

[REDACTED] TPC ¶¶ 24, 80, 114. [REDACTED]

[REDACTED] which was directly contrary to SHIP's express objectives conveyed to Beechwood, he was causing Beechwood to breach its fiduciary duties to SHIP. TPC ¶ 114. Bodner was one of the masterminds of the Platinum-Beechwood Scheme, had knowledge of all aspects of the Platinum-Beechwood Scheme, and took material steps to further the Platinum-Beechwood Scheme to the detriment of SHIP. TPC ¶¶ 24, 63, 72, 74, 78, 80.

i. BRILLC Series C and Monsey Equities LLC

Bodner owned and controlled several corporate entities that he used as alter egos to help him exert control over Beechwood, in furtherance of the Platinum-Beechwood Scheme, including Moving Defendants BRILLC Series C, and Monsey Equities LLC. TPC ¶¶ 12, 14, 24, 26, 29-31, 96. Both entities were formed by Bodner to conceal his Beechwood ownership interests and participated in the August 2016 transactions that were designed to further conceal

Bodner's role in the Platinum-Beechwood Scheme. TPC ¶¶ 26, 29-31. Bodner owned and controlled Monsey Equities LLC, by way of his wife, Naomi Bodner, and their children—Moshe Bodner, Aaron Bodner, Eliezer Bodner, Tzipporah Rottenberg, Rochel Fromowitz, Yissochar Bodner, Yaakov Bodner, and Mordechai Bodner. TPC ¶ 30(c). Monsey Equities LLC was the sole member of BRILLC Series C. *Id.* The BRILLC Series Entities and the BRILLC Series Members collectively owned all of the preferred stock in Beechwood Re, BBL, BBIL, and BAM. TPC ¶¶ 31, 96. Each of the BRILLC Series entities served as an alter ego of Nordlicht, Bodner, or Huberfeld—or some combination thereof—and were used for the purpose of concealing their ownership interests in Beechwood. TPC ¶¶ 24, 29-31, 96, 381.

ii. Beechwood Trust Nos. 7-14

Bodner created Moving Defendants Beechwood Trust Nos. 7-14 as holding vehicles for his concealed ownership interest in Beechwood, and he later used them to divest himself (at least nominally) of that ownership interest in exchange for a debt obligation in August 2016 to further conceal the illicit connections between Platinum and Beechwood. TPC ¶¶ 24, 26. Beechwood Trust Nos. 7-14 were beneficially owned by the children of Bodner. TPC ¶¶ 24, 26, 85, 87, 392. Each of these trusts is an alter ego of Bodner, having been dominated and controlled by him for the purpose of concealing his ownership and control of Beechwood Holdings and BBL. TPC ¶¶ 12, 14, 24, 26. Bodner created the trusts as asset protection vehicles for use in siphoning off and secreting the ill-gotten gains from the Platinum-Beechwood Scheme in order to place them beyond the reach of his creditors. TPC ¶ 26. Bodner caused Beechwood Trust Nos. 7-14 to sell their equity in Beechwood as part of the 2016 Acquisition Transactions, which were intended to conceal the true ownership and economic interests in Beechwood. TPC ¶¶ 34, 388-396, 436, 450, 462.

c. Daniel Saks

Moving Defendant Daniel Saks (“Saks”) is both a Platinum Insider and a Beechwood Insider. TPC ¶¶ 4 n.7, 29 n.16. Until 2014, Saks worked as a portfolio manager at Platinum Management in New York. TPC ¶ 37. During 2014, Saks began working at BAM, although he was still also working for PPVA/Platinum Management. TPC ¶¶ 37, 107, 108, 413. At the end of 2014, Saks replaced Levy as Chief Investment Officer for BAM subsequent to Levy’s return to Platinum Management, and later served as BAM’s President. *Id.* Saks routinely received and was involved in commenting on the third-party valuation reports sent to BAM that included inflated valuations of the Beechwood transactions with PPVA. TPC ¶¶ 37, 339, 347, 423.

Based on Saks’s position and involvement at the Beechwood Advisors, he understood that its investment valuations as reported to SHIP and others were materially inflated. TPC ¶¶ 37, 240, 261, 333, 339. Saks was instrumental to the Beechwood Advisor’s involvement in numerous Platinum-related investments, and acted as signatory on behalf of various Beechwood Entities in connection with several of the transactions among the Beechwood Entities and PPVA. TPC ¶¶ 37, 109, 251, 261. For example, Saks was involved in orchestrating the January 2015 Montsant transaction and executed the transaction documents on behalf of BAM. TPC ¶¶ 37, 251. Saks similarly was involved in negotiating amendments to the Golden Gate Oil transaction documents. TPC ¶ 37. Saks had actual knowledge of all aspects of the Platinum-Beechwood Scheme and took material steps to further its ill goals, to the detriment of SHIP. TPC ¶¶ 37, 107-109, 240, 251, 261, 333, 339, 347, 413, 423.

d. Will Slota

Moving Defendant Will Slota (“Slota”) is a Platinum Insider. TPC ¶ 29 n.16. Slota was the Chief Operating Officer of Platinum who, starting in November 2013, misrepresented himself to WNIC and BCLIC as the Chief Operating Officer of Beechwood Re and BAM. TPC

¶¶ 45, 125. He was not alone in making this misrepresentation. *Id.* His Co-Conspirators misrepresented Slota as the Chief Operating Officer of Beechwood Re and BAM all while he remained employed as a senior manager of Platinum Management. *Id.* Slota and the Co-Conspirators lived this lie for several years, starting in November 2013, when Slota's paychecks were coming from Platinum Management. TPC ¶ 45. Slota was integral to the formation of the Beechwood Entities. TPC ¶¶ 45, 412, 421. He helped organize the tasks necessary to open bank accounts, brokerage accounts, and corporate documents. TPC ¶¶ 45, 116. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] TPC ¶ 45.

Slota served as the enforcer within the integrated Platinum-Beechwood conspiracy for maintaining the deception that the Beechwood Entities had no connection with Platinum, ensuring that the Co-Conspirators who were misrepresenting themselves as certain of the Beechwood Entities' officers and managers did NOT use their "@platinumlp" domain (or otherwise convey evidence of their Platinum affiliation) when communicating with those outside of the conspiracy. *Id.* Slota was also the point person responsible for finding and hiring a valuation firm that would make the Beechwood Advisors' investments in Platinum Funds and Platinum-related entities appear legitimate to the outside world. *Id.* Slota was included on emails regarding updates on investment performance sent around Beechwood for the purpose of valuation, and as such understood that the valuations used were being inflated. TPC ¶ 240(a). Slota had actual knowledge of all aspects of the Platinum-Beechwood Scheme and took material steps to further its ill goals, to the detriment of SHIP. TPC ¶¶ 45, 116, 125, 240(a), 335.

e. David Ottensoser

Moving Defendant David Ottensoser (“Ottensoser”) is a Platinum Insider. TPC ¶ 29 n.16. Ottensoser served as General Counsel and Chief Compliance Officer for Platinum Management and PPVA. TPC ¶¶ 41, 120, 368. Ottensoser was in-house counsel responsible for documenting many of the related-party transactions in which the Beechwood Advisors caused SHIP to invest. TPC ¶ 41. Ottensoser was also involved in creating the Beechwood Entities and worked as General Counsel for certain of the Beechwood Entities during their initial stages, providing legal services to certain of the Beechwood Entities and PPVA even when both parties ostensibly were on opposite sides of a transaction. TPC ¶¶ 41, 72, 73, 412. In his capacity as General Counsel of Platinum Management, PPVA, and certain of the Beechwood Entities, Ottensoser was aware of the conflicts between those entities and arising out of the related-party transactions. TPC ¶ 41. As a member of the risk committee, Ottensoser was responsible for assessing the risk associated with PPVA’s assets and investments, and such risk assessment materially affected the value of such assets and investments. TPC ¶¶ 41, 328. As a lawyer advising both Platinum and Beechwood, he was responsible for understanding the conflicts and improprieties in the concealed relationships and undisclosed related-party transactions that characterized the Platinum-Beechwood Scheme. TPC ¶¶ 41, 120, 124. Ottensoser had actual knowledge of all aspects of the Platinum-Beechwood Scheme and took material steps to further its ill goals, to the detriment of SHIP. TPC ¶¶ 41, 72, 73, 120, 124, 304, 328, 368, 378, 412, 421.

f. Bernard Fuchs

Moving Defendant Bernard Fuchs, a/k/a Berish Fuchs (“Fuchs”) is a Platinum Insider. TPC ¶ 29 n.16. Fuchs is the direct or indirect holder of ownership interests in Platinum Management. TPC ¶¶ 46, 240. As such, he personally benefited from the inflated distributions, fees, and other payments made by PPVA to Platinum Management. *Id.* Fuchs did not have an

knowledge of all aspects of the Platinum-Beechwood Scheme and took material steps to further its ill goals, to the detriment of SHIP. TPC ¶¶ 46, 240, 327, 328, 378.

g. Stewart Kim

Moving Defendant Hokyong Kim a/k/a Stewart Kim (“Kim”) is both a Platinum Insider and a Beechwood Insider. TPC ¶¶ 4 n.7, 29 n.16. Kim served in dual roles at certain of the Beechwood Entities and Platinum Management. TPC ¶¶ 44, 116, 119, 124. Kim was a senior manager of Platinum Management. *Id.* Starting in November 2013, Kim misrepresented himself and other Platinum Management employees to WNIC and BCLIC as the Chief Risk Officer for Beechwood Re and BAM, demonstrating his understanding of the need for secrecy and concealment of the Platinum-Beechwood Scheme and Platinum Management’s control over the Beechwood Entities. TPC ¶¶ 44, 124. Kim also allowed other Co-Conspirators to misrepresent his employment with Beechwood Re and BAM without correction. TPC ¶ 44. At the time, Beechwood Re and BAM did not have a Chief Risk Officer, despite marketing materials claiming otherwise. *Id.* Kim acted as Beechwood Re and BAM’s Chief Risk Officer, while still employed by Platinum Management, until January 2015, when he officially became a full-time employee of Beechwood Re and BAM, having been hired by Feuer and Taylor as the Beechwood Re and BAM’s Chief Risk Officer. TPC ¶ 44.

Kim had actual knowledge of all aspects of the Platinum-Beechwood Scheme and took material steps to further its ill goals, to the detriment of SHIP. TPC ¶¶ 44, 116, 119, 124, 127, 377, 378, 415, 423. [REDACTED]

[REDACTED] TPC ¶ 116. Kim knew this even after he became the fulltime Chief Risk Officer at Beechwood Re and BAM. [REDACTED]

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██████████ TPC ¶ 44. ██████████
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██████████ TPC ¶ 377. Edelstein confirmed the loans should be transferred from CNO to SHIP, and that agreement is forwarded back to Kim. *Id.*
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██████████ TPC ¶ 127.

2. Michael Joseph Nordlicht

Moving Defendant Michael Joseph Nordlicht is the nephew of Mark Nordlicht, one of the founders of Platinum Partners. TPC ¶ 48. In or about 2014, Mark Nordlicht installed Michael Nordlicht as in-house counsel for Agera Energy, LLC (“Agera Energy”), even though he had only recently graduated from law school. TPC ¶¶ 48, 272. Before the series of transactions involving Agera Energy discussed below, Michael Nordlicht held a 95.01% indirect equity interest in Agera Energy, although it is unclear what consideration, if any, he paid for that controlling interest. TPC ¶¶ 48, 272, 273. Michael Nordlicht participated in meetings with SHIP to discuss the Agera Transactions. TPC ¶¶ 48, 288, 296. He participated directly in the closing of those transactions to the detriment of SHIP. TPC ¶ 48. Michael Nordlicht had actual knowledge of all aspects of the Platinum-Beechwood Scheme and took material steps to further its ill goals, to the detriment of SHIP. TPC ¶¶ 48, 272, 273, 288, 296.

