UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,	:	
	:	18-cv-06658 (JSR)
Plaintiff,	:	
	:	**ECF CASE**
-against-	:	
	:	
BEECHWOOD RE LTD., *et al.*,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF PARTIAL MOTION TO DISMISS THE SECOND AMENDED COMPLAINT BY DEFENDANTS BEECHWOOD RE (IN OFFICIAL LIQUIDATION) S/H/A BEECHWOOD RE LTD., B ASSET MANAGER, L.P., BEECHWOOD BERMUDA INTERNATIONAL LTD., BEECHWOOD RE INVESTMENTS, LLC, MARK FEUER, SCOTT TAYLOR, AND DHRUV NARAIN

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Defendants Mark Feuer, Scott Taylor, and Dhruv Narain (collectively, the "Individual Defendants"), and the Beechwood companies,[1] respectfully submit this memorandum of law in support of their partial motion to dismiss SHIP's Second Amended Complaint ("SAC," Doc. 84) under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, and in particular ask the Court to:

- dismiss Counts IV (breach of fiduciary duty), VII (constructive fraud), and XII (gross negligence) of the SAC against the Individual Defendants;
- dismiss Count V (fraudulent inducement) of the SAC against: (a) the Beechwood companies, except as to the representations/omission in SAC ¶¶ 69-70, 77-78, and 87; (b) Feuer, except as to the representation/omission in SAC ¶¶ 77 and 87; and (c) Taylor, except as to the representations/omission in SAC ¶¶ 69-70 and 87;
- dismiss Count VI (fraud) of the SAC against: (a) the Beechwood companies, except as to the representations in SAC ¶¶ 165-68, 172-74, 178-80, 265, and 270; (b) Feuer, except as to the representations in SAC ¶¶ 265 and 270; (c) Taylor, except as to the representations in SAC ¶¶ 172-74 and 178-80; and (d) Narain;
- dismiss Counts VIII-X (civil RICO) and XIII (unjust enrichment) of the SAC against all Defendants; and
- dismiss Count XI (civil conspiracy) against Narain.

PRELIMINARY STATEMENT[2]

SHIP's SAC has failed to cure the patent deficiencies identified by this Court in its December 6, 2018 Opinion and Order (the "December 6 Order," Doc. 72). Where, as here, allegations were previously dismissed as deficient, and the plaintiff received a detailed blueprint

[1] Terms not defined herein have the meaning stated in Defendants' motion to dismiss SHIP's initial complaint (Doc. 62).

[2] To avoid burdening the Court and to minimize duplication, Defendants respectfully incorporate by reference the Statement of Relevant Facts and Applicable Legal Standard set forth in their moving brief in support of their motion to dismiss SHIP's initial complaint. (Doc. 62 at 3-8.)

of how to remedy the defects in their claims, which they ignored, the deficient claims should be dismissed with prejudice. In particular:

1. SHIP's breach of fiduciary duty claim should be dismissed against the Individual Defendants because (a) SHIP has not adequately alleged that any of them – as opposed to the Beechwood companies – owed a fiduciary duty to SHIP, (b) SHIP did not initially plead and was expressly denied leave to plead any aiding and abetting breach of fiduciary duty claims against the Individual Defendants based on their "knowing participation" in the Beechwood companies' alleged breaches of their fiduciary duties to SHIP, and (c) the conduct of the Individual Defendants in allegedly inducing SHIP to enter into the IMAs cannot support an aiding and abetting claim because such conduct pre-dated the execution of the IMAs. (*See* Point I.)

2. SHIP's gross negligence and constructive fraud claims should be dismissed against the Individual Defendants because each of these claims is similarly predicated on a non-existent duty allegedly owed by each of the Individual Defendants to SHIP. (*See* Points II-III.)

3. As SHIP was not given leave to amend or otherwise supplement its fraudulent inducement claim, that claim should be limited to the three specific statements and one omission that this Court found to have satisfied Rule 9(b) in its December 6 Order, *i.e.*, SAC ¶¶ 69-70, 77-78, and 87, and further limited to the Defendants that actually made such representations or omission. (*See* Point IV.)

4. SHIP's fraud claim should also be limited to the specific statements that arguably satisfy Rule 9(b), *i.e.,* SAC ¶¶ 165-68, 172-74, 178-80, 265, and 270, and similarly limited to the Defendants that actually made such representations. (*See* Point V.)

