UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANT SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA'S MEMORANDUM OF LAW IN OPPOSITION TO THE RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTORY STATEMENT

The PPCO Receiver seeks broad summary judgment rulings that the Beechwood Advisers acted as SHIP's agents for all purposes in negotiating and executing the December 2015 and March 2016 secured loan transactions and that unspecified knowledge they allegedly gained in connection with those transactions should be imputed to SHIP as a matter of law.[1] As a threshold matter, the Receiver has not presented any evidence that those transactions were fraudulent as to PPCO Master Fund's creditors, as established in SHIP's affirmative motion for summary judgment. *See* No. 18-cv-12018, ECF Nos. 498-501. That foundational evidentiary failure alone requires denial of the Receiver's motion, as no guilty conduct or knowledge exists that can be imputed to SHIP. The Receiver's motion also signals a remarkable, but ultimately inevitable, concession: the Receiver does not have—and never had—any evidence whatsoever to support her core factual contention that SHIP actively directed and negotiated those transactions. Confronted with the reality that this evidentiary void all but dooms her claims against SHIP, the Receiver tries in vain to salvage those claims by shifting course and seeking to impute to SHIP some unspecified knowledge of the very entities that indisputably were engaged in a massive fraud against SHIP at the time of the December 2015 and March 2016 transactions. And she does so despite the fact that she must stand in the shoes of Platinum and its principals, who are the architects of that very fraud in concert with Beechwood. As with her now-discredited and abandoned theory of SHIP's active direction and involvement, the Receiver's imputation theory is both factually unsupported and legally flawed.

First, the Receiver overstates the level of SHIP's contractual control over the Beechwood

[1] The Receiver defines the "Beechwood Advisers" as Beechwood entities BBIL, Beechwood Re, and BAM. *See* No. 18-cv-12018, ECF No. 493, Receiver's Memorandum of Law in Support of Motion for Partial Summary Judgment ("Receiver Mem.") at 2. This memorandum will distinguish between each of the Beechwood Advisers as necessary. In addition, references to "Beechwood" refer to the collection of entities operating under that umbrella.

Advisers and fails to carry her threshold burden to establish an agency relationship. The investment management agreements ("IMAs") that governed the relationship between SHIP and Beechwood granted the Beechwood Advisers virtually unlimited discretion to invest $270 million in SHIP's capital, subject only to investment guidelines that the Beechwood Advisers agreed up front to follow and that could only be changed with the Beechwood Advisers' express written consent. Under well-established New York law, SHIP's near-total lack of control over the Beechwood Advisers precludes a finding that the Beechwood Advisers acted as SHIP's agents.

Second, even if a principal-agent relationship were established, the Receiver's motion fails entirely to identify the specific knowledge and conduct of the Beechwood Advisers that she wishes to impute to SHIP. It is hornbook law that the knowledge of an agent may be imputed to the principal only to the extent that such knowledge is acquired within the scope of the agency relationship. Because the Receiver does not identify the relevant knowledge of the Beechwood Advisers—and instead simply states that she "will establish [it] at trial," Receiver Mem. at 22—there is no way for SHIP or this Court to assess whether that unspecified knowledge was in fact acquired while the Beechwood Advisers were acting as SHIP's agents. This is no mere technicality. The Beechwood Advisers and their affiliates acted in multiple capacities throughout the relevant time period, including on their own behalf, for Platinum, and for other clients. More to the point, the evidence shows that Beechwood and Platinum both understood that Beechwood was acting on its own behalf, not on SHIP's behalf, in negotiating and executing the December 2015 and March 2016 transactions. SHIP was merely a means to an end in those transactions, with its cash and assets used as a piggy bank that Beechwood believed it could access at any time and for any reason. Given this evidentiary record, the Receiver's argument for imputing Beechwood knowledge to SHIP is both unjustifiable and brazen.

Third, the Receiver's attempt to avoid application of the adverse interest exception similarly fails. No dispute exists that, at the time of the December 2015 and March 2016 transactions, SHIP was the victim of an ongoing fraud perpetrated by Beechwood and Platinum. Where the principal is the target, and not the beneficiary, of the agent's fraudulent conduct, the adverse interest exception applies. That conclusion cannot be altered by pointing to non-fraudulent conduct by the agent that results in some benefit, no matter how marginal, to the principal.

Finally, the Receiver's contention that SHIP somehow ratified Beechwood's unspecified and unproven fraudulent conduct by filing a Proof of Claim in the receivership proceedings has no merit. As a threshold matter, the Receiver has not established that the December 2015 and March 2016 transactions were themselves animated by an underlying fraudulent purpose. The Receiver's fundamental failure to make that showing precludes application of the ratification doctrine—SHIP cannot "ratify" non-existent knowledge of fraudulent intent or wrongful conduct. The Receiver also cannot use the filing of a Proof of Claim as a basis to contend that SHIP has ratified Beechwood's entire fraudulent scheme against it. If pointing to an agent's non-fraudulent conduct is insufficient to defeat application of the adverse interest exception, then the principal's "ratification" of that non-fraudulent conduct necessarily is insufficient as well. In any event, the Receiver has failed to put forth requisite evidence that, at the time SHIP filed the Proof of Claim in March 2019, SHIP had knowledge of all material facts surrounding the December 2015 and March 2016 transactions. The Receiver's attempt to invoke the ratification doctrine thus fails.

STATEMENT OF FACTS

In light of the Court's familiarity with the general background of this litigation, and in the interest of brevity, only a condensed summary of the key facts relevant to the resolution of this motion is provided. SHIP respectfully refers the Court to the Receiver's Statement of Material

Facts Pursuant to Local Civil Rule 56.1 ("Receiver's SMF") and SHIP's Counterstatement of Additional Material Facts ("SHIP CAMF") for a fuller factual recitation.

A. SHIP Is Fraudulently Induced to Enter Into the IMAs, Which Granted the Beechwood Advisers Virtually Unlimited Discretion to Invest $270 Million in SHIP's Money.