3. Kevin Cassidy

Moving Defendant Kevin Cassidy (“Cassidy”) is an Agera executive. TPC ¶ 49. In 2007, Optionable Inc., a fund co-founded by Cassidy and affiliated with Nordlicht, collapsed after Cassidy was arrested for deliberately misstating the value of Optionable, Inc.’s natural gas

derivatives. TPC ¶¶ 49, 58, 308. Cassidy, who had served two prior stints in prison, was sentenced to be incarcerated for 30 months. TPC ¶¶ 49, 58.

When Cassidy was released from prison in 2014, Nordlicht, Bodner, and Huberfeld installed him as the managing director of Agera Energy. *Id.* Cassidy was intimately involved in all aspects of the Agera Transactions and participated in meetings with SHIP related to the transactions. TPC ¶¶ 49, 288, 308, 449, 465. In 2016, when the Beechwood Advisors were soliciting SHIP to participate as an unwitting victim in the June 2016 Agera Transactions where SHIP's fresh cash of \$50 million or more was needed to advance the scheme, Cassidy met with Wegner and Lorentz of SHIP when they visited New York before the deal, and Cassidy joined in the effort to solicit SHIP on the false premise that the proposed deal was a legitimate transaction when in fact SHIP was duped, as he fully understood. TPC ¶¶ 49, 288. Cassidy had actual knowledge of numerous aspects of the Platinum-Beechwood Scheme and took material steps to further its ill goals, to the detriment of SHIP. TPC ¶¶ 49, 288, 308, 449, 465.

B. Entity Moving Defendants

1. Beechwood Entities

The TPC makes reference to the “Beechwood Entities”—a group of corporate entities created by the Platinum and Beechwood Insiders for the specific purpose of effectuating the Platinum-Beechwood Scheme—to assert allegations common to each entity defined as such. Moving Defendants BAM II, BAMAS, Beechwood Holdings, BBL, BAM I GP, BAM II GP, MSD Administrative, and Beechwood Capital are all Beechwood Entities. As alleged, each of the Beechwood Entities was created by the Platinum and Beechwood Insiders for the sole purpose of instituting and executing the Platinum-Beechwood Scheme (TPC ¶¶ 81, 83) by (1) concealing the involvement of Platinum Partners (TPC ¶¶ 99, 106, 391), (2) luring in institutional investors such as SHIP to gain access to their money (TPC ¶ 411), (3) funneling that

money into Platinum Partner hedge funds and Platinum-related investments (TPC ¶¶ 238, 411, 412), and (4) siphoning off the profits of the Platinum-Beechwood Scheme to put them beyond the reach of any potential creditors (TPC ¶ 88). The Beechwood Entities were at all times completely owned and controlled by Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor, and acted as alter egos to those individuals and to Platinum for the purposes of executing the Scheme. TPC ¶¶ 82, 83, 88-95, 101, 103, 413.

The TPC additionally makes specific allegations regarding each of the Beechwood Entities to support SHIP's claims against them.

a. B Asset Manager II LP

Moving Defendant B Asset Manager II LP ("BAM II"), like BAM I, served as an investment advisor for the Beechwood Entities, and enacted Investment Management Agreements with both BBIL and Beechwood Re. TPC ¶ 17. BAM I generally acted as the investment advisor for SHIP's investments and signed on behalf of SHIP for most, if not all, of the deals Beechwood caused SHIP to enter. *Id.* For deals in which SHIP was transacting with a Beechwood Entity directly, BAM II served as the investment advisor to the Beechwood Entity and BAM I served as investment advisor to SHIP. *Id.* For example, if BBIL were purchasing a \$15 million participation in a loan, BAM II would sign as the investment advisor on behalf of BBIL. *Id.* If BBIL were purchasing a \$15 million participation in a loan on SHIP's behalf, BAM I would sign as the investment advisor on behalf of SHIP. *Id.* If BBIL were selling to SHIP a \$15 million participation in a loan that it had previously purchased, BAM I would sign as SHIP's investment advisor and BAM II would serve as BBIL's investment advisor. *Id.*

This paradigm was structured by the Co-Conspirators to facilitate cross party and related party transactions that were key to the Platinum-Beechwood Scheme. *Id.* The BAM entities are alter egos of their beneficial owners—Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor—

having been dominated and controlled by them for the purpose of concealing their ownership and control of the Beechwood Entities. TPC ¶¶ 17, 94. Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor exercised this ownership to exert control over BAM II, and used that control in furtherance of the Co-Conspirators' Platinum-Beechwood Scheme and to the detriment of SHIP. *Id.* Through its controllers, BAM II had knowledge of all aspects of the Platinum-Beechwood Scheme, and it was employed to take material steps to further the Platinum-Beechwood Scheme to the detriment of SHIP. TPC ¶ 17.

b. BAM Administrative Services LLC

Moving Defendant BAM Administrative Services LLC (“BAMAS”) served as agent for the Beechwood Trusts and as agent and signatory on behalf of Beechwood Re and BBIL in connection with certain transactions described more fully below. TPC ¶¶ 20, 251, 256, 302. For example, BAMAS was a signatory to a May 22, 2015 participation agreement in a July 14, 2010 Desert Hawk Gold Corporation note as agent for Beechwood Re, BBIL, SHIP, BCLIC, WNIC, and ULICO, counter to DMRJ Group I, LLC—a subsidiary of PPVA. TPC ¶ 20. Levy signed the same note on behalf of DMRJ Group I, LLC and PPVA. *Id.* Feuer signed for BAMAS. *Id.* BAMAS had knowledge through its controllers that PPVA was a related party, but did not disclose this fact to SHIP, nor did it seek SHIP's approval for the transaction. *Id.* BAMAS was a wholly owned subsidiary of BAM I, and was at all times relevant to the TPC controlled by BAM I and its owners and managers. TPC ¶¶ 20, 94. BAMAS is an alter ego of Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor, having been dominated and controlled by them for the purpose of concealing their ownership and control of the Beechwood Entities and causing certain transactions that were part of the Platinum-Beechwood Scheme. TPC ¶ 20. BAMAS was paid significant management fees that it did not earn, and was, in fact, created by Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor as an asset protection vehicle for use in siphoning

off and secreting the ill-gotten gains from the Co-Conspirators' Platinum-Beechwood Scheme in order to place them beyond the reach of their creditors. *Id.*

c. Beechwood Re Holdings, Inc.

Moving Defendant Beechwood Re Holdings, Inc. ("Beechwood Holdings") was an entity organized to hold all of the common stock of Beechwood Re. TPC ¶¶ 12, 26, 27, 28. Beechwood Re served as counterparty to one of the IMAs with SHIP. TPC ¶ 12. [REDACTED]

[REDACTED] TPC ¶¶ 12, 26, 90, 392, 433. The ownership of Beechwood Holdings allowed the Nordlicht Group to exert control over Beechwood Re. TPC ¶¶ 12, 26, 383. Beechwood Holdings is an alter ego of Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor, having been dominated and controlled by them for the purpose of concealing the Nordlicht Group's ownership and control of the Beechwood Entities. TPC ¶¶ 12, 26, 33, 96. Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor created Beechwood Holdings as an asset protection vehicle for use in siphoning off and secreting the ill-gotten gains from the Co-Conspirators' Platinum-Beechwood Scheme in order to place them beyond the reach of their creditors. TPC ¶¶ 12, 91, 383, 392.

d. Beechwood Bermuda Ltd.

Moving Defendant Beechwood Bermuda Ltd. ("BBL") was an entity organized under Bermuda law, with its principal place of business in Bermuda and a place of business in New York, New York. TPC ¶ 14. BBL was a reinsurance company that was licensed as an insurer located in Hamilton, Bermuda and regulated by the Bermuda Monetary Authority. *Id.* BBL holds all of the common stock of BBIL, one of the Beechwood Entities with which SHIP entered an IMA. *Id.* [REDACTED] TPC ¶¶ 14, 26, 90, 393, 433. The ownership of Beechwood Holdings allowed the Nordlicht Group to

exert control over both BBL and BBIL. *Id.* BBL is an alter ego of Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor, having been dominated and controlled by them for the purpose of concealing the Nordlicht Group’s ownership and control of the Beechwood Entities. *Id.* Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor created BBL as an asset protection vehicle for use in siphoning off and secreting the ill-gotten gains from the Co-Conspirators’ Platinum-Beechwood Scheme in order to place them beyond the reach of their creditors. TPC ¶¶ 14, 383.

e. B Asset Manager GP LLC and B Asset Manager II GP LLC

Moving Defendants B Asset Manager GP LLC (“BAM I GP”) and B Asset Manager II GP LLC (“BAM II GP,” collectively with BAM I GP, “BAM GP”) are the general partners of BAM I and BAM II respectively. TPC ¶¶ 18, 19. [REDACTED]

[REDACTED] BAM GP was the alter ego of Levy until the entities that comprise BAM GP were sold, and then it became the alter ego of Feuer, having been dominated and controlled by either Levy or Feuer at the relevant times of their ownership. TPC ¶ 19. Both Levy and Feuer used BAM GP for the purpose of controlling BAM, which served as the Beechwood investment managers, and thereby controlled the investment decisions of Beechwood. *Id.* Levy and Feuer used the BAM GP entities as asset protection vehicles for use in siphoning off and secreting the ill-gotten gains from the Co-Conspirators’ Platinum-Beechwood Scheme in order to place them beyond the reach of their creditors. *Id.*

f. MSD Administrative Services LLC

Moving Defendant MSD Administrative Services LLC (“MSD Administrative”) was a wholly owned subsidiary of Beechwood Holdings. TPC ¶ 21, 91. [REDACTED]

creditors. TPC ¶ 33. N Management had knowledge of all aspects of the Platinum-Beechwood Scheme, and took material steps to further that scheme to the detriment of SHIP. TPC ¶¶ 33, 74, 96. N Management was integral to the initial purported capitalization of Beechwood Re and BBIL. TPC ¶ 33.

3. Beechwood Owner Trusts

a. Feuer Family Trust

Moving Defendant Feuer Family Trust was created to hold Feuer's ownership interest in Beechwood Holdings and BBL. TPC ¶¶ 27, 85. Through the Feuer Family Trust, Feuer owned approximately 20% of the common stock of Beechwood Holdings and BBL. *Id.* The Feuer Family Trust is an alter ego of Feuer, having been dominated and controlled by him for the purpose of highlighting his ownership and control of Beechwood Holdings and BBL, in contrast to the generically named Beechwood Trusts used to hide the ownership of those who truly controlled the Beechwood Entities. TPC ¶¶ 27, 85, 380, 463. Feuer used the trust as an asset protection vehicle for use in siphoning off and secreting the ill-gotten gains from the Platinum-Beechwood Scheme in order to place them beyond the reach of his creditors. TPC ¶¶ 27, 85, 380, 463.

b. Taylor-Lau Family Trust

Moving Defendant Taylor-Lau Family Trust was created to hold Taylor's ownership interest in Beechwood. TPC ¶¶ 28, 85. Through the Taylor-Lau Family Trust, Taylor owned approximately 10% of the common stock of Beechwood Holdings and BBL. *Id.* The Taylor-Lau Family Trust is an alter ego of Taylor, having been dominated and controlled by him for the purpose of highlighting his ownership and control of Beechwood Holdings and BBL, in contrast to the generically named Beechwood Trusts used to hide the ownership of those who truly controlled the Beechwood Entities. TPC ¶¶ 28, 85, 380, 463. Taylor created the trust as an asset

protection vehicle for use in siphoning off and secreting the ill-gotten gains from the Platinum-Beechwood Scheme in order to place them beyond the reach of his creditors. TPC ¶¶ 28, 85, 380, 463.