5. SHIP's civil RICO claims should be dismissed against all Defendants because they are (a) barred by the RICO amendment to the Private Securities Litigation Reform Act

("PSLRA"), and (b) too narrow in terms of the number of victims, time period and purpose to constitute a continuous pattern of racketeering. (*See* Point VI.)

6. SHIP's civil conspiracy claim should be dismissed against Narain because it has not adequately alleged that he was party to any agreement to defraud SHIP or that he intentionally participated in any alleged fraud. (*See* Point VII.)

7. Lastly, SHIP's unjust enrichment claim should be dismissed against (a) the Beechwood companies because SHIP fails to identify how any of them were unjustly enriched as a result of the $50 million non-IMA investment, and (b) the Individual Defendants because SHIP has similarly failed to allege in nonconclusory fashion how any of them were unjustly enriched as a result of the IMAs or any non-IMA investments. (*See* Point VIII.)

ARGUMENT

I. SHIP's Breach Of Fiduciary Duty Claim (Count IV) Should Be Dismissed Against The Individual Defendants

A. SHIP's Breach Of Fiduciary Duty Claim Should Be Dismissed Against Feuer And Taylor

As this Court stated in its December 6 Order, to assert a viable claim for breach of fiduciary duty, SHIP must allege "(1) that a fiduciary duty existed between plaintiff and defendant, (2) that defendant breached that duty, and (3) damages as a result of the breach." *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 114 (S.D.N.Y. 2009). (Doc. 72 at 9.)

This Court then held that SHIP had adequately alleged that the *Beechwood companies* owed a fiduciary duty to SHIP because of their status as investment advisors under the IMAs, which afforded them considerable discretion with respect to SHIP's portfolio, including over the specific investments they made under the IMAs. (*Id.* at 11.) In stark contrast, the Court never held that SHIP adequately alleged that Feuer or Taylor owed any fiduciary duty to SHIP. Instead, the Court stated that SHIP alleged that "Taylor [and] Feuer . . . personally induced SHIP

to invest with Beechwood[, which] is enough to establish that [they] 'knowingly participate[d] in a breach of [Beechwood's] fiduciary duties.'" (*Id.* at 13-14.) Such finding, however, is not sufficient to hold Feuer or Taylor liable for a claim of breach of fiduciary duty for two reasons:

First, "knowing participation" in another's breach of fiduciary duty is *not* an element of a claim for breach of fiduciary duty: it is only an element of a claim for aiding and abetting a breach of fiduciary duty, which is a distinct claim under New York law. In originally holding that Feuer and Taylor may be liable for breach of fiduciary duty based on their purported "knowing participation" in the alleged breach by the Beechwood companies, this Court relied on the New York Appellate Division's decision in *Talansky v. Schulman*, 770 N.Y.S.2d 48, 53 (1st Dep't 2003). (Doc. 72 at 13.) The Second Circuit in *Krys v. Butt*, 486 F. App'x 153, 156-57 (2d Cir. 2012), however, clarified that a corporate officer who participates individually in a corporation's breach is not liable for breach of fiduciary duty but rather may be liable for aiding and abetting, noting that the *Talansky* decision "trace[s] back to the principles set forth in *Wechsler v. Bowman,* 285 N.Y. 284, 291, 34 N.E.2d 322 (1941), the seminal New York case establishing liability for aiding and abetting another's breach of fiduciary duty." *Id.*; *see also*, *Thermal Imaging, Inc. v. Sandgrain Sec. Inc.*, 158 F. Supp. 2d 335, 344 n.18 (S.D.N.Y. 2001) ("Aiding and abetting a breach of fiduciary duty is a claim separate and distinct from breach of one's own fiduciary duty.").[3] Because SHIP has not pled a direct breach of fiduciary duty claim against Feuer or Taylor, and this Court held in its December 26, 2018 Order (the "December 26

[3] *Compare Litvinoff v. Wright*, 54 N.Y.S.3d 22, 24 (2d Dep't 2017) ("The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct") (citation omitted) *with Bullmore v. Ernst & Young Cayman Islands*, 846 N.Y.S.2d 145, 148-49 (1st Dep't 2007) (to state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom).

Order," Doc. 83) that "SHIP has also failed to establish good cause for adding . . . [a] new claim[] for . . . aiding and abetting breach of fiduciary duty" (Doc. 83 at 3.), SHIP's breach of fiduciary duty claim against Feuer and Taylor should be dismissed with prejudice.