Between May 2014 and January 2015, SHIP executed three IMAs with the Beechwood Advisers. SHIP CAMF ¶ 8. Pursuant to the IMAs, SHIP entrusted the Beechwood Advisers with a total of $270 million in capital for investment on SHIP's behalf. *Id.* ¶ 14. The Beechwood Advisers deployed a substantial portion of these funds for investment in Platinum assets, including numerous PPCO Master Fund assets. *Id.* ¶ 15.

At all relevant times, Mark Nordlicht, Murray Huberfeld, and David Bodner—the founders of the Platinum Partners family of funds—owned and controlled the Beechwood Advisers (among other Beechwood entities). *Id.* ¶¶ 1, 6. The Platinum founders formed Beechwood for the purpose of gaining access to hundreds of millions of dollars in insurance assets. *Id.* ¶ 4. Beechwood deliberately concealed the substantial connections between Platinum and Beechwood from SHIP prior to the execution of the IMAs and thereafter. *Id.* ¶¶ 16-17. Those connections first came to light only in July 2016, after Huberfeld was arrested on federal bribery charges and press accounts reported on the relationship. *Id.* ¶ 18. Even then, Beechwood continued to misrepresent the extent of the significant ownership and control exerted over it by the Platinum founders, falsely stating in a July 26, 2016 letter to SHIP that Beechwood was [redacted] *Id.* ¶ 19. SHIP ultimately lost tens of millions of dollars from the funds it invested through the IMAs. *Id.* ¶ 15.

Under the IMAs, the Beechwood Advisers were granted "*complete, unlimited and unrestricted* authority with respect to the investment and reinvestment of the Account." Receiver's SMF ¶ 27 (emphasis added). That authority was subject only to SHIP's "general investment

policy, guidelines and restrictions," which were incorporated into the IMAs as Exhibit A and which could be revised only "with the prior written consent of the" Beechwood Advisers. *Id.* ¶¶ 27-28. The IMAs reiterated in paragraph 3(b) that the Beechwood Advisers "shall have sole and exclusive authority and discretion to manage and control the assets of the Account," subject only to "the investment policy, guidelines and restrictions" that the parties mutually agreed would apply. *Id.* ¶ 28. The IMAs did, however, limit the activities the Beechwood Advisers could undertake on SHIP's behalf to "buy[ing], sell[ing] and otherwise deal[ing] in securities and other property and contracts relating to same for the Account." *Id.* ¶ 31.

The IMAs also contained several other significant restrictions on SHIP's ability to control the relationship. The IMAs granted the Beechwood Advisers the power to veto requests from SHIP to implement "investment asset allocation restrictions on the investments in the Account" and "permitted [the Beechwood Advisers] to borrow money for the Account or on behalf of the Account … upon such terms as [the Beechwood Advisers] may deem advisable and proper." SHIP CAMF ¶ 10. The IMAs also vested in the Beechwood Advisers sole responsibility for the valuation of any investments they might make. Receiver's SMF ¶ 29. Finally, the IMAs prohibited SHIP from "withdraw[ing] any amounts from the Account or contribut[ing] additional amounts to the Account" without the Beechwood Advisers' prior written consent. SHIP CAMF ¶ 11.

Consistent with the terms of the IMAs, the Beechwood Advisers generally invested SHIP's funds without providing any prior notice to SHIP of the specific investments they intended to make and without receiving any input or direction from SHIP. *See id.* ¶ 13. Multiple witnesses confirmed these practices, including both Beechwood's and SHIP's Rule 30(b)(6) designees and SHIP's former CFO, Paul Lorentz. *See id.* These practices also were followed with respect to the December 2015 and March 2016 loan transactions at the center of this dispute: Beechwood did not

notify any person at SHIP that BAM—the Beechwood Adviser that entered into those transactions on SHIP's behalf—was undertaking those transactions before doing so. *Id.* ¶ 57.

B. The Beechwood Advisers Acted in Multiple Capacities, Including in Connection With the December 2015 and March 2016 Loan Transactions.

It is undisputed that, at any given time, the Beechwood Advisers acted in several different capacities beyond their roles as SHIP's investment advisers under the IMAs. For example:

- Beechwood CEO Mark Feuer testified that "Beechwood was acting on behalf of itself" in connection with the "blocks of [reinsurance] business" that it bought from CNO. Beechwood thus "distinguished perhaps our role and responsibility with regard to SHIP versus some of our reinsurance contracts."
- Beechwood CIO Dhruv Narain testified that Beechwood had several clients for which it managed "investments that were related to reinsurance agreements," including "BCLIC, WNIC, ULICO, Motorist, Atlantic Coast," and also managed "segregated accounts associated with [Beechwood entities] Beechwood Omnia and BBIHL."
- Beechwood Rule 30(b)(6) designee and General Counsel Christian Thomas testified that Beechwood also held certain investments "for its own account."

SHIP CAMF ¶ 20. Moreover, by its very nature, Beechwood existed to act in the interests of Platinum, whose principals owned and controlled Beechwood.

The Beechwood Advisers also acted in dual roles specifically in connection with the December 2015 and March 2016 loan transactions. In the December 2015 loan transaction, Beechwood Re and BBIL—both Beechwood Advisers under the Beechwood Re and BBIL IMAs, respectively—offloaded participation interests in debt of Desert Hawk Gold Corporation that they then held *for their own accounts* in exchange for approximately $9.2 million that SHIP loaned to PPCO Master Fund under the December 2015 SHIP Note. *Id.* ¶¶ 30-31, 58(a). Beechwood Re also was able to obtain repayment of $5 million in debt of LC Energy Operations LLC originally issued to the BCLIC/WNIC Trusts, through which Beechwood Re managed the "blocks of [reinsurance] business" that it bought from CNO. *Id.* ¶¶ 33-34, 58(b). The March 2016

transactions similarly involved secured term notes issued not just to SHIP, but also to the BCLIC/WNIC Trusts that Beechwood directly managed "on behalf of itself." *Id.* ¶¶ 54, 58(c).