4. 2016 Acquisition Trusts

Moving Defendants Beechwood Global Distribution Trust, Feuer Family 2016 ACQ Trust, and Taylor-Lau Family 2016 ACQ Trust (collectively, the “2016 Acquisition Trusts”) were trusts created and used for the purpose of furthering the fraudulent schemes of Feuer, Taylor, Levy, Nordlicht, Huberfeld, and Bodner. TPC ¶¶ 34, 389-396. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* The 2016 Acquisition Trusts were alter egos of Nordlicht, Huberfeld, and Bodner, having been dominated and controlled by them for the purpose of concealing their ownership and control of the Beechwood Entities, and transferring ownership for appearances without adversely affecting the their economic benefit. *Id.* Feuer and Taylor created the 2016 Acquisition Trusts as asset protection vehicles for use in siphoning off and secreting the ill-gotten gains from the Co-Conspirators’ Platinum-Beechwood Scheme in order to place them beyond the reach of their creditors. *Id.*

III. ARGUMENT

A. **The TPC Does Not Engage in “Impermissible Group Pleading” and Easily Satisfies Rule 8(a)**

Virtually all of the Moving Defendants reflexively invoke the phrase “impermissible group pleading” in describing the TPC. These defendants mischaracterize the TPC’s allegations and flatly ignore this Court’s prior rulings upholding the very pleading approach that the TPC employs.

With respect to each of the Moving Defendants, the TPC “clear[s] the low bar imposed by Rule 8,” which merely requires a plaintiff “to give the defendant fair notice of what the plaintiff’s claim is and the ground upon which it rests.” ECF No. 225, 4/11/19 Opinion & Order (“PPVA MTD Op.”) at 42 (internal quotation marks omitted). Like the complaint in the PPVA action, the TPC does so “by describing in exhaustive detail the nature of the [Platinum-Beechwood Scheme] and by identifying the” Moving Defendants as participants in that scheme. *Id.* The Moving Defendants apparently disagree, arguing that the TPC “lumps” all of them together. *See, e.g.*, ECF No. 478, Moving Beechwood Defs.’ Br. at 9-10 (quoting *Atuahene v. City of Hartford*, 10 F. App’x 33, 34 (2d Cir. 2001)). The Moving Defendants are wrong.

As described in painstaking detail in Part II above, the TPC includes a wealth of well-pled allegations specific to each of the Moving Defendants. The TPC describes each Moving Defendant’s role in the criminal Platinum-Beechwood Scheme, whether that role be as: (1) a senior Platinum executive, a senior Beechwood executive, or a combination of the two, each of whom is plausibly alleged to have had direct knowledge of the inner workings of the criminal enterprise (Huberfeld, Bodner, Saks, Ottensoser, Fuchs, Slota, and Kim); (2) an Agera executive who directly participated in and benefited from the fraudulent Agera Transactions (Michael Nordlicht and Cassidy); or (3) an instrumentality of the Beechwood-Platinum Scheme that was

created and controlled by the founders of Platinum and Beechwood to serve a specific purpose in furtherance of the criminal enterprise (the Bodner Instrumentalities and the Beechwood Defendants).

This Court already has held that substantially identical allegations as to Moving Defendants Huberfeld, Bodner, Saks, Ottensoser, Fuchs, Michael Nordlicht, and Cassidy satisfied Rule 8(a). *See* PPVA MTD Op. at 38-43, 60-62. The Court should reaffirm that ruling as to those Moving Defendants here. As for Slota and Kim, the allegations specific to them are follow the same pattern. As a senior executive of Platinum who served in a dual role and made a habit of misrepresenting himself as Chief Operating Officer of Beechwood Re and BAM, Slota knows well the basis for his inclusion as a third-party defendant here. [REDACTED]

[REDACTED] Slota and Kim cannot plausibly argue that the TPC's allegations fail to put them on notice of the claims asserted against them and the grounds upon which they rest.

As detailed above, each of the Bodner Instrumentalities also is alleged to have played a specific role in the in the fraudulent scheme. *See* Part II.A.1.b.(2) (Beechwood Trust Nos. 7-14). Each of the Beechwood Trusts Nos. 7-14 is alleged to have engaged in those August 2016 transactions individually; the fact that the TPC refers to them collectively for ease of reference does not equate to impermissible "lumping together," as this Court already has held in rejecting BAM I and BAM II's bid to dismiss the claims asserted against them in the PPVA Action on group pleading grounds. *See* PPVA MTD Op. at 37 ("While it is true that BAM I and BAM II are 'lumped' together as a single BAM entity, it cannot seriously be argued that the FAC fails as a result to give BAM II fair notice of what the plaintiff's claim is and the ground upon which it rests." (internal quotation marks omitted)). The allegations against BRILLC Series C and its

owner, Monsey Equities LLC, similarly are sufficient to satisfy Rule 8(a). *See* Part II.A.1.b.(1) (BRILLC Series C, Monsey Equities).

Finally, the Moving Beechwood Defendants' contention that the TPC somehow fails to place them on notice of the basis for the claims against them does not warrant serious consideration.⁵ Because the Moving Beechwood Defendants make specific group pleading arguments only with respect to Beechwood Holdings, BBL, MSD Administrative, and Beechwood Capital, SHIP addresses the well-pled allegations against each of those entities briefly here. Each of those entities played a specific role in the complex web of lies and deceit that the Platinum and Beechwood fraudsters spun. *See* Part II.B.1.c-d (Beechwood Holdings, BBL). This Court previously has upheld claims for (among others) fraud, breach of fiduciary duty, and civil conspiracy against Beechwood Re and BBIL in the SHIP Action. *See generally Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515 (S.D.N.Y. 2018); *see also In re Platinum-Beechwood Litig.*, ___ F. Supp. 3d ___, 2019 WL 1759925, at *4 (S.D.N.Y. Apr. 22, 2019). As the sole shareholders of Beechwood Re and BBIL, respectively, Beechwood Holdings and BBL have no basis to argue that they lack notice of the grounds upon which SHIP's claims rest. The same goes for Beechwood Capital. *See* Part II.B.1.g (Beechwood Capital). Finally, MSD Administrative's group pleading argument does not pass the laugh test. MSD Administrative, one of Beechwood Holdings' wholly owned subsidiaries, was a fraudulent

⁵ Ironically, the Moving Beechwood Defendants engage in their own version of "group pleading" in their brief, as it is nearly impossible to decipher which arguments apply to which defendants. While they identify themselves collectively as "Movants" at the beginning of their brief, Moving Beechwood Defs.' Br. at 1, they advance their arguments for dismissal of Counts One and Two on behalf of only "the non-asset manager Movants," *id.* at 11, a term first used on page 2 and not used again in the intervening pages. The brief also identifies Beechwood Holdings, BBL, MSD Administrative, and Beechwood Capital in subheading IV.A., *id.*, but then includes N Management in the paragraph setting forth the argument under that subheading, *id.* at 12.

sham vehicle through which the criminal enterprise funneled exorbitant amounts of money as fees for inscrutable—and in all likelihood mostly non-existent—[REDACTED] as fraudster Feuer so aptly described MSD Administrative’s “role” in a March 17, 2014 email.

In sum, the TPC easily satisfies Rule 8(a)’s “low bar” as to each and every one of the Moving Defendants. PPVA MTD Op. at 42. Courts in this District repeatedly have rejected attempts to use the Second Circuit’s decision in *Atuahene* as a cudgel to obtain a quick dismissal of well-pled claims simply because they are asserted against more than one defendant. *See, e.g., David v. Weinstein Co.*, No. 18-cv-5414 (RA), 2019 WL 1864073, at *5 (S.D.N.Y. Apr. 24, 2019) (“Nothing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical claims are asserted against each defendant.” (quoting *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 2d 729, 771 (S.D.N.Y. 2018)); *Canosa v. Ziff*, No. 18-cv-4115 (PAE), 2019 WL 498865, at *10 (S.D.N.Y. Jan. 28, 2019) (rejecting group pleading argument where complaint pled “collective knowledge by the directors of Weinstein’s intentional wrongs towards women, followed by collective inaction”).⁶ Consistent with its prior decision in the PPVA Action, the Court should do the same here.

B. The Moving Defendants Misapply the Separate and Distinct “Group Pleading” Doctrine, Which Relaxes Rule 9(b)’s Pleading Requirements by Allowing Attribution of Corporate Misstatements to Senior Executives

Several of the Moving Defendants who parrot the “impermissible group pleading” mantra confuse cases evaluating a complaint’s compliance with Rule 8(a) with cases permitting a plaintiff to attribute corporate misstatements to high-level executives for purposes of satisfying Rule 9(b) on a claim for fraud. As the Court previously has explained, the group pleading

⁶ For that reason, the Moving Defendants’ criticisms of SHIP’s use of defined terms for convenience—particularly in the context of the intentionally convoluted, fraudulent scheme spanning multiple years in which they participated—are without merit.

doctrine allows a plaintiff to attribute corporate misstatements to a group of individual defendants “where the defendants are a narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document” PPVA MTD Op. at 44 (quoting *Elliott Assocs., L.P. v. Hayes*, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000)). Though the doctrine “allows plaintiffs only to connect defendants to statements,” it applies not just to claims for fraud but “whenever Rule 9(b) applies, which is whenever the alleged conduct of defendants is fraudulent in nature.” *Id.* at 23 (quoting *Schwartzco Enters. LLC v. TMH Mgmt., LLC*, 60 F. Supp. 3d 331, 350 (E.D.N.Y. 2014)).

Here, to the extent that SHIP employs the group pleading doctrine at all, it is solely to attribute misstatements collectively to Beechwood, Levy, Feuer, and Taylor for the purpose of establishing the direct fraud and breaches of fiduciary duty committed by those entities and individuals, which form the basis for the aiding and abetting and civil conspiracy claims that SHIP asserts against the Moving Defendants. *See, e.g.*, TPC ¶¶ 411, 420, 446. Given Levy, Feuer, and Taylor’s status as “highly ranked officers or directors” of Beechwood, use of the group pleading doctrine as to them is unquestionably appropriate. PPVA MTD Op. at 44. More to the point, it appears entirely lost on the Moving Defendants that the underlying fraud and breaches of fiduciary duty that Beechwood and its senior officers committed are the very ones that this Court already has sustained as sufficiently pled in the SHIP Action. *See In re Platinum-Beechwood Litig.*, 2019 WL 1759925, at *2.

The claims for aiding and abetting and conspiracy against the Moving Defendants, on the other hand, do not rely on *misstatements* by those defendants for their viability, but rather on the Moving Defendants’ knowledge and conduct, as detailed above and below. Thus, any argument that SHIP improperly invokes the group pleading doctrine as to the Moving Defendants is a red

herring—SHIP need not attribute any specific misstatement to any of the Moving Defendants to sustain its claims, and thus does not require the group pleading doctrine to satisfy Rule 9(b).