Second, any aiding and abetting claim against Feuer and Taylor, even if SHIP had permission to assert it, would still be deficient as a matter of law because:

1. To aid and abet a breach of fiduciary duty, a defendant must knowingly participate in another party's breach of a *then-existing* fiduciary duty. *See, e.g.*, *Hightower v. Cohen*, 2009 WL 9042127, at *9 (E.D.N.Y. Sept. 30, 2009) (dismissing aiding and abetting claim against defendants who drafted offering memoranda that induced plaintiffs to invest with an investment company, finding that "as a matter of law plaintiffs cannot establish that [the investment company] owed them a fiduciary duty before they invested in [it]"). Here, SHIP alleges that Feuer and Taylor induced it to execute the IMAs with the Beechwood companies, but the fiduciary duty that the Beechwood companies allegedly owed to SHIP did not arise until the IMAs were actually executed. Thus, as a matter of law, Feuer and Taylor could not have aided and abetted the Beechwood companies' breach by inducing SHIP to execute the IMAs.

2. To assert an aiding and abetting claim, SHIP must also allege that Feuer and Taylor "proximately caused the harm on which the primary liability is predicated." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 201-02 (S.D.N.Y. 2006). Here, SHIP claims that the Beechwood companies are primarily liable for breaching their duty to properly invest SHIP's assets under the IMAs. Any aiding and abetting claim against Feuer and Taylor based on their purported inducement of SHIP to execute the IMAs would fail because such conduct did not proximately cause the Beechwood companies to improperly invest SHIP's assets. *See, e.g.*, *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 345-46 (2d

Cir. 2018) (finding state law aiding and abetting claims deficient as a matter of law, noting that plaintiffs had pled "[a]t most . . . but-for causation," meaning that the defendants' actions were "simply too attenuated [from the alleged harm] to constitute proximate cause").

B. SHIP's Breach Of Fiduciary Duty Claim Should Be Dismissed Against Narain

The breach of fiduciary duty claim should also be dismissed with prejudice against Narain. In its December 6 Order, the Court dismissed SHIP's claim for breach of fiduciary duty against Narain because the complaint failed to allege that "there was anything about [Narain's] role as a corporate official that created a personal relationship of trust and confidence." (Doc. 72 at 14.) SHIP's additional conclusory and derivative allegations about its relationship with Narain do not cure this deficiency. And even if they did, SHIP has failed to plead that Narain breached his fiduciary duty – at most, Narain's culpability would be narrowly limited to the Agera transactions in June 2016 – or that any alleged breach caused any identifiable damages.

The majority of SHIP's new allegations regarding its personal relationship with Narain are "wholly conclusory." *Indep. Asset Mgmt. LLC v. Zanger*, 538 F. Supp. 2d 704, 710 (S.D.N.Y. 2008) (Rakoff, J.) (dismissing breach of fiduciary duty claim premised on conclusory allegations of relationship of trust and confidence). SHIP alleges that it "trusted Narain and had confidence in him," (SAC ¶ 241), and labels Narain as SHIP's "fiduciar[y] and trusted investment adviser[]," (*id.* ¶ 238), but fails to allege any factual basis to suggest that SHIP deliberately elected to trust Narain rather than any other investment advisor. Quite the contrary, SHIP chose *Beechwood*, and Narain happened to work there. Moreover, there are no factual allegations to suggest that Narain accepted any trust and confidence placed in him personally. SHIP's "repeated conclusory assertion[s] of a relationship of 'trust and confidence'" do not make it so, *Rosenblatt v. Christie, Manson & Woods Ltd.*, 2005 WL 2649027, at *10 (S.D.N.Y. Oct.

14, 2005), *aff'd*, 195 F. App'x 11 (2d Cir. 2006), nor do they constitute "specific facts" set forth "with sufficient particularity to enable the court to determine whether, if true, such facts could give rise to a fiduciary relationship," *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 504 (S.D.N.Y. 2007) (citation omitted) (also noting that "even allegations that a plaintiff relied on a defendant's expertise in a particular field are insufficient by themselves to survive dismissal"), *aff'd*, 328 F. App'x 695 (2d Cir. 2009).