Other documents and testimony also indicate that the Beechwood Advisers were acting for themselves in negotiating and consummating the December 2015 and March 2016 transactions. For example, December 2015 e-mail communications indicate that Beechwood and Platinum understood that Beechwood, not SHIP, was [redacted] *Id.* ¶¶ 21, 59(a). Beechwood CEO Mark Feuer confirmed at his deposition that the December 2015 transaction was consummated as part of a broader request from Platinum to "restructure … all of the transactions that we had done by and between Platinum and *Beechwood*." *Id.* ¶ 59(b) (emphasis added). The March 2016 transactions likewise were the result of a request from Mark Nordlicht, on behalf of Platinum, for a further "restructuring" of the relationship between Beechwood and Platinum, identifying the specific reasons that Mr. Nordlicht offered for the restructuring. *Id.* ¶ 59(c).

LEGAL STANDARD

Summary judgment should be denied unless "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Walker v. City of New York*, 621 F. App'x 74, 75 (2d Cir. 2015). "An issue of fact is material for these purposes if it might affect the outcome of the suit under the governing law [while] [a]n issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Shade v. Hous. Auth. of City of New Haven*, 251 F.3d 307, 314 (2d Cir. 2001) (internal citations omitted). In deciding a summary judgment motion, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986). The movant bears the burden to present "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, that demonstrate the absence of a genuine issue of material fact." *Chen v. New Trend Apparel, Inc.*, 8 F. Supp. 3d 406, 430 (S.D.N.Y. 2014). "If the evidence submitted in support of the summary judgment does not meet the movant's burden of production, then summary judgment must be denied *even if no opposing evidentiary matter is presented*." *Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (internal quotations omitted) (emphasis in original); *see, e.g.*, *Coraud LLC v. Kidville Franchise Co.*, 122 F. Supp. 3d 387, 393 (S.D.N.Y. 2015) (same).

ARGUMENT

I. The Receiver Has Not Established Any Relevant Knowledge That the Beechwood Advisers Gained Within the Scope of an Agency Relationship With SHIP.

A. The Receiver Mischaracterizes the Relationship Between SHIP and the Beechwood Advisers Under the IMAs.

The Receiver opens her arguments with the broad and misguided pronouncement that "[i]t follows directly from the unambiguous provisions of the IMAs that each of the Beechwood Advisers were SHIP's agents as a matter of law." Receiver Mem. at 12. The Receiver is wrong for two key reasons. *First*, the Receiver overstates SHIP's right of control over the relationship based on an overly expansive reading of the relevant provisions of the IMAs. In reality, the IMAs effectively granted exclusive control and authority to *Beechwood*, and that is precisely how Beechwood operated during the course of its relationship with SHIP. Far from being "undisputed," *id.* at 16, serious factual questions exist concerning whether SHIP possessed the control required to establish a principal-agent relationship in the first place. *Second*, even if the Receiver were to establish the existence of an agency relationship, the Receiver's apparent suggestion that the Beechwood Advisers acted as SHIP's agents generally is simply not accurate. Any agency relationship is limited in scope and nature to the four corners of the IMAs and extends no further.

Under New York law, an agency relationship exists only if three elements are present: "(1)

there must be a manifestation by the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principal is to be in control of the undertaking." *Maung Ng We v. Merrill Lynch & Co.*, No. 99-cv-9687 (CSH), 2000 WL 1159835, at *4 (S.D.N.Y. Aug. 15, 2000) (quoting *Rubin Bros. Footwear, Inc. v. Chem. Bank*, 119 B.R. 416, 422 (S.D.N.Y. 1990)). "The question of whether an agency relationship exists is 'a mixed question of law and fact' that should be submitted to a jury '[u]nless the facts are insufficient to support a finding of agency or there is no dispute as to the historical facts.'" *Cromer Fin. Ltd. v. Berger*, 245 F. Supp. 2d 552, 560 (S.D.N.Y. 2003) (quoting *Cabrera v. Jakabovitz*, 24 F.3d 372, 385-86 (2d Cir. 1994)). An express agency relationship is "conferred by a principal to an agent by distinct and plain words, which may be communicated orally or in a written document." *Precedo Capital Grp. Inc. v. Twitter Inc.*, 33 F. Supp. 3d 245, 253 (S.D.N.Y. 2014). To determine whether an express agency relationship has been formed, courts examine "the actual interaction between the putative principal and agent, not [] any perception a third party may have of the relationship." *Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd.*, 909 F.2d 698, 702 (2d Cir. 1990). As the third element of the above test indicates—and as particularly relevant here—"[a]n essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control." *Red Pocket, Inc. v. Interactive Commc'ns Int'l, Inc.*, No. 17-cv-5670 (KMK), 2020 WL 838279, at *8 (S.D.N.Y. Feb. 20, 2020) (quoting *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 295 (2d Cir. 1984)) (denying summary judgment where evidence "undermin[ed] idea that Plaintiff maintained complete control over Defendant's distribution of" plaintiff's products).

The evidence establishes that, far from acting subject to SHIP's direction and control, the Beechwood Advisers maintained complete discretion to invest SHIP's funds as they saw fit, and

repeatedly and consistently exercised that discretion without any input, approval, or even knowledge by SHIP. The IMAs themselves make this virtually unlimited discretion explicit, providing that SHIP "hereby grants to the Adviser *complete, unlimited, and unrestricted authority* with respect to the investment and reinvestment of the Account," subject only to "general investment policy, guidelines, and restrictions" that were incorporated into the IMAs. Receiver's SMF ¶ 27. The IMAs essentially restate this principle in paragraph 3(b), emphasizing again that the Beechwood Advisers "shall have sole and exclusive authority and discretion to manage and control the Assets of the Account," and that the Beechwood Advisers' "prior written consent" was required before SHIP could "revise the general investment policy, guidelines and restrictions with respect the Account." *Id.* ¶ 28.

The IMAs also granted the Beechwood Advisers the power to veto requests from SHIP to implement "investment asset allocation restrictions on the investments in the Account" and "permitted [the Beechwood Advisers] to borrow money for the Account or on behalf of the Account … upon such terms as [the Beechwood Advisers] may deem advisable and proper." SHIP CAMF ¶ 10. Thus, while the IMAs included some up-front general guardrails for the investment of SHIP's money in the form of investment guidelines that could not be changed without Beechwood's consent, the IMAs did not grant SHIP any authority to direct specific investments or otherwise tell Beechwood what to do. Beechwood, and Beechwood alone, possessed "sole and exclusive authority" to invest SHIP's funds without any input from SHIP.