Instead, because this Court has already determined that SHIP adequately pleads the underlying torts, the principal question to be answered on these motions is whether the TPC alleges the Moving Defendants' knowledge of those torts with the requisite particularity. In that regard, Rule 9(b) permits a defendant's knowledge to be pled generally, "provided a factual basis is pled 'which gives rise to a strong inference of fraudulent intent.'" *JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 252 (S.D.N.Y. 2005) (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)). As set forth below, SHIP alleges such a factual basis as to each of the Moving Defendants.

C. SHIP States Claims for Aiding and Abetting Fraud and Breach of Fiduciary Duty Against All of the Moving Defendants

A claim for aiding and abetting fraud consists of the following basic elements: "(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." *Anwar v. Fairfield Greenwich, Ltd.*, 728 F. Supp. 2d 372, 442 (S.D.N.Y. 2010) (quoting *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 466 (S.D.N.Y. 2009)). A claim for aiding and abetting breach of fiduciary duty similarly requires: "(1) breach of fiduciary obligations to another of which the aider and abettor had actual knowledge; (2) the defendant knowingly induced or participated in the breach; and (3) plaintiff suffered actual damages as a result of the breach." *Id.* Because "the same activity is alleged to constitute the primary violation underlying both claims" in this case, the claims overlap "in several respects" *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 360 (S.D.N.Y. 2007) (quoting *Pension Cmte. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 201 (S.D.N.Y. 2006)).

In particular, “[k]nowledge of the primary violation with respect to one claim will entail knowledge of the primary violation with respect to the other,” and “when a plaintiff adequately pleads substantial assistance in connection with a fraud claim, he or she fulfills also the participation element of the breach of fiduciary duty claim.” *Id.*

Though the arguments advanced by each of the Moving Defendants vary on the margins, they all essentially claim that the TPC does not allege their knowledge of and substantial assistance in the Platinum-Beechwood Scheme. For many of these Moving Defendants, this Court already has considered and rejected the same arguments. These defendants’ attempts to relitigate the same issues should not be rewarded. As for the others, they identify no legal or factual basis to justify dismissal of the claims against them. The Court should reject the Moving Defendants’ attempt to wriggle their way out of the morass of fraud and deceit that they actively fostered.

1. SHIP Alleges An Underlying Fraud And Breaches Of Fiduciary Duty, And Bodner’s Attempts To Compartmentalize The Fraudulent Scheme Should Be Rejected

Of the ten motions to dismiss the TPC on file, only one—Bodner’s—explicitly contends that SHIP has not stated claims for fraud and breach of fiduciary duty against the SHIP Action Defendants. In advancing that argument, Bodner ignores the Court’s prior opinions unequivocally holding that SHIP has pled actionable fraud and fiduciary duty claims against those defendants. *In re Platinum-Beechwood Litig.*, 2019 WL 1759925, at *2; *Beechwood Re Ltd.*, 345 F. Supp. 3d at 523-27. The TPC’s allegations supporting the underlying fraud and breaches of fiduciary duty are the same ones that this Court has upheld through two rounds of motions to dismiss. Bodner does not identify any rational basis to revisit those decisions, and none exists. The primary torts are therefore adequately pled.

Separately, Bodner devotes a substantial portion of his brief to mischaracterizing the TPC in an effort to obfuscate his role in the fraud, inventing out of whole cloth “three distinct claims of fraud” that, according to him, are pled in the TPC. ECF No. 472, Bodner Br. at 1. He unilaterally labels these “claims” as the “Inducement Claim,” the “Valuation Claim,” and the “Transactional Claim” and confidently asserts that they constitute “separate acts of fraud, and as acts that breached fiduciary duties owed to SHIP” *Id.* at 1-2. The TPC does not allege “separate acts of fraud”; it alleges a unified, far-reaching fraudulent scheme of which Bodner was an integral and indispensable part. The artificial distinctions between various aspects of the integrated scheme that Bodner attempts to draw are nothing more than an effort to obscure his continuing role in it—from the moment of its inception when he helped found Platinum, to the moment of its death when the fraud was revealed and his compatriots were hauled away in handcuffs. Bodner is not the first defendant in this matter to attempt to place one of SHIP’s pleadings in a “factual straitjacket” on a motion to dismiss, *In re Platinum-Beechwood Litig.*, 2019 WL 1759925, at *2, but SHIP respectfully submits that he should be the last.

2. The Moving Defendants Had Actual Knowledge of the Platinum-Beechwood Scheme

To establish the “actual knowledge” element of an aiding and abetting claim at the pleading stage, “plaintiffs must ‘plead the events which they claim give rise to an inference of knowledge’ of the underlying fraud” *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, No. 12-cv-3723, 2016 WL 5719749, at *5 (S.D.N.Y. Sept. 29, 2016) (quoting *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014)). “[S]o long as fraudulent intent may be inferred from the surrounding circumstances,” actual knowledge may be pled “generally, particularly at the pre-discovery stage.” *Landesback Baden-Wurtttemberg v. RBS Holdings USA, Inc.*, 14 F. Supp.

3d 488, 514 (S.D.N.Y. 2014) (quoting *DDJ Mgmt., LLC v. Rhone Grp., LLC*, 911 N.Y.S.2d 7 (1st Dep't 2010)). The TPC meets this standard as to each of the Moving Defendants.

The court's application of these principles in *Anwar* is instructive here. In that case, plaintiffs, investors who lost millions investing with Bernie Madoff, sued several of the feeder fund entities as well as executives and professional service providers who audited, administered, or were otherwise involved with those funds, asserting that they aided and abetted Madoff's fraud. *Anwar*, 728 F. Supp. 2d at 387. Among the defendants were Citco Group Ltd. and its related entities, outsiders to the Madoff business who allegedly served in various capacities for the feeder funds, including preparing monthly reports, monitoring any sub-custodians of the funds, and acting as the funds' public liaison. *Id.* at 392-94. The Court denied the Citco defendants' motion to dismiss the aiding and abetting claims, finding that the plaintiffs alleged the Citco defendants' actual knowledge of the fraud by alleging, among other things, "that the Citco defendants were aware of the roles consolidated in Madoff, the lack of transparency into his operations, . . . and his implausibly consistent investment returns." *Id.* at 443.

If the allegations against the Citco defendants were sufficient to give rise to a strong inference of fraud, then the allegations against the Moving Defendants—all insiders to or instrumentalities of the Platinum-Beechwood Scheme—necessarily are sufficient. The TPC alleges in great detail that a core element of the Platinum-Beechwood Scheme was a conspiracy to conceal Platinum's ownership, control, and funding of Beechwood. The TPC also describes the revolving door between Platinum and Beechwood, the dual roles in which various individuals served at both enterprises, and the extensive efforts made to hold Beechwood out as an independent business. This active and continued concealment, which by its nature was evident to insiders, including the Co-Conspirators, paved the way for the Platinum-Beechwood Scheme

and resulted in Beechwood's unfettered control over more than \$300 million of SHIP's money, which was intentionally misused and misappropriated in order to enrich the Defendants. TPC ¶¶ 1-4. In short, the TPC sets forth specific, individualized allegations as to each of the Moving Defendants that give rise to a strong inference that they had actual knowledge of the fraudulent scheme, as outlined above in Part II and as described in greater detail below.

a. Huberfeld and Bodner

Huberfeld does not contest his actual knowledge of the fraud and breaches of fiduciary duty, but instead asserts only that the TPC does not allege that he substantially assisted in it. *See* ECF No. 457, Huberfeld Br. at 7. Huberfeld's substantial assistance in the fraud—which was wide-ranging and long-running—is addressed more fully below in Part III.C.3., but his concession that the TPC pleads his actual knowledge all but obliterates the contrary arguments advanced by the other Moving Defendants. That concession does not come as a surprise, however, as this Court previously found essentially the same allegations against Huberfeld in the PPVA action “sufficient by themselves to give rise to a strong inference of fraudulent intent” PPVA MTD Op. at 50. The Court's holding in that regard also likely explains why Moving Defendant Ottensoser—who also was charged with knowledge of the fraudulent scheme in the PPVA action, *id.* at 46-47—did not even attempt to dismiss the TPC's aiding and abetting claims as asserted against him. ECF No. 469, Ottensoser Br. at 1.

Bodner at least nominally attacks the TPC's allegations of his actual knowledge, ECF No. 472, Bodner Br. at 8-9, ignoring that the allegations outlining his role and involvement in the fraud are virtually identical to Huberfeld's—both were Platinum founders who participated in the creation of Beechwood and surreptitiously owned substantial shares of the Beechwood business through fraudulent investment vehicles—and in direct contravention of this Court's prior opinion finding these same allegations sufficient to give rise to a strong inference of fraudulent intent.

PPVA MTD Op. at 50. Bodner's imaginative and gratuitous description of the TPC's underlying fraud allegations does not change the result here.

b. Cassidy and Michael Nordlicht

This Court also has held already that Kevin Cassidy and Michael Nordlicht “knew the Platinum Defendants were breaching their fiduciary duties to PPVA.” PPVA MTD Op. at 60. The Court reached that conclusion based on the PPVA Liquidator's allegations that Michael Nordlicht and Cassidy were actively involved in effectuating the Agera Transactions after Michael Nordlicht was installed, fresh out of law school, as the general counsel of Agera Energy and held a 95.01% indirect equity interest in Agera Energy, for which he gave up no consideration as part of the Agera Transactions. *Id.* at 59-60. Again, equivalent allegations are made by SHIP and warrant the same outcome with respect to the TPC. TPC ¶¶ 48, 49, 272, 273, 288, 296, 304, 308, and 449. If anything, the TPC goes further than PPVA's complaint in alleging that together, Cassidy and Michael Nordlicht provided information to SHIP regarding Agera's operations and had a first-hand role in assisting Beechwood and Platinum in soliciting SHIP's investment in Agera outside of the IMAs and in eventually preparing the documents by which various portions of the transaction were consummated. As a result of those transactions, Cassidy reaped a windfall of \$13 million through Starfish Capital for no consideration. TPC ¶¶ 288, 304, 308. These allegations are sufficient, at the pleading stage, to establish Cassidy and Michael Nordlicht's actual knowledge that Beechwood was defrauding SHIP.

c. Saks and Fuchs

Daniel Saks is no different. As outlined above in Part II.A.1.c (Saks), SHIP has alleged more than enough facts to give rise to an inference that he knew about the fraudulent scheme and participated in it. As alleged in the TPC, and like many other individual defendants, Saks served in dual roles at Platinum and Beechwood. He also was specifically involved in numerous

transactions involving SHIP in his capacity as BAM's Chief Investment Officer and was the frequent recipient of fraudulent valuation reports concerning SHIP's investments. Based on similar allegations in the PPVA action, this Court "reasonably infer[red] that Saks knowingly participated in the Platinum Defendants' tortious conduct." PPVA MTD Op. at 56-57. In particular, this Court recognized that Saks helped orchestrate the transaction in which Montsant paid millions of dollars for Black Elk senior secured notes "of dubious value" by executing the agreement under which Montsant pledged collateral to secure the loan from SHIP that it used to purchase the notes. *Id.* SHIP makes these same allegations regarding Saks's role—which the Court recently upheld as sufficient to state an aiding and abetting claim, *see* ECF No. 488, 6/21/19 Opinion & Order ("PPVA MTD Op. II") at 63-64—and more in its TPC, and thus has satisfied its burden that Saks had actual knowledge of the fraudulent scheme and breach of fiduciary duties carried out to the detriment of SHIP.