The remaining allegations are "entirely derivative" of BAM's duty – describing a relationship with Narain only in his capacity as a BAM executive – and are therefore "legally insufficient to state a claim" against him personally. *Krys*, 486 F. App'x at 156. Courts consistently dismiss claims lodged against individual officers at investment firms that allege a fiduciary duty by virtue of those individuals' official roles. In *Krys*, the Second Circuit explained that a corporate officer did not derive from his employer, an investment firm, a personal fiduciary duty to a hedge fund client by virtue of his role overseeing commodity pools or his other delegated responsibilities, including executing trades and acting as the hedge fund's contact. *Id.* Likewise, in *In re MF Global Holdings Ltd. Inv. Litig.*, 998 F. Supp. 2d 157 (S.D.N.Y. 2014), *aff'd*, 611 F. App'x 34 (2d Cir. 2005), the court held that individual officers of a futures commission merchant did not owe a fiduciary duty to their employer's customers even though the customers relied on the officers to maintain their funds in segregated and secured accounts. *Id.* at 182. That is because the individual officers "bore those responsibilities in their capacity as employees . . . , not because of their relationship with the [c]ustomers." *Id.*

So too here. The newly alleged facts demonstrate Narain acting "in [his] capacity as [an] employee[]," *id.*; they relate to official meetings in corporate offices as well as emails that Narain allegedly sent on behalf of BAM to SHIP executives. (*See, e.g.*, SAC ¶ 250 (referring to

"*our* commitment" to "do everything in *our* power") (emphases added); *id.* ¶ 256 (referring to "the trust your organization has placed in *us*") (emphasis added).) And none of the allegations plausibly claims that SHIP placed its trust in Narain as an individual, nor could they: SHIP did not even meet Narain until May 2016, shortly after he was hired but more than two years into SHIP's course of investing hundreds of millions of dollars with the Beechwood companies. In short, the new allegations "are not sufficient to extend the relationship of trust and confidence" between SHIP and BAM "into such a relationship" between SHIP and Narain. *See In re MF Global Holdings*, 998 F. Supp. 2d at 182.

What is more, the claim as to Narain fails for the independent reason that it does not allege breach or damages in any identifiable way. Even if Narain did owe SHIP a fiduciary duty, that duty could not have arisen until May 2016 at the earliest, when SHIP first met Narain in connection with the Agera Energy transactions. (SAC ¶ 231.) Any fiduciary duties that arose in connection with the IMAs (and any damages that followed) predated Narain's involvement, and indeed, every challenged transaction except the Agera transactions occurred prior to Narain's arrival at Beechwood (and entirely without his involvement). As for the limited transactions with which Narain was alleged to be involved after SHIP's personal introduction to him, (*see id.* ¶¶ 231-61), SHIP alleges that Narain and Beechwood prioritized Beechwood's and Platinum-related entities' interests above SHIP's, but nowhere plausibly alleges that Narain's conduct was a "but for" cause of "an identifiable loss," *Trautenberg v. Paul, Weiss, Rifkind, Wharton & Garrison LLP*, 629 F. Supp. 2d 259, 262-63 (S.D.N.Y. 2007), *aff'd*, 351 F. App'x 472 (2d Cir. 2009) (citations omitted). Instead, SHIP makes the repeated and vague allegation that the Agera Energy transactions, which began in early 2014 (*see* SAC ¶ 215) – long before Narain was hired – ultimately resulted in SHIP having "funds tied up in illiquid interests of questionable worth in

an entity now controlled by Eli Global" (*id.* ¶ 262; *see also id.* ¶ 28 (alleging that SHIP was left with "illiquid holdings of questionable value"); *id.* ¶ 214 (alleging SHIP was left with "illiquid investments of uncertain value").) But that is merely a characterization of existing funds, not a plausible claim that the funds have been diminished such that they have resulted in identifiable damages. And even if Narain could somehow be tied to damages flowing from the investment of funds under the IMAs, SHIP merely alleges that the Defendants *as a group* "denied SHIP the use and benefit of its invested funds" and certain "contractual" and "promised" returns. (*Id.* ¶ 323.) It does not identify any damages separate from contract damages, let alone explain how Narain's actions were a "but for" cause of any damages personally attributable to him.

Finally, for the same reasons stated above with respect to the breach of fiduciary duty claim against Feuer and Taylor, Narain cannot be held liable based on any alleged participation in any alleged breach of the *Beechwood companies'* purported fiduciary duties to SHIP.

II. SHIP's Gross Negligence Claim (Count XII) Should Be Dismissed Against The Individual Defendants

To assert a viable claim for gross negligence, SHIP must allege the existence of a duty owed by each defendant to SHIP. *Purchase Partners, LLC v. Carver Fed. Sav. Bank*, 914 F. Supp. 2d 480, 497 (S.D.N.Y. 2012) (gross negligence requires "(1) the existence of a duty; (2) a breach of that duty . . . ."). In discussing SHIP's gross negligence claim, the Court noted that SHIP generally alleged "that 'Defendants owed SHIP a duty to act with reasonable care in connection with managing SHIP's assets,' and that 'Defendants breached that duty of care by, among other things, making imprudent investments to benefit Platinum, failing to advise SHIP of the reasons for such investments, and improperly valuing such assets.'" (Doc. 72 at 32).