And in practice, consistent with the terms of the IMAs, the Beechwood Advisers did not notify SHIP about investments they planned to make before doing so—much less ask for SHIP's permission to make any particular investment—as the consistent testimony shows:

- Christian Thomas testified repeatedly that it was standard practice for Beechwood to make investment decisions without SHIP's input, specifically noting that SHIP

would not have reviewed or approved the December 2015 or March 2016 loan transaction documents because the Beechwood Advisers "would have acted under the authority granted to them under" the IMAs in executing those documents. Mr. Thomas also specifically testified that then-chief investment officer of Beechwood Dhruv Narain "would not necessarily have had communications with SHIP" concerning the March 2016 loan transactions because "[h]e had discretion under the IMA."

- SHIP's former CFO, Paul Lorentz, confirmed that SHIP did not "monitor[]" investments made by Beechwood and "didn't pass on investments" because the Beechwood Advisers "were free to invest in accordance with the terms of the investment policy guidelines statement." He further testified that it was "Beechwood's responsibility under the IMAs to have independent valuations made" of the investments and that he did not believe SHIP needed to conduct its own valuations in light of the nature of "the arrangement that we had with Beechwood under the IMAs."

- John Robison, SHIP's Rule 30(b)(6) designee, testified that Beechwood "had full discretion to trade [SHIP's] account any way it wished" under the IMAs, subject only to the "overall investment guidelines" that the parties agreed to as part of the execution of the IMAs. He also stated that SHIP had no awareness of the January 2016 loan transaction that resulted in the amendment and restatement of the December 2015 SHIP Note.

- The Receiver's Rule 30(b)(6) designee also confirmed that Beechwood "had complete discretion to make investments" under the IMAs, subject to the agreed-upon "operating guidelines or investment guidelines."

- Mark Feuer's testimony also helps to explain why Beechwood would have viewed its relationship with SHIP differently from a traditional investment adviser relationship. It was his understanding that each of the IMAs was "structured in the form of some sort of loan" from SHIP to Beechwood, "with a guaranteed rate of return."

SHIP CAMF ¶ 13. The Receiver ignores this undisputed testimony, and contorts the testimony she does cite, to fit an unsupported narrative that "there were 'caveats' to the Beechwood Advisers' discretion under the IMAs." Receiver Mem. at 16. As established above, the IMAs indisputably granted the Beechwood Advisers a blank check to invest SHIP's assets as they wished.

There was only one "caveat" to this unbridled discretion identified in the testimony the Receiver cites: the investment guidelines that the parties mutually agreed to apply at the outset of the relationship and that could be changed thereafter only with the Beechwood Advisers' express

written consent. Consistent with the terms of the IMAs, the undisputed evidence shows that SHIP neither maintained nor exercised any right to control the Beechwood Advisers' investment decisions. The Beechwood Advisers took full advantage of the discretion they enjoyed, investing and transacting without requesting SHIP's approval or even apprising SHIP in advance. The fiction of control and authority that the Receiver seeks to conjure does not resemble reality.

Finally, even if the Receiver could establish that SHIP enjoyed the requisite right to control the relationship, the Receiver describes the relationship much too broadly. Any authority the Beechwood Advisers had to act on SHIP's behalf under the IMAs was expressly limited to "buy[ing], sell[ing] and otherwise deal[ing] in securities and other property and contracts relating to same for the Account …." Receiver's SMF ¶ 31. To the extent that the Receiver seeks a ruling that "SHIP authorized the Beechwood Advisers to act as its agents" generally, including for purposes not within the scope of the matters set forth in the IMAs, the motion should be denied. *See, e.g.*, *Highland Capital Mgmt. LP v. Schneider*, 607 F.3d 322, 327 (2d Cir. 2010) ("[A]n agent has actual authority if the principal has granted the agent the power to enter into contracts on the principal's behalf, subject to whatever limitations the principal places on this power, either explicitly or implicitly."); *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472, 346 N.Y.S.2d 238, 244 (1973) ("An agent's power to bind his principal is coextensive with the principal's grant of authority.").

B. The Receiver Has Neither Identified the Knowledge She Seeks to Impute to SHIP Nor Established That Such Knowledge Was Acquired Within the Scope of the Beechwood Advisers' Agency.

Even leaving aside the threshold problems with the Receiver's agency analysis, the Receiver's motion should be denied for the further reason that she fails to identify the precise knowledge that she seeks to impute to SHIP and does not explain the circumstances under which the Beechwood Advisers acquired that knowledge. The Receiver instead seeks an advance ruling that all of the Beechwood Advisers' "wrongful actions and knowledge" are imputed to SHIP as a

matter of law, and represents to the Court in conclusory fashion that she "will establish at trial" what those unspecified wrongful actions and knowledge are. Receiver Mem. at 22. The Receiver has the law precisely backwards.

Under New York law, "[t]he general rule is that knowledge acquired by an agent *acting within the scope of his agency* is imputed to his principal …." *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 784, 497 N.Y.S.2d 898, 899 (1985) (emphasis added). As this statement of the rule indicates, the knowledge of the agent sought to be imputed must have been acquired within the scope of the agency relationship before such imputation will be permitted. Conversely, "[a] principal is not charged with the acts or knowledge of an agent when the agent acts outside the scope of the agent's employment." *In re Parmalat Sec. Litig.*, 684 F. Supp. 2d 453, 472 (S.D.N.Y. 2010); *see, e.g.*, *Mallis v. Bankers Tr. Co.*, 717 F.2d 683, 689 (2d Cir. 1983) (refusing to impute knowledge where evidence showed that attorney was not acting as plaintiffs' agent); *In re Lyondell Chem. Co.*, No. 16-cv-518 (DLC), 2016 WL 5818591, at *6 (S.D.N.Y. Oct. 5, 2016) (noting "uncontroversial fact that an agent's knowledge will not be imputed to his principal if the knowledge was acquired outside the scope of his employment"); *In re Efros*, 19 Misc. 3d 1113(A), 2008 N.Y. Slip Op. 50678(U), at *3 (Sur. Ct., N.Y. Cty. 2008) (declining to impute knowledge where "the knowledge gained by [the agent] f[ell] outside the scope his agency as an investment advisor"). Whether an agent acquired knowledge within the scope of the agency relationship "at a particular time [is] a fact-intensive inquiry" that "is ordinarily for the jury." *Cromer Fin. Ltd.*, 245 F. Supp. 2d at 561 (quoting *Girden v. Sandals Int'l*, 262 F.3d 195, 205 (2d Cir. 2001)).