Fuchs is in the same boat, as the TPC details Fuchs's senior position at Platinum and his involvement in numerous SHIP-related transactions, including but not limited to the Agera Transactions. TPC ¶ 46. Fuchs also was intimately involved in formulating the messaging strategy at the highest levels of Platinum to dissuade investors from inquiring about the status of Platinum's investments or from contacting law enforcement. *Id.* The TPC further alleges Fuchs's involvement in a scheme to dump bad investments from CNO's account to SHIP's accounts at Beechwood. *Id.* ¶¶ 373-78. These allegations are sufficient at the pleading stage to give rise to an inference that Fuchs had actual knowledge of the Platinum-Beechwood Scheme.⁷

⁷ Notably, this Court offered Fuchs an opportunity to dismiss the claims asserted against him in the PPVA action after rejecting his first motion to dismiss on group pleading grounds, *see* PPVA MTD Op. at 61-62, but Fuchs declined to take the Court up on that offer. His decision not to

d. Slota and Kim

Consistent with the Court's analysis in the PPVA MTD Opinion, the allegations in the TPC regarding Slota and Kim also meet the threshold of supporting a reasonable inference that each of these Defendants had actual knowledge of the fraud and breach of fiduciary duty that were afoot as a result of the Platinum-Beechwood Scheme. *See* Part II.A.1.d, g (Slota, Kim). These allegations, when taken together, demonstrate that they, like the other Co-Conspirator Individuals, were aware of each other's roles and the lack of transparency into the Platinum-Beechwood Scheme operations, and had first-hand knowledge of valuation and investment return discrepancies in a way that caused damaged SHIP.

Slota inexplicably focuses on the TPC's recitation of the elements in the "Counts" section of the TPC, suggesting that the absence of detail there somehow negates the detailed allegations regarding Slota elsewhere in the complaint. ECF No. 479, Slota Br. at 12-14. Count One and Count Two both incorporate "each and every allegation above as if set forth fully in this count," TPC ¶¶ 410, 419, emphasizing the obvious point. As for the substantive allegations against Slota, they plainly make out a case that he was aware of the fraudulent scheme. Slota served dual roles at Platinum and Beechwood, was integral in Beechwood's formation, and was chiefly responsible for maintaining nominal separation between the two criminal enterprises and hiring a valuation firm avaricious enough to sign off on Beechwood's fraudulent valuations of its Platinum investments in exchange for a fee. *Id.* ¶¶ 45, 124. He also communicated directly with, and received orders from, Platinum chief Mark Nordlicht in connection with various fraudulent prime brokerage agreements, and he received multiple updates on failing Platinum-

seek dismissal of the claims asserted against him there speaks volumes about the merit of his motion here.

related investments into which SHIP's funds were placed. *Id.* ¶¶ 116, 240(a). Slota's wishful contention that these allegations are insufficient to support an inference of actual knowledge should be rejected out of hand.

Kim's conclusory argument that the TPC does not plead his actual knowledge should also be rejected. ECF No. 291-1, Kim Br. at 4. Kim's knowledge and involvement in the fraud is pled throughout the TPC, and he was closely tied to the very same activities that form the basis for Slota's knowledge. *See, e.g.*, TPC ¶¶ 44, 116, 124, 373-78. Kim's robotic recitation of the elements of an aiding and abetting cause of action does not change that fact.⁸

e. The Moving Beechwood Defendants and the Bodner Instrumentalities

Neither the Moving Beechwood Defendants nor the Bodner Instrumentalities contend directly that the TPC does not plead their actual knowledge of the Platinum-Beechwood Scheme. In fact, several Moving Beechwood Defendants—BAM II, BAM GP, and BAMAS—do not even specifically argue at all for dismissal of the aiding and abetting claims asserted against them; only the “non-asset manager” Moving Beechwood Defendants do. Moving Beechwood Defs.’ Br. at 2, 11.⁹ The “non-asset manager” Moving Beechwood Defendants solely advance a

⁸ Kim also submits a declaration with his motion in which he asserts that he was only paid a salary and did not receive incentive-based compensation. *See* No. 18-cv-12018, ECF No. 291-2, Kim Declaration. As an initial matter, the TPC includes no allegations about the manner in which Kim was compensated, so it is unclear why he believes that topic is relevant here. In any event, matters outside the complaint, like the Kim Declaration, are not properly considered on a motion to dismiss. *See, e.g., Global Network Commc’ns, Inc. v. City of New York*, 458 F.3d 150, 156 (2d Cir. 2006) (court “committed reversible error when, in ruling that the complaint failed to state a claim for which relief could be granted, it considered matters outside plaintiff’s complaint”).

⁹ The decision not to seek dismissal on behalf of BAM II, BAM GP, and BAMAS is consistent with this Court’s June 21 Opinion & Order in the PPVA Action, which upheld the aiding and abetting claims asserted against BAM II and BAMAS. *See* PPVA MTD Op. at 28-29.

confused “substantial assistance” argument that misinterprets the allegations against them, *see id.* at 11-15, while the Bodner Instrumentalities appear to take issue with the TPC’s characterization of them as Bodner’s alter egos, ECF No. 474, Bodner Instrumentalities Br. at 1. These arguments are addressed specifically in Part III.3. below.

In any event, it bears emphasis here that the TPC unquestionably contains sufficient factual matter to demonstrate actual knowledge of the fraudulent scheme on the part of each those defendants, including through the roles of these mere instrumentalities in overly complex structures designed to camouflage true ownership and control and to further the interests of their controlling forces and alter egos. *See* Parts II.A.1.b.(1)-(2) (BRILLC Series C, Monsey Equities, Beechwood Trust Nos. 7-14); II.B.1.c-d (Beechwood Holdings, BBL), f-g (MSD Administrative, Beechwood Capital); II.B.2-4 (N Management, Beechwood Owner Trusts, 2016 Acquisition Trusts). Each of these instrumentalities necessarily had active knowledge of the fraud and breaches of fiduciary carried out by the Beechwood Entities and the Co-Conspirators in connection with the Platinum-Beechwood Scheme.

3. Each of the Moving Defendants Participated and Substantially Assisted in the Fraud and Breach of Fiduciary Duty

Substantial assistance exists where a defendant “affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed.” *Nigerian Nat’l Petroleum Corp. v. Citibank, N.A.*, No. 98-cv-4960 (MBM), 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999) (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992)). A defendant need not have been an active participant in the creation of the fraud since the “critical test for substantial assistance is whether the third party’s conduct made a substantial contribution to the perpetration of the fraud.” *In re Refco Inc. Sec. Litig.*, No. 07-cv-8663 (JSR), 2011 WL 13261982, at *3 (S.D.N.Y. Apr. 11, 2011) (internal quotations omitted).

Consistent with this understanding, courts have recognized that “substantial assistance can take many forms” *Winnick*, 406 F. Supp. 2d at 257 (internal quotation marks omitted); accord *Silvercreek Mgmt., Inc. v. Citigroup, Inc.*, 346 F. Supp. 3d 473, 492 (S.D.N.Y. 2018). Such forms may include, as particularly relevant here, “[e]xecuting transactions’ or helping a firm to present an ‘enhanced financial picture to others.’” *Silvercreek*, 346 F. Supp. 3d at 487 (quoting *In re Enron Corp.*, 511 F. Supp. 2d 742, 806 (S.D. Tex. 2005)); see also *In re Refco*, 2011 WL 13261982, at *2-3. In situations where co-conspirators enjoy a common and mutually beneficial relationship in a “symbiotic fraudulent scheme,” courts have rejected defendants’ attempts to cast their activities as “ordinary-course transactions.” *ABF Capital Mgmt. v. Askin Capital Mgmt., L.P.*, 957 F. Supp. 1308, 1330 (S.D.N.Y. 1997).

Despite the case law recognizing the expansive nature of substantial assistance, particularly in the context of an elaborate “symbiotic fraudulent scheme” such as the Platinum-Beechwood Scheme, the Moving Defendants argue that the TPC fails to allege sufficiently that each of them substantially assisted the fraudulent scheme that misappropriated more than \$300 million of SHIP’s assets and hundreds of millions or more from other victims over several years. Such an argument is not only untenable, it asks the Court to ignore hundreds of well-pled factual allegations that demonstrate the extent of the Co-Conspirators’ knowing participation in support of the fraud and breaches of fiduciary duty that took place with respect to SHIP. See Part II.A.1.a-g (Huberfeld, Bodner, Saks, Slota, Ottensoser, Fuchs, Kim); II.A.2-3 (Michael Nordlicht, Cassidy); II.B.1.a-g (BAM II, BAMAS, Beechwood Holdings, BBL, BAM GP, MSD Administrative, Beechwood Capital); II.B.2 (N Management); II.B.3.a-b (Feuer Family Trust, Taylor-Lau Family Trust); II.B.4 (2016 Acquisition Trusts); and II.A.1.b.(1)-(2) (BRILLC Series C, Monsey Equities, Beechwood Trust Nos. 7-14).

These specific allegations illustrate the Moving Defendants’ “substantial assistance” and “knowing participation” in furtherance of the fraud and breaches of fiduciary duty and are non-exhaustive. The TPC contains hundreds of paragraphs that go far beyond what is listed above as substantial assistance, and the Moving Defendants cannot baldly refute these well-pled allegations with blanket assertions that SHIP has not met its burden. Overwhelming factual allegations, which must be taken as true at this stage, describe the Moving Defendants’ affirmative assistance, active concealment, and failure to act in order to enable the fraud to proceed. *See Nigerian Nat’l Petroleum Corp.*, 1999 WL 558141, at *8. Certain arguments raised by specific Moving Defendants, however, bear special mention.

First, Saks and Fuchs both cite to *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273 (2d Cir. 2006), for the proposition that inaction alone is not sufficient to sustain a cause of action for aiding and abetting. Yet the TPC does not allege mere inaction—it alleges specific actions taken by each of the Moving Defendants in furtherance of the fraudulent scheme, including: (i) specific fraudulent transactions that they executed or in which they otherwise participated; (ii) conduct designed to conceal the deep connections between Beechwood and Platinum; and (iii) providing false information concerning the value of Platinum investments to Beechwood and its third-party valuation consultants, knowing that such information ultimately would make its way to SHIP. This is not a case where the defendants are alleged to have idly stood by while the fraud unfolded—these Moving Defendants actively participated in the fraud and made substantial efforts to prevent its detection, all to SHIP’s severe detriment. Saks’s attempt to argue otherwise is particularly baffling, given that the Court already has held that less fulsome allegations than those set forth in the TPC established Saks’s substantial assistance in the fraud. *See PPVA MTD Op. II* at 63-64. The TPC’s allegations plainly are sufficient at the pleading

stage to establish each Moving Defendant’s substantial assistance. *See Lerner*, 459 F.3d at 295 (asserting that “[s]ubstantial assistance occurs when a defendant [1]) affirmatively assists, [2]) helps conceal or [3]) fails to act when required to do so” (citing *Kaufman v. Cohen*, 307 A.D.2d 113, 126 (1st Dep’t 2003)); *see, e.g., Loreley*, 2016 WL 5719749, at *6 (denying motion to dismiss aiding and abetting claim where plaintiff was “premissing aiding and abetting liability against collateral managers on their selection of risky investments at [defendants’] behest”).