However, for the reasons discussed in Point I above, this claim should be dismissed against the Individual Defendants because SHIP has not adequately alleged that any of them

owed a fiduciary duty to SHIP – as opposed to the duty the Beechwood companies allegedly owed to SHIP under the IMAs. *See Schulman v. Delaire*, 2011 WL 672002, at *4 (S.D.N.Y. Feb. 22, 2011) ("Because Plaintiffs have failed to show a fiduciary duty, the state law claims for negligence, gross negligence and breach of fiduciary duty must also be dismissed.").

III. SHIP's Constructive Fraud Claim (Count VII) Should Be Dismissed Against The Individual Defendants

To assert a viable claim for constructive fraud, this Court confirmed that SHIP must also allege the existence of a fiduciary or confidential relationship between it and each defendant. (Doc. 72 at 25-26.) For the reasons stated in Point I above, this claim also fails and should be dismissed with prejudice against the Individual Defendants.[4]

IV. SHIP's Fraudulent Inducement Claim (Count V) Should Be Limited To The Three Representations And One Omission That The Court Found Satisfied Rule 9(b) And To Those Defendants That Actually Made Each Representation/Omission

In its December 6 Order, the Court stated:

> A fraudulent inducement claim is subject to the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure, which require a plaintiff to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). "In cases where the alleged fraud consists of an omission and the plaintiff is unable to specify the time and place because no act occurred, the complaint must still allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff, and (4) what defendant obtained through the fraud." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000).

[4] As to Narain, specifically, because this Court concluded that misstatements in the constructive fraud claim must be pled with the same specificity as those in the fraud claim (Doc. 72 at 25-26), the constructive fraud claim against Narain should be dismissed for the same reasons discussed in Point V below, as well as because SHIP has not sufficiently alleged that Narain owed it a fiduciary duty. *See Sentlowitz v. Cardinal Dev., LLC*, 882 N.Y.S.2d 267, 269 (2d Dep't 2009) (explaining that constructive fraud claim should be dismissed where plaintiff failed to allege facts to demonstrate a fiduciary relationship).

(Doc. 72 at 15.) The Court went on to identify only three representations and one omission that met this heightened pleading standard:

- The April 10, 2014 email *by Taylor* to SHIP with the attached Discussion Document (Doc. 1 ¶¶ 57-58; SAC ¶¶ 69-70; Doc. 72 at 15-16);
- The statements allegedly made *by Feuer* at a May 13, 2014 Board meeting (Doc. 1 ¶ 65; SAC ¶ 77; Doc. 72 at 16);
- The oral and written presentations *by Levy* to SHIP officials at Beechwood's offices where he allegedly reiterated Beechwood's consistent themes of strong security and collateralization, conservative approach and a guaranteed return for SHIP. (Doc. 1 ¶ 66; SAC ¶ 78; Doc. 72 at 16-17); and
- Defendants' omission that "Beechwood intended, in essence, to convert SHIP's assets to the uses of Platinum and the individuals controlling Beechwood and Platinum in a manner fundamentally inconsistent with the safe and conservative portfolio they promised would result in a guaranteed return" (Doc. 1 ¶ 73; SAC ¶ 85; Doc. 72 at 17).

SHIP was not given leave to amend its fraudulent inducement claim to add or otherwise supplement the allegations supporting this claim. Indeed, in its December 26 Order, this Court specifically denied SHIP leave to add a new fraudulent inducement claim against Narain with respect to the $50 million non-IMA investment because "SHIP 'had all the information necessary to support' this claim at the time it filed its initial complaint,'" and "the Court made clear . . . that SHIP would not be permitted to add new causes of action to its complaint where they were not based on newly discovered evidence." (Doc. 83 at 3.)

SHIP's fraudulent inducement claim should thus be strictly limited to the three representations and one omission identified above and should not include any new allegations, including, without limitation, allegations related to the $50 million non-IMA investment. *See Palm Beach Strategic Income, LP v. Salzman*, 457 F. App'x 40, 43 (2d Cir. 2012) ("District courts in this Circuit have