Judge Castel's decision in *Owens v. Gaffken & Barriger Fund, LLC*, No. 08-cv-8414 (PKC), 2011 WL 1795310 (S.D.N.Y. May 5, 2011), is a particularly illustrative application of these principles on summary judgment. There, the plaintiff alleged that he was fraudulently

induced into investing $2 million in a commercial real estate investment fund, which "was represented to provide a highly liquid investment similar to a money market fund, with a guaranteed 8 percent annual return." *Id.* at *1. The plaintiff decided to invest following a meeting with one of the fund principals, instructing his lawyer "to wire $2 million for investment in the Fund." *Id.* After the fund collapsed, the plaintiff learned that the fund's true investment strategy was to invest "in subprime, commercial real estate loans." *Id.* The plaintiff's lawyer previously had become aware of the fund's true investment strategy as a result of his prior representation of the fund on various matters. *See id.* at *3.

The defendants moved for summary judgment, arguing that the lawyer's knowledge of the fund's activities should be imputed to the plaintiff. *Id.* The court denied the motion, noting that the defendants' imputation theory was "premised upon knowledge that [the lawyer] acquired in his capacity as an attorney representing the fund." *Id.* Emphasizing that only "knowledge acquired by an agent acting *within the scope of his agency*" may be imputed to the principal, the court determined that "[b]ecause a reasonable juror could conclude that [the lawyer's] knowledge about the Fund was not acquired within the scope of his agency for Owens, it is not imputed to the plaintiff as a matter of law." *Id.* (quoting *Seward Park Hous. Corp. v. Cohen*, 287 A.D.2d 157, 167, 734 N.Y.S.2d 42, 50-51 (1st Dep't 2001)) (emphasis in original); *cf. Grupo Verzatec S.A. de C.V. v. RFE Inv. Partners*, No. 17-cv-9887 (ALC), 2019 WL 1437617, at *9 (S.D.N.Y. Mar. 29, 2019) (declining to impute knowledge of officer defendants to corporation where complaint's "allegations implicate[d] conduct outside the scope of [the officer defendants'] agency").

The circumstances presented here compel the same result. The Receiver fails entirely to identify what knowledge the Beechwood Advisers acquired, let alone when they acquired that knowledge or how it was acquired within the scope of the Beechwood Advisers' alleged agency

relationship with SHIP. The Receiver instead submits a Statement of Material Facts that consists almost exclusively of quotes from and references to the IMAs and the relevant transaction documents, without offering any detail about the origins or negotiation of the two sets of transactions at issue. Those details are crucial to the "fact-intensive inquiry" required to determine whether specific matters of the knowledge and intent of the Beechwood Advisers may be imputed to SHIP, *Cromer Fin. Ltd.*, 245 F. Supp. 2d at 561, particularly since the Beechwood Advisers simultaneously acted in multiple capacities at any given time, including in the context of the December 2015 and March 2016 transactions themselves.

The undisputed evidence shows that Beechwood occupied numerous roles beyond its role as SHIP's investment adviser. As Beechwood's former CEO Mark Feuer testified, for example, "Beechwood was acting on behalf of itself" in connection with the "blocks of business" that it bought from CNO. SHIP CAMF ¶ 20(a). Mr. Feuer accordingly was careful to "distinguish[] perhaps our role and responsibility with regard to SHIP versus some of our reinsurance contracts." *Id.* Dhruv Narain similarly testified that: (i) Beechwood had several clients for which it managed "investments that were related to reinsurance agreements," including "BCLIC, WNIC, ULICO, Motorist, [and] Atlantic Coast"; and (ii) Beechwood also managed "segregated accounts associated with [Beechwood entities] Beechwood Omnia and BBIHL." *Id.* ¶ 20(b). Beechwood's Rule 30(b)(6) designee and General Counsel, Christian Thomas, further testified that Beechwood held certain investments "for its own account." *Id.* ¶ 20(c). At any given time, therefore, Beechwood could have been acting on behalf of itself, SHIP, or one of its several other clients.

And that is precisely what Beechwood did in connection with the December 2015 and March 2016 transactions. With respect to the December 2015 transactions, BAM executed assignment agreements for Desert Hawk participation interests on behalf of Beechwood Re and

BBIL, whereby Beechwood Re and BBIL assigned those participation interests to PPCO Master Fund. *Id.* ¶ 30. The March 2016 transactions likewise involved secured term notes issued to the BCLIC/WNIC Trusts that Beechwood managed "on behalf of itself." *Id.* ¶¶ 54, 58(c).

Because Beechwood occupied multiple roles in connection with these transactions, legitimate questions remain as to whether any knowledge it might have acquired regarding the purpose of the transactions was acquired when Beechwood was acting on behalf of itself, rather than on behalf of SHIP. The documentary evidence in the record shows that was the case. E-mail communications from around the time of the December 2015 transactions indicate that Mark Nordlicht negotiated the contemplated loan on behalf of Platinum and that Platinum understood that Beechwood—not SHIP—was [redacted] *Id.* ¶ 21. Mark Feuer also confirmed at his deposition that the transaction was consummated as part of a broader request from Platinum to "restructure … all of the transactions that we had done by and between Platinum and *Beechwood*." *Id.* ¶ 59(b) (emphasis added). Mr. Feuer further testified that the March 2016 transactions also were the result of a request from Mark Nordlicht, on behalf of Platinum, for a further "restructuring" of the relationship between Beechwood and Platinum, identifying the specific reasons that Mr. Nordlicht offered for the restructuring. *Id.* ¶ 59(c).