Second, the Bodner Instrumentalities’ wrongly depict the well-pled allegations against them as conclusory and artificially attempt to distance themselves from Bodner through mind-bending mental gymnastics. Each of the Bodner Instrumentalities was formed by Bodner and acted at Bodner’s direction and under his control. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Without regard to whether they qualify as Bodner’s alter egos—and they do—their own independent actions are sufficient to qualify as substantial assistance under the broad definition set forth above. The Bodner Instrumentalities’ contrary contention should be rejected.

Third, the Moving Beechwood Defendants’ substantial assistance arguments similarly are without merit. They are not alleged merely to be “holding companies” or trusts that did not actually engage in any affirmative conduct, as the Moving Beechwood Defendants’ contend. MSD Administrative siphoned off significant sums of money from SHIP’s accounts in exchange for unspecified [REDACTED] that it allegedly performed. The reality is that MSD Administrative was simply another vehicle through which the fraudsters could steal funds from

their putative [REDACTED] and that was precisely the purpose to which it was put. Beechwood Holdings and BBL also cannot plausibly argue that they did not provide substantial assistance as the sole shareholders of Beechwood Re and BBIL. With respect to BBL and Beechwood Holdings, the TPC alleges that: (i) BBL, [REDACTED] reaped “significant management fees and [was] provided significant assets for no consideration” and participated directly in the sham August 2016 transactions designed to perpetuate the fraud, TPC ¶¶ 93, 393; and (ii) Beechwood Holdings, [REDACTED] [REDACTED] also vacuumed up unearned “management fees” and participated in the August 2016 transactions, TPC ¶¶ 92, 392. Beechwood Capital substantially assisted in the fraud by lending its name as a “trade reference” to the other Beechwood Entities and serving as the vehicle for Platinum’s initial investment in Beechwood. *Id.* ¶¶ 9, 66. Finally, N Management—a Nordlicht and (later) Feuer-controlled entity and managing member of BRILLC—was instrumental in the formation of Beechwood Re and BBIL. *Id.* ¶ 33.

The Feuer Family Trusts, the Taylor-Lau Family Trusts, and the 2016 Acquisition Trusts distort the TPC’s allegations against them and then label those distorted allegations “illogical.” The TPC does not allege that those trusts, simply by their nature, concealed the ownership in Beechwood of Nordlicht, Huberfeld, Bodner, and Levy. Rather, the TPC alleges that the August 2016 Transactions—in which each of the trusts participated and without which those transactions could not have been accomplished—allowed Beechwood to continue falsely touting its family ownership, while still enabling Nordlicht, Huberfeld, and Bodner to walk away with a significant economic interest in Beechwood that they could cash out upon a sale of Beechwood (which ultimately occurred in 2017). In other words, these trusts substantially assisted not just in continuing to conceal the ties between the Platinum and Beechwood, but also in providing the

fraudsters with the opportunity to cash out of the scam. These allegations are sufficient to establish substantial assistance.

Fourth, and finally, several Moving Defendants inaccurately argue that the TPC does not plead that their conduct proximately caused SHIP's harm. The concept of proximate cause is "embedded into the substantial assistance element," and it is established "where a plaintiff's injury was a direct or reasonably foreseeable result of the defendant's conduct." *Silvercreek*, 346 F. Supp. 3d at 488. Where, as here, a plaintiff "allege[s] a highly interdependent scheme," proximate causation is adequately pled if the plaintiff alleges "that a defendant actively assisted and facilitated the fraudulent scheme itself," even if that defendant's assistance is not tied to a particular misstatement by the primary tortfeasor. *ABF Capital Mgmt.*, 957 F. Supp. at 1328; *accord King Cty., Wash v. IKB Deutsche Industriebank AG*, 751 F. Supp. 2d 652, 665-66 & n.101 (S.D.N.Y. 2010) (allegations sufficient to plead proximate causation where plaintiffs alleged "highly interdependent scheme"); *Nathel v. Siegal*, 592 F. Supp. 2d 452, 470 (S.D.N.Y. 2008) (denying motion to dismiss where it was reasonably foreseeable that defendants' execution of partnership agreements that misrepresented their expertise, and defendants' continued concealment of their true professional backgrounds, "would cause Plaintiffs to invest in the partnerships and to suffer the loss of virtually all their investment."). More broadly, "the issue of proximate cause is fact laden and inappropriate for a motion to dismiss at the pleadings stage." *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 468 F. Supp. 2d 508, 531 (S.D.N.Y. 2006); *Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 351 F. Supp. 2d 79, 91 (S.D.N.Y. 2004) ("[P]roximate causation generally remains an issue of fact for the jury.").

Here, the Platinum-Beechwood Scheme is a paradigmatic example of a "highly interdependent scheme," as it involves a multitude of individuals and entities, all with unique

roles, working in concert to achieve the scheme’s fraudulent ends. And as explained in detail above, the TPC’s well-pled allegations establish that each of the Moving Defendants actively assisted and facilitated the fraudulent scheme. That is enough to establish proximate causation at the pleading stage.

D. SHIP Has Sufficiently Stated a Claim for Civil Conspiracy Against All Moving Defendants

To “properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement.” *Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dep’t 2012). A “plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan.” *Ray Legal Consulting Grp. v. DiJoseph*, 37 F. Supp. 3d 704, 723 (S.D.N.Y. 2014) (citation omitted). SHIP’s detailed factual allegations about each of the Moving Defendants—all of whom served as co-conspirators in a scheme to commit multiple underlying harms—adequately state a claim for civil conspiracy.¹⁰

1. The Intra-Corporate Conspiracy Doctrine is Inapplicable

The Moving Beechwood Defendants cannot escape liability by reliance on the narrow intra-corporate conspiracy doctrine. “Under the intracorporate conspiracy doctrine, the officers, agents, and employees of *a single corporate entity*, each acting within the scope of [his] employment are legally incapable of conspiring together.” *Christians of California, Inc. v. Clive Christian New York, LLP*, No. 13-cv-275 (KBF), 2015 WL 468833, at *9 (S.D.N.Y. Feb. 3, 2015); *see also Simon v. Phillip Morris, Inc.*, 86 F. Supp. 2d 95, 121 (S.D.N.Y. 2000)

¹⁰ Ottensoser does not move to dismiss the civil conspiracy claim against him.

(“component corporations of a single integrated entity may be considered separate and capable of conspiring” for purposes of New York’s substantive tort law). Simply because an individual may have an interest in or control over an entity is insufficient to trigger the intra-corporate conspiracy doctrine. *U.S. ex rel. Grueba v. Rosicki, Rosicki & Assocs., P.C.*, 318 F. Supp. 3d 680, 705 (S.D.N.Y. 2018) (Rakoff, J.).

Here, the Co-Conspirators consist of at least Feuer, Taylor, Levy, Nordlicht, Huberfeld, Bodner, Manela, Beren, Saks, Kim, Steinberg, Feit, Small, Landesman, SanFilippo, Ottensoser, Slota, Fuchs, Michael Nordlicht, Cassidy, the Beechwood Entities, Platinum Management, N Management LLC, and the 2016 Acquisition Trusts. TPC ¶ 1 n.1. The TPC demonstrates that these individuals and entities served many roles for many distinct entities and organizations, and no basis exists in the TPC to conclude that all are officers, agents, or employees of a single corporate entity. This is fatal to their assertion of this defense. *See Grueba*, 318 F. Supp. 3d at 705 (declining to apply intra-corporate conspiracy doctrine where complaint did not plead common ownership across all conspirators or that the companies were wholly owned subsidiaries of the principals).

While one or more of the Co-Conspirators may have at one time or another been employed by various Beechwood or Platinum entities, the TPC does not allege that each of these entities and individuals were acting on behalf of a single entity. To the contrary, the TPC alleges a broad and wide-ranging scheme across many entities and individuals, where each of the Moving Beechwood Defendants conspired with Platinum and Platinum employees to harm SHIP. *See* TPC ¶¶ 446-452. There is also quite the irony in the Moving Defendants’ attempt to invoke the intra-corporate conspiracy doctrine when the very purpose of creating the intricate web of LLCs, trusts, and corporate ownership was to obscure on whose behalf any of the Co-

Conspirators were acting at any given time and conceal the Platinum-Beechwood interconnectedness.

2. The Factual Allegations in the TPC Sufficiently State a Conspiracy Claim Against Each of the Moving Crossclaim and Third-Party Defendants

As outlined in Part II above, the TPC meets all of the elements and pleading requirements concerning civil conspiracy as to each Defendant by alleging: (1) a cognizable underlying tort, (2) an agreement by each defendant to commit the tort, and (3) an overt act by each defendant in furtherance of the agreement. *Perez*, 97 A.D.3d at 560.

a. David Bodner and his Alter-Ego Entities (Beechwood Trusts Nos. 7-14, Monsey Equities, LLC, and BRILLC Series C)

Bodner—one of the founders and owners of Platinum—was a knowing and active participant in the Platinum-Beechwood conspiracy. *See* Part II.A.1.b (Bodner). Bodner himself also took several overt steps in furtherance of the Co-Conspirators’ illegal objectives. *Id.* Bodner committed each of these acts and others in furtherance of the Co-Conspirators’ common fraudulent goal to acquire and misuse large sums of money from SHIP and others. Bodner’s efforts to keep SHIP and others from knowing the truth about Beechwood led to the establishment of alter-ego entities and trusts, including Beechwood Trusts Nos. 7-14, BRILLC Series C, and Monsey Equities. As alter egos of Bodner, each of these entities is also liable for furthering the conspiracy that resulted in the fraud against SHIP and breaches of fiduciary duties to SHIP.

b. Murray Huberfeld

Huberfeld, a Platinum founder, was an architect of the Platinum-Beechwood conspiracy. *See* Part II.A.1.a (Huberfeld). As this Court has ruled in the context of similar allegations in the PPVA Action, Huberfeld was one of the “primary decision makers” at Platinum, April 11, 2019

Order at 49, and his extensive role in the establishment of the Platinum-Beechwood conspiracy is outlined in the detailed allegations of the TPC.

c. Moving Beechwood Defendants

The Moving Beechwood Defendants' knowing and active participation in the Platinum-Beechwood conspiracy is detailed above in Parts II.B.1 (Beechwood Entities) and II.B.3-4 (Beechwood Owner Trusts, 2016 Acquisition Trusts), which shows that each of the Moving Beechwood Defendants played a unique and integral role within the Platinum-Beechwood conspiracy, which has committed several underlying torts, including (1) fraudulent inducement of SHIP to enter the IMAs, and (2) breach of fiduciary duty by intentional misuse of funds that were to be invested conservatively for SHIP's benefit.

These allegations demonstrate that SHIP has satisfactorily pled the elements of civil conspiracy sufficiently against each of these defendants by showing (1) the cognizable underlying harms, (2) the agreement by the entity or its controlling alter egos to commit the harms, and (3) overt acts in furtherance of the conspiracy. *See Perez*, 97 A.D.3d at 560.

d. Bernard Fuchs

Fuchs, as a central figure within the Platinum enterprise, was part of the engine that drove many of Platinum's illegal activities, and he benefited from these activities as an owner of Platinum Management. *See Part II.A.1.f (Fuchs)*. Fuchs's intimate familiarity with the activities of Platinum, and his frequent communications with Nordlicht, Bodner, Huberfeld, and Levy, combine to create a plausible inference that he agreed to the formation of Beechwood, the fraudulent statements that Feuer, Taylor, Levy and others made to attract SHIP to invest its funds, and the misuse of the money that SHIP entrusted with Beechwood.