The evidence thus shows that Beechwood was, and Platinum understood Beechwood to be, acting on behalf of itself in negotiating the December 2015 and March 2016 transactions. That Beechwood ultimately used SHIP's cash and assets to complete the transactions is beside the point—if Platinum and Beechwood both understood that Beechwood was acting on its own behalf in negotiating the transactions, any knowledge acquired during the course of those negotiations necessarily would have been acquired outside the scope of Beechwood's agency relationship with SHIP. SHIP thus could not be charged with any such knowledge.

In any case, the fact remains that the Receiver's motion leaves SHIP—and, more important, this Court—to speculate as to the specific knowledge and conduct she believes should be subject to imputation. The Receiver fails at the threshold to pinpoint any relevant knowledge that Beechwood might have gained vis-à-vis the purpose and intent of the December 2015 and March 2016 transactions. The Receiver instead asks the Court to accept uncritically—without a shred of evidence—that Beechwood committed "wrongful actions" and possessed "knowledge" that the transactions were fueled by an illicit purpose. Receiver Mem. at 22. The Receiver further asks the Court to impute that unspecified conduct and knowledge to SHIP without any evidence that Beechwood was acting on SHIP's behalf and in the face of the contrary evidence summarized above. The Receiver's cavalier approach to imputation is particularly unjustifiable given that Beechwood had so many relevant relationships—including being owned and controlled by Platinum for the purpose of raising fresh cash from insurers like SHIP—and played so many different roles, such that it is not comparable to an employee who reasonably can be assumed to act at all times as an agent for an employer-corporation. These fundamental failures of proof require denial of the Receiver's motion. *See Owens*, 2011 WL 1795310, at *3.

II. Even If the Receiver Had Established That the Beechwood Advisers Gained Knowledge of an Illicit Purpose for the December 2015 and March 2016 Loan Transactions, the Adverse Interest Exception Bars Imputation to SHIP.

Though her failure to specify the knowledge that she wishes to impute to SHIP is reason enough to deny her motion, the Receiver's motion should be denied in any event because the adverse interest exception to imputation plainly applies here. The Receiver argues that the exception is inapplicable because, according to her, Beechwood did not "completely abandon" SHIP's interests in connection with the December 2015 and March 2016 transactions. Receiver Mem. at 23. In advancing that argument, however, the Receiver elides any mention of the pervasive fraud that infected SHIP's relationship with Beechwood from its inception. The

Receiver also ignores the undisputed evidence that Beechwood—saddled with irreconcilable conflicts of interest given the ownership and control exerted over it by Platinum insiders—undertook the transactions at Platinum's request and for Platinum's benefit. Finally, and perhaps most critically, the Receiver overlooks the fact that Beechwood benefited handsomely from the transactions by offloading assets held *for its own accounts* and leaving SHIP holding the bag on loans that never have been repaid. The Receiver instead myopically focuses only on the fact that SHIP received a security interest for its trouble (and for its considerable cash), claiming that this single inchoate "benefit" somehow erases all of the harm that the transactions caused SHIP.

The Receiver's further attempt to avoid application of the adverse interest exception by claiming that SHIP "ratified" Beechwood's unspecified fraudulent conduct with respect to the subject transactions similarly is without merit. The Receiver's ratification argument fundamentally fails because she has not established that the transactions themselves were fraudulently undertaken; that is, she has not identified any fraudulent knowledge or conduct for SHIP to "ratify" in the first place. The Receiver also mischaracterizes SHIP's reactive measure in filing a Proof of Claim as a knowing ratification of that unproven fraud. In reality, SHIP merely was trying to enforce a valid security interest that it justly received in return for more than $40 million in cash and assets that it loaned to PPCO Master Fund and never repaid. As elaborated in the next section, the legal concept of imputation, which is designed to protect innocent third parties to a true agency relationship, was never intended to be deployed opportunistically to benefit a party like Platinum (in whose shoes the Receiver stands). Platinum is not a true or innocent third party but rather owned and controlled SHIP's purported "agent," Beechwood, and thus knew full well that Beechwood was not acting (whether fraudulently or not) for SHIP in the transactions at issue. Beechwood was acting for Platinum and Beechwood. The Receiver's attempt to avoid application

of the adverse interest exception should be rejected.[2]

A. Beechwood Abandoned SHIP's Interests by Engaging in an Ongoing Fraud Against SHIP and Executing the December 2015 and March 2016 Transactions Solely for the Benefit of Itself and Platinum.

The adverse interest exception "is a method by which a [principal] can demonstrate that its agent's actions should not be imputed to it." *Symbol Techs., Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 196, 888 N.Y.S.2d 538, 542 (2d Dept. 2009). The "exception rebuts the usual presumption that the acts and knowledge of an agent acting within the scope of employment are imputed to the principal." *Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000) (quoting *In re Mediators, Inc.*, 105 F.3d 822, 287 (2d Cir. 1997)). It applies "when the principal is the victim of a fraud perpetrated by the agent." *Abele Tractor & Equip. Co. v. Balfour*, 133 A.D.3d 1171, 1172 n.1 (3d Dep't 2015). "The rationale for this exception is clear; the law does not presume that the wrongdoer would perform his usual duty of disclosing all material facts regarding his action if such disclosure would reveal his fraud." *In re Maxwell Newspapers, Inc.*, 164 B.R. 858, 866 (Bankr. S.D.N.Y. 1994). Thus the exception applies, "where the agent is engaged in prosecuting some fraudulent or illegal enterprise, the success of which would be impaired or defeated by the disclosure to his principal of the notice or knowledge sought to be imputed." *Id.*

In determining whether an agent has abandoned the principal's interests, such that the adverse interest exception should apply, courts "focus on the fraudulent actions of agents (to the exclusion of conduct unrelated to the fraud itself)." *Allied Irish Banks, P.L.C. v. Citibank, N.A.*,

[2] It bears repeating that the following analysis rests on the Receiver's unsupported assumption that Beechwood actually possessed knowledge that the December 2015 and March 2016 loan transactions were undertaken with a fraudulent purpose. As set forth in SHIP's motion for summary judgment, there is no evidence that the transactions were undertaken with an intent to defraud PPCO Master Fund's creditors, much less evidence that Beechwood knew of that fraudulent intent. Without proof of such knowledge, it is irrelevant whether the adverse interest exception or the doctrine of ratification applies.