Fuchs's arguments for dismissal of the civil conspiracy count against him are without merit. While similarities exist between SHIP's claims of civil conspiracy and aiding and

abetting against Fuchs, the civil conspiracy count is not “duplicative” of aiding and abetting and does not warrant dismissal because conspiracy might be proved where other claims could fail. This Court has denied motions to dismiss aiding and abetting and civil conspiracy claims in the related SHIP Action and PPVA Action. *See* PPVA MTD Op. at 51-52.¹¹

e. Michael Nordlicht and Kevin Cassidy

Michael Nordlicht and Kevin Cassidy’s (the “Agera Executives”) knowing and active participation is outlined above in Parts II.A.2-3 (Michael Nordlicht, Cassidy). Both played their role in the conspiracy and acted to induce SHIP to invest \$50 million of its assets—above and beyond the \$270 million that SHIP entrusted with Beechwood through the IMAs—in a sham business deal to funnel money into Platinum subsidiary PGS, with little to no possibility of positive return for SHIP. TPC ¶¶ 285-310. These facts support a plausible inference that the Agera Executives were knowing and voluntary participants in the conspiracy to exploit SHIP illegally. On the basis of similar allegations concerning the same transaction, the Court found that PPVA had adequately pled scienter against the Agera Executives. *See* PPVA MTD Op. at 60-61.

f. Daniel Saks

SHIP has also alleged sufficient facts to show that Saks was a key figure in the Platinum-Beechwood conspiracy to defraud SHIP and breach the fiduciary duties owed to SHIP. *See* Part II.A.1.c (Saks). By virtue of his control of BAM, along with his prior employment with Platinum, the TPC sufficiently alleges that Saks was a knowing and willing participant in the

¹¹ SHIP recognizes that the Court dismissed civil conspiracy claims as duplicative in the PPVA Action with respect to defendants against whom it had upheld aiding and abetting claims. PPVA MTD Op. II at 29, 63 n.15. In the event that the Court dismisses SHIP’s aiding and abetting claims against any Moving Defendant, SHIP respectfully submits that its civil conspiracy claim should be sustained with respect to each such defendant.

Platinum-Beechwood conspiracy and took each of the aforementioned actions in furtherance of its aims. TPC ¶ 37. SHIP has adequately pled civil conspiracy against Saks.

g. Will Slota

SHIP also demonstrates that a claim for civil conspiracy against Slota, a senior manager at Platinum who moonlighted as COO of Beechwood Re and BAM, is appropriate. *See* Part II.A.1.d (Slota). The TPC's detailed allegations sufficiently demonstrate that Slota was a key participant in the Platinum-Beechwood conspiracy.

h. Stewart Kim

SHIP has also demonstrated that the claim for civil conspiracy against Kim, the Beechwood Re and BAM Chief Risk Officer, a high level executive in Beechwood, is well pled. *See* Part II.A.1.g (Kim). The TPC's detailed allegations about Kim's time at Platinum, his knowing involvement in planning and orchestrating the Platinum-Beechwood Scheme, and his work while at Beechwood, with the knowledge he gained from working at Platinum, are enough to demonstrate that Kim was a key participant in the Platinum-Beechwood conspiracy.

E. The Motions to Dismiss SHIP's Unjust Enrichment Claims Should Be Denied

Under New York law, a claim for unjust enrichment requires (1) that the defendant was enriched, (2) at the plaintiff's expense, and (3) it is against equity and good conscience to permit the defendant to retain what plaintiff is seeking to recover. *Briarpatch Ltd., L.P. v. Phoenix Pictures Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). SHIP has alleged sufficient facts to maintain unjust enrichment claims against each moving party. Each of the Moving Defendants alleges that SHIP did not plead sufficient factual allegations and lacked the particularity required by Rule 9(b) to support its claims. The Third-Party Defendants overlook the overwhelming factual allegations laid out in the TPC.

1. Will Slota

Slota argues that no allegations in the TPC show that Slota was enriched by SHIP, relying on buzzwords such as “threadbare,” and “conclusory.” Slota Br. at 21-22. Slota, however, served as Beechwood’s Chief Operating Officer and was instrumental in perpetrating Beechwood’s scheme. *See* Part II.A.1.d (Slota). The falsely inflated valuations resulted in deceptively procured funds from SHIP, and unearned performance fees, from which Slota benefited.

2. David Ottensoser

Ottensoser argues that the TPC lacks sufficient factual allegations against him and therefore, “just as this Court dismissed the unjust enrichment against Ottensoser in the related Trott Litigation, it should dismiss SHIP’s unjust enrichment claim against Ottensoser here.” Ottensoser Br. at 1. Here, however, SHIP has alleged sufficient factual allegations as to Ottensoser. *See* Part II.A.1.e (Ottensoser). As a member of the risk committee, Ottensoser was responsible for assessing the risk associated with PPVA’s assets and investments, and such risk assessment materially affected the value of those assets and investments. Ottensoser benefited from the inflated valuations associated with PPVA.

3. SHIP’s Unjust Enrichment Claims Are Not “Too Attenuated” as to Huberfeld, Cassidy, and Michael Nordlicht

In addition to arguing that SHIP’s unjust enrichment claim against him fails because there are no “particularized facts” related to him, Huberfeld also argues the claim is “too attenuated” in that “SHIP does not aver that Huberfeld had any relationship with it.” Huberfeld Br. at 10-11. Both Cassidy and Michael Nordlicht echo Huberfeld in claiming their connection with SHIP is “too attenuated” to state a claim for unjust enrichment. ECF No. 476, Cassidy & Nordlicht Br. at 18.

First, the TPC references Huberfeld by name over 100 times. To claim that no “particularized facts” are provided ignores the narrative of over 400 paragraphs in the TPC. *See* Part II.A.1.a (Huberfeld). Huberfeld’s ownership, control, and funding of Beechwood Re flies in the face of his bald assertion that an unjust enrichment claim against him is “too attenuated.”

Cassidy’s similar assertion is equally unfounded. *See* Part II.A.3 (Cassidy). Cassidy was intricately involved with all aspects of the Agera Transactions and participated in meetings with SHIP regarding the transactions. *Id.* Cassidy received interests in AGH Parent worth over \$13 million through Starfish Capital, an entity controlled by Cassidy. *Id.* The TPC clearly outlines how he was unjustly enriched.

Michael Nordlicht also alleges that the TPC contains no “single act of direct dealing” between him and SHIP, yet the TPC alleges such a direct transaction between the two—Agera. *See* Part II.A.2 (Michael Nordlicht). In connection with those transactions, Michael Nordlicht was handed direct ownership of Agera for no consideration. Given these factual allegations, to claim the relationship between Michael Nordlicht and SHIP is “too attenuated” to support a claim for unjust enrichment is disingenuous, and his motion should be denied.

4. SHIP’s Unjust Enrichment Claims Are Not Barred By The IMAs

Fuchs and Bodner mistakenly assert that SHIP’s unjust enrichment claim duplicates its claims arising under the IMAs. Fuchs and Bodner were not parties to the IMAs and the claims against them are not “subsumed” by SHIP’s breach of contract claims against the Beechwood Advisors. The factual allegations against Fuchs and Bodner are not based on performance fees payable under the IMAs. Instead, SHIP’s allegations relate to Fuchs’ and Bodner’s ownership interests and direct actions related to Platinum and Beechwood investments. *See* Parts II.A.1.b, f (Bodner, Fuchs). By virtue of their ownership interests in the many investments, Bodner and

Fuchs received the benefit of SHIP's investment money. The existence of the IMAs does not bar claims of unjust enrichment against Fuchs, with whom SHIP had no contractual agreement.

Despite Bodner's insistence that the TPC allegations against him are contractual in nature and relate to the IMAs only, he is wrong. Bodner, as one of the owners of Beechwood through the Beechwood Owner Trusts, the BRILLC Series Entities, the BRILLC Series Members, and the 2016 Acquisition Trusts, was a beneficiary of performance fees paid to the Beechwood Entities and monies earned from transactions in which Beechwood favored its own interests or Platinum's interests over SHIP's interests. *Id.* ¶ 462. Bodner was not a party to the IMAs.

The Moving Beechwood Defendants mimic the arguments of Bodner, Cassidy, and Michael Nordlicht, claiming that the IMAs expressly govern "the rights at issue" and "is true for both signatories and non-signatories alike." Beechwood Br. at 17. The Moving Beechwood Defendants, however, are mistaken that SHIP cannot maintain an unjust enrichment claim simply because the IMAs exist. *Green v. Beer*, No. 06-cv-4156, 2007 WL 576089, at *3 (S.D.N.Y. Feb. 22, 2007) ("[T]he existence of a contract does not require dismissal of an unjust enrichment claim where the claim "is based on alleged wrongdoing not covered by the contract.")). SHIP's unjust enrichment claim is rooted in the misrepresentations and concealments that favored the interests of Platinum and Beechwood entities and individuals to SHIP's detriment, which resulted in unearned performance fees or monies earned from investment transactions, much of which had nothing to do with IMAs. The cases cited by the Moving Beechwood Defendants are inapplicable to the facts alleged in the TPC. *See, e.g., SmartStream Techs., Inc. v. Chambadal*, No. 17-cv-2459, 2018 WL 1870488, at *7 (S.D.N.Y. Apr. 16, 2018) (dismissing claim concerning employee benefit plan and involving straightforward nonperformance of "an express

contract [that] covered the subject matter of the dispute); *Vitale v. Steinberg*, 764 N.Y.S.2d 236, 239 (1st Dep’t 2003) (same).

5. The Bodner Instrumentalities

The Bodner Instrumentalities argue that SHIP’s unjust enrichment claims must fail because there are no particularized allegations as required by Rule 9(b). Moreover, they claim that the entities have “not been accused of any wrongdoing.” The elements of unjust enrichment, however, require no affirmative wrongdoing on their part; “innocent” parties can be unjustly enriched. Bodner Instrumentalities Br. at 1. Regardless, these entities were instrumentalities owned and controlled by Bodner in perpetration of the Beechwood-Platinum Scheme and SHIP has met its burden in pleading unjust enrichment as to these Defendants. *See* Parts II.A.1.b.(1)-(2) (BRILLC Series C, Monsey Equities, Beechwood Trusts Nos. 7-14).

6. Daniel Saks and Stewart Kim

Saks hangs his hat on the singular argument that because the TPC alleges, “[t]o the extent that [the Co-Conspirators] received the proceeds of unearned Performance Fees or monies earned from transactions favoring Beechwood’s or Platinum’s interests over SHIP’s,” no facts exist to suggest that Saks was unjustly enriched. Kim also argues there are no allegations that he stood to benefit from SHIP’s relationships with Beechwood. To the contrary, the TPC contains numerous factual allegations to support that Saks and Kim were unjustly enriched at SHIP’s expense. *See* Part II.A.1.c, g (Saks, Kim). Kim also argues that the TPC does not allege that he had any motive to benefit himself at SHIP’s expense, but motive is not an element of a claim for unjust enrichment. *Briarpatch Ltd.*, 373 F.3d at 306.

Saks, Kim, and the other Moving Defendants attempt to impose an unreasonably high standard of proof on SHIP at the notice pleading stage. The Court should reject such efforts. The TPC details the numerous investments and vast sums of money and financial benefit that

were unjustly received by the Moving Defendants. The fact that SHIP cannot presently trace the exact flow of funds through numerous Moving Defendants and pin an exact dollar amount on each individual at the pleading stage does not provide an adequate basis for dismissal. The fraudulent scheme's central mission was to secure SHIP's funds and convert them for the Moving Defendants' own benefit, at SHIP's expense. The Moving Defendants were not working for free, nor have any renounced ownership interests in the entities to which SHIP funds flowed. Thus, equity and good conscience require the Moving Defendants be accountable for their unjust enrichment. The motions to dismiss SHIP's claims for unjust enrichment should all be denied.

F. SHIP Has Not Made Any Material Admissions, and the Doctrine of *In Pari Delicto* Is Inapplicable

The Moving Beechwood Defendants seek dismissal because SHIP has not yet filed an answer to counterclaims raised in the SHIP Action by a subset of these Moving Defendants who are also defendants in the SHIP Action – BBIL, Beechwood Re, BAM, BRILLC, Feuer, Taylor, and Narain (collectively, the “Beechwood Defendants in the SHIP Action”). This frivolous argument relies on a flagrant mischaracterization of the procedural record and misstates the law. As the Moving Beechwood Defendants know well, SHIP ardently disputes the merits of the counterclaims brought by the Beechwood Defendants in the SHIP Action and long ago made an application to this Court to move to dismiss those claims, subject to scheduling details being worked out.

On March 20, 2019, the Beechwood Defendants in the SHIP Action filed their Answer and Counterclaims to SHIP's Second Amended Complaint in *SHIP v. Beechwood Re, et al.*, 18-cv-6658 (JSR), ECF No. 190.¹² The Beechwood Defendants in the SHIP Action asserted five

¹² In raising this argument, the Moving Beechwood Defendants rely on numerous documents outside the pleadings before this Court in the *Cyganowski v. Beechwood Re, Ltd.*, 18-cv-12018

counterclaims in all: three for advancement or indemnification of expenses under the IMAs and two relating to a February 2015 Surplus Note transaction involving SHIP, BBIL and BRILLC. ECF No. 190. Contemporaneously with the counterclaims, the Beechwood Defendants in the SHIP Action also filed a motion for partial summary judgment only on the three Beechwood counterclaims for third-party advancement. ECF No. 191-92. On April 5, 2019, the parties convened a call with the Court for SHIP's application to set a briefing schedule on a cross-motion for partial summary judgment on the advancement counterclaim and a motion to dismiss the remaining counterclaims.¹³ This Court set a schedule on the motion for partial summary judgment but denied SHIP's request for a briefing schedule on its potentially dispositive motions, noting that "SHIP will not be prejudiced from bringing any motions - whether a motion to dismiss or a motion for summary judgment." *See* ECF No. 481-1, Lipsius Decl. Ex. 1. Following oral argument, this Court denied Beechwood's motion for partial summary judgment on first-party advancement. ECF No. 392, 5/17/19 Op. & Order. The Beechwood Defendants in the SHIP Action have since moved for reconsideration of that decision [ECF No. 430], and the motion remains pending before the Court as of the date of this filing.

case, and even rely on correspondence and affidavits to support their argument. "[W]hen matters outside the pleadings are presented in response to a 12(b)(6) motion,' a district court must either "exclude the additional material and decide the motion on the complaint alone" or 'convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material.'" *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000) (quoting *Fonte v. Bd. of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir. 1988)). As such, this Court should either decide this motion on the TPC alone or convert the Moving Beechwood Defendants' motion to one for summary judgment. If the latter, the motion should be denied for failing to comply with Local Rule 56.1 and because there are (as demonstrated in this brief) many disputes of material fact regarding the claims asserted.

¹³ The Beechwood Defendants in the SHIP Action opposed this request, stating that briefing on a motion to dismiss the counterclaims "should be on a separate schedule" from the motion for partial summary judgment. *See* June 28, 2019 Declaration of Robert C. Santoro, Ex. 1.

Despite previously demanding that the briefing schedules for the advancement claim be separated from any briefing on the Beechwood Defendants in the SHIP Action's counterclaims, the Moving Beechwood Defendants now argue that SHIP should be deemed in default and that Beechwood's self-serving allegations should be deemed admitted. ECF No. 477, Moving Beechwood Defs.' Br. at 7. Rather than sling default accusations, the parties, in consultation with the Court, should confer and set a schedule for briefing on the motion to dismiss at an appropriate time (after the motion to reconsider is resolved or otherwise).

Routine scheduling matters done in consultation with the Court do not implicate defaults. The Moving Beechwood Defendants have not moved for a default judgment on their counterclaims, because they know they do not have grounds to do so. Instead, they raise a preposterous argument in their motion to dismiss. A default judgment must be secured as a prerequisite to having allegations in a complaint deemed admitted. "[A] party's default is deemed to constitute a concession of all well pleaded allegations of liability." *Greyhound Exhibit Grp., Inc. v. E.L.U.L. Realty Corp.* 975 F.2d 155, 158 (2d Cir. 1992); see *Finkel v. Romanowicz*, 577 F.3d 79, 84 (2d Cir. 2009) ("In light of [defendant's] default, a court is required to accept all of the Joint Board's factual allegations as true..."); see also *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 62, 65 (2d Cir. 1981) ("a district court retains discretion under [Federal Rule of Civil Procedure] 55(b)(2) once a default is determined to require proof of necessary facts and need not agree that the alleged facts constitute a valid cause of action."). The single case the Moving Beechwood Defendants rely on in support of their argument acknowledges that a default is a prerequisite to deeming allegations admitted. See *SG Equip.*

Fin. USA Corp. v. Nikitin, No. 09-cv-7167, 2010 WL 743762, at *1 (S.D.N.Y. Mar. 2, 2010) (deeming allegations in complaint to be admitted after certificate of default was entered).¹⁴

The Moving Beechwood Defendants further argue that the doctrine of *in pari delicto* is “triggered by SHIP’s admissions that it committed fraud against Beechwood,” and as such, bars all of SHIP’s claims against those Defendants. ECF No. 478 at 19. The Moving Beechwood Defendants’ entire *in pari delicto* argument to bar all of SHIP’s claims in the TPC stems from their erroneous assertion that SHIP has admitted through a purported procedural default (that has not been pursued) that SHIP has committed fraud against Beechwood. For the reasons stated immediately above, SHIP has not made any such admissions or concessions with respect to the counterclaims brought by the Beechwood Defendants in the SHIP Action.

Rather than deal with SHIP’s well-pled allegations, which at the motion to dismiss stage must be assumed to be true, the Moving Defendants hide from those allegations. SHIP has alleged with detail that it is the victim of a longstanding fraudulent scheme as a result of the tortious and illicit conduct of the Moving Defendants and other tortfeasors. Any wrongdoing alleged against SHIP in the Beechwood Defendants’ counterclaims in the SHIP Action, by contrast, is not assumed to be true in considering SHIP’s affirmative claims here. *See, e.g. Gary/Chi. Int’l Airport Auth. v. Zaleski*, 144 F. Supp. 3d 1019, 1022 (N.D. Ind. 2015) (rejecting similar argument because “any defendant who files a third-party complaint would necessarily be deemed to admit all the allegations of the original complaint—a result that would force

¹⁴ The Moving Beechwood Defendants also cite to a memorandum of law filed in support of a motion for reconsideration in *Abraham v. Leigh*, No. 17-cv-5429, 2018 WL 3639930 (S.D.N.Y. June 27, 2018) in support of their argument. A memorandum of law, particularly one filed in a case that has nothing to do with this case, has no bearing on this Court’s decision-making process here.

defendants to either defend themselves from the underlying claims or seek contribution, but never both.”).¹⁵

G. The Trusts Are Proper Parties to This Action

The Feuer Family Trust, Taylor-Lau Family Trust, and the 2016 Acquisition Trusts attempt to extricate themselves by arguing that they are not proper parties to this suit because only a trustee, and not a trust, may be sued. This argument ignores the extensive allegations (not only in SHIP’s TPC but also in CNO’s Crossclaim Complaint against those same trusts) that demonstrate that each of these trusts was established as a mere alter ego of Feuer, Taylor, Levy, and the other Co-Conspirators for the specific purposes of disguising true ownership of Beechwood and of siphoning off and shielding ill-gotten gains from the Platinum-Beechwood Scheme. TPC ¶¶ 9, 12, 14, 15, 18-21, 25-29, 31, 33, 34.

As an initial matter, at least with respect to the Feuer Family Trust and the Taylor-Lau Family Trust, any jurisdictional challenge has been waived. Under the Federal Rules of Civil Procedure, the defense of lack of capacity to sue is waived if not raised “by specific negative averment” in the answer, or by motion before the answer is filed. Fed. R. Civ. P. 9; *Lang v. Texas & Pacific Ry. Co.*, 624 F.2d 1275, 1277 (5th Cir. 1980); *Summers v. Interstate Tractor & Equip. Co.*, 466 F.2d 42, 49 (9th Cir. 1972); *see also Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor, Inc.*, 929 F.2d 343 (7th Cir. 1991) (defendant waived right to use capacity defense in motion to dismiss first amended complaint because of failure to timely raise capacity issue in direct negative averment); *Windbourne v. Eastern Air Lines, Inc.*, 479 F. Supp. 1130, 1155 (E.D.N.Y. 1979), *rev'd on other grounds*, 632 F.2d 219 (2d Cir. 1980) (lack of

¹⁵ To the extent that Beechwood Re, BBIL, and BAM I also move to dismiss Count Eight of the TPC for contractual indemnification, the motion should be denied because only their meritless *in pari delicto* argument could possibly provide a basis for dismissal.

capacity defense waived if not raised in answer). Both the Feuer Family Trust and the Taylor-Lau Family Trust were named as third-party defendants in CNO's Third-Party Complaint in this action. Both parties filed a motion to dismiss without raising the issue of capacity. Should the remaining parties' motion be granted, it would lead to the inconsistent result of allowing certain trusts to be named parties to the related Actions, while allowing others to avoid liability.

In any event, courts may consider a trustee to be substituted for a named-party trust in a lawsuit, where necessary. *See Raymond Loubier Irrevocable Tr. v. Loubier*, 858 F.3d 719, 731 (2d Cir. 2017) (stating "because traditional trusts cannot sue or be sued except through their trustees that the named party trusts must be deemed only proxies for their trustees"). Here, such a move would elevate form over substance and add an additional party (the trustee) without any corresponding benefit, as the control persons already are defendants. Where named parties technically lack the capacity to sue or be sued, such a deficit may be overlooked where no prejudice to the opposing party can be shown. *Stephentown Concerned Citizens v. Herrick*, 223 A.D.2d 862, 866 n.2 (3d Dep't 1996) (finding that where Plaintiff "sued in its association name alone" "[s]uch a defect is ... not jurisdictional [] and, given that respondents have failed to show any prejudice, the court may disregard any irregularity in the pleading") (citations omitted). Here, the trusts cannot allege prejudice, and in each case the trustee was served on the trust's behalf. Thus, in the event this Court were to find that the Feuer Family Trust, Taylor-Lau Family Trust, and 2016 Acquisition Trusts are not proper parties, the proper remedy is substitution, not dismissal.

IV. CONCLUSION

For all of the foregoing reasons, SHIP respectfully submits that each of the Moving Defendants' motions to dismiss should be denied in their entirety.

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