No. 03-cv-3748, 2015 WL 4104703, at *8 (S.D.N.Y. June 30, 2015); *accord Conway v. Marcum & Kliegman LLP*, 176 A.D.3d 477, 478, 110 N.Y.S.3d 695, 697 (1st Dep't 2019) ("[A]ny purported benefit flowing to plaintiffs must be tied to wrongful conduct by defendants." (internal quotations omitted)). In other words, the "relevant question is … whether [the agent's] *fraudulent* actions totally abandoned [the principal's] interests." *Allied Irish*, 2015 WL 4104703, at *9 (emphasis in original). In *Allied Irish*, an Allied Irish Bank ("AIB") employee fraudulently carried out a rogue-trading scheme through trading placed with Citibank to cover up his massive trading losses and prevent the bank from finding them. *Id.* The defendant, Citibank, sought summary judgment under the *in pari delicto* doctrine, arguing that the employee "did not totally abandon [AIB's] interests insofar as he continued to trade and achieve occasional profits on [AIB's] behalf." *Id.* at *8. Rejecting Citibank's argument and finding the adverse interest exception applicable, the court emphasized that the employee's "fraudulent scheme was directed at defrauding [his principal, AIB], not defrauding others on its behalf, compelling this Court's conclusion that it would be inappropriate to impute [the employee's] actions and knowledge to [AIB]." *Id.* at *9. The court also rejected the defendant's attempt to rely on the fact that AIB benefited from some of the employee's other, non-fraudulent trading conduct. Rather, "[t]he relevant conduct is the wrongful conduct, and the relevant inquiry is whether the agent was acting entirely for his own self-interest in engaging in that wrongful conduct." *Id.*

The same is true here. The Receiver does not dispute—and in fact admits and affirmatively alleges in her FAC—that at the time of the December 2015 and March 2016 transactions, Platinum and Beechwood were engaged in a wide-ranging scheme to defraud SHIP and numerous other innocent third parties. *See* SHIP CAMF ¶¶ 1-7, 14-19. The undisputed evidence shows that Beechwood was owned and controlled by Platinum insiders and that this fact was deliberately and

successfully concealed from SHIP. *See id.* During the time that these conflicts of interest and the true purpose for Beechwood's existence were shielded from discovery, Beechwood invested substantial sums of SHIP's funds in Platinum investments of questionable value, ultimately resulting in substantial damage to SHIP. *Id.* ¶ 15. SHIP only became aware of any connection between Platinum and Beechwood when the fraudulent scheme unraveled in July 2016 following the arrest of Murray Huberfeld on federal bribery charges. *Id.* ¶¶ 16-18. Even then, Beechwood continued to lie to SHIP, falsely asserting in a July 26, 2016 letter that Beechwood was [redacted] *Id.* ¶ 19.

By engaging in this fraudulent scheme, Beechwood indisputably abandoned SHIP's interests in the same manner that the rogue trader abandoned AIB in *Allied Irish*. The fraud's singular purpose was to serve *Platinum's* interests by enabling it to access hundreds of millions of dollars in new capital under false pretenses, thereby perpetuating Platinum's own fraudulent scheme. Through this motion, however, the Receiver effectively seeks to impute to SHIP knowledge of the very fraudulent scheme that victimized it. The law does not permit the proverbial shield for the innocent to be bent into a sword to protect the guilty in this manner. The law of imputation does not operate "where the [principal] is actually the agent's intended victim." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466, 912 N.Y.S.2d 508, 518 (2010); *see also Abele*, 133 A.D.3d at 1172 n.1, 20 N.Y.S.3d at 700 n.1. The imputation rule simply prevents a principal from avoiding liability "[w]here the agent is defrauding *someone else* on the [principal's] behalf." *Kirschner*, 15 N.Y.3d at 466, 912 N.Y.S.2d at 518 (emphasis added). As Platinum was a defrauder, not the defrauded, the Receiver cannot benefit from this rule. Beechwood's fraudulent conduct harmed SHIP and benefited Beechwood and Platinum. The adverse interest exception applies.[3]

[3] The Receiver's imputation theory also falters because it would deny SHIP—which lacked any actual knowledge of any aspect of the December 2015 and March 2016 transactions, as the

The adverse interest exception also applies even if Beechwood's overarching fraud is disregarded and the specific transactions are analyzed. As detailed above, the December 2015 and March 2016 transactions were executed at Platinum's behest and only with Beechwood and Platinum's interests in mind, not SHIP's. The result of those transactions demonstrates this fact.

With respect to the December 2015 transactions, Beechwood caused SHIP to loan over $14 million *in cash* to PPCO Master Fund. SHIP CAMF ¶ 37. SHIP's cash, in turn, was used to allow *Beechwood* to unload assets that the Receiver's own expert characterizes as worthless: (i) $9.2 million in participation interests in the debt of Desert Hawk Gold Corporation that were then held by Beechwood Re and BBIL for their own accounts; and (ii) a $5 million debt owed by LC Energy Operations LLC pursuant to promissory notes originally issued to the WNIC/BCLIC Trusts, which Beechwood directly managed on its own behalf. *See id.* ¶¶ 27-36. In return, all SHIP received was PPCO Master Fund's promise to pay, along with a security interest in PPCO Master Fund's assets and a Subsidiary Guaranty. *Id.* ¶¶ 25-26. The funds SHIP loaned never have been repaid, *id.* ¶ 46, and the Receiver has blocked attempts to enforce the security interest and Subsidiary Guaranty. Beechwood served its own interests and those of PPCO Master Fund in executing these transactions, and SHIP has received nothing in return.

The March 2016 transactions follow a similar pattern, as they were designed to help PPCO Master Fund and Beechwood, not to benefit SHIP. Former Beechwood CEO Mark Feuer recognized as much, acknowledging that the transaction was undertaken at the request of Mark Nordlicht in order to allow PPCO Master Fund to restructure its debt obligations. *Id.* ¶ 59. And the Receiver's expert admits that the transaction succeeded in that regard, as he calculates the value

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Receiver effectively conceded in filing this motion—the ability to assert a valid defense to the Receiver's fraudulent conveyance claims on the grounds that SHIP was an innocent purchaser for fair consideration. N.Y.D.C.L. § 278(1).

realized by PPCO Master Fund as a result of the transactions at approximately $50 million. *Id.* ¶ 55. For its part, SHIP provided $25.7 million of that value (including nearly $10 million in cash) and received a mere promise to pay and a security interest in return. *Id.* ¶ 49. As with the December 2015 transactions, SHIP has not been repaid a penny of that consideration. *Id.* ¶ 56.

The peppercorn of "benefit" that the Receiver claims SHIP received in connection with the transactions is insufficient to establish that Beechwood was acting in SHIP's interests. SHIP provided valuable consideration—including nearly $26 million in cash—in exchange for a promise to pay and a valid security interest that it has been blocked from enforcing. The net result of the transactions has been harm, not benefit, to SHIP. These "purported 'benefits'"—the value of which has not been realized—are "insufficient to show that the adverse interest exception is inapplicable, as there exist factual questions as to whether [SHIP was a] beneficiar[y], rather than [a] victim[], of [Beechwood's] fraud." *Conway*, 176 A.D.3d at 478, 110 N.Y.S.3d at 697 (internal quotations omitted). In any event, "any purported benefit flowing to [SHIP] must be tied to wrongful conduct by [Beechwood]." *Id.* The Receiver has not tied SHIP's receipt of PPCO Master Fund's promise to pay and the security interest in PPCO Master Fund's assets to any wrongful conduct on Beechwood's part with respect to the subject transactions. The Receiver thus cannot use these "benefits" as a basis to impute to SHIP any relevant knowledge Beechwood might have.

B. SHIP Is Not Seeking to Retain the "Benefits" of the Transactions—It Is Seeking to Limit the Damage That Those Transactions Have Caused.

The Court should also reject the Receiver's attempt to sidestep the adverse interest exception through the doctrine of ratification, which she claims should apply because SHIP allegedly "accept[ed] the benefits" of the transactions. Receiver Mem. at 22.

Preliminarily, it bears emphasis that the Receiver has not submitted any evidence that PPCO Master Fund intended to defraud its creditors in executing the December 2015 and March

2016 transactions, let alone any evidence that the Beechwood Advisers knew of that unproven fraudulent intent. As the Receiver recognizes, the doctrine of ratification generally bars a principal from "disavow[ing] an act of an agent while simultaneously taking advantage of the benefits of the *fraudulently procured bargain*." *In re Payroll Exp. Corp.*, 186 F.3d 196, 208 (2d Cir. 1999) (emphasis added). Because no fraudulent knowledge or conduct exists for SHIP to "ratify," the doctrine simply has no application here.

Separately, to the extent that the Receiver argues that SHIP somehow ratified Beechwood's broader scheme to defraud SHIP and others by seeking to enforce rights arising out of specific, non-fraudulent transactions, that argument should also be rejected. As explained above, the "focus" of the adverse interest exception is "on the fraudulent actions of agents (to the exclusion of conduct unrelated to the fraud itself)." *Allied Irish Banks, P.L.C.*, 2015 WL 4104703, at *8. If an agent's non-fraudulent conduct cannot provide a basis to avoid the adverse interest exception, then the principal's "ratification" of that same non-fraudulent conduct necessarily has no impact on whether the adverse interest exception should apply.

Even if the Receiver had established Beechwood's guilty knowledge and conduct with respect to the transactions, the doctrine of ratification applies only where the principal has "full knowledge of all the material facts involved in the transaction." *In re First Republic Grp. Realty, LLC.*, 421 B.R. 659, 682 (Bankr. S.D.N.Y. 2009); *see also Breen Air Freight, Ltd. v. Air Cargo, Inc.*, 470 F.2d 767, 773 (2d Cir. 1973) ("[R]atification can only occur when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it."). The Receiver attempts to establish such knowledge based on the facts that SHIP (i) filed a lawsuit against Beechwood, (ii) was served with the Receiver's original complaint in this action alleging that the December 2015 and March 2016 transactions were fraudulent, and (iii) filed a proof of

claim with the Receiver. The Receiver again comes up well short of meeting her burden of proof.

First, none of SHIP's pleadings in this consolidated matter specifically references the December 2015 or March 2016 transactions. That alone is sufficient to defeat any claim of "full knowledge of all the material facts" associated with those transactions based on SHIP's pleadings. The Receiver cannot avoid that result by claiming generally, and in conclusory fashion, that SHIP filed its complaint "with full knowledge of any fraud SHIP asserts Beechwood committed on it." Receiver Mem. at 21. The relevant inquiry is whether SHIP possessed full knowledge of the material facts specifically relating to the transactions, not a broader fraud committed against it by Beechwood. In any event, allegations of fraud in a pleading do not amount to "full knowledge" of that fraud; the Receiver cites no law to suggest otherwise. The Receiver likewise cannot rely on unproven allegations in *her own* complaint as evidence that *SHIP* had "full knowledge" that the December 2015 and March 2016 transactions were fraudulent, particularly where discovery has conclusively established that no evidence exists to back up the Receiver's allegations.

Second, SHIP filed the Proof of Claim as a reactive measure to protect itself, not because it had "full knowledge" of any fraud that it intended to ratify. The Receiver required all claims to be filed by the bar date. If SHIP had not filed a Proof of Claim, the Receiver no doubt would have taken the position that SHIP had waived all of its rights to enforce its security interests. According to the Receiver, then, she wins no matter what course of action SHIP takes. The Court should reject the Receiver's attempt to transform SHIP's efforts to limit the substantial financial harm it suffered at the hands of Beechwood and Platinum into a ratification of an unspecified fraud.

CONCLUSION

For all these reasons, SHIP respectfully submits that the Receiver's motion for partial summary judgment should be denied in its entirety.

Dated: New York, New York
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DLA PIPER LLP (US)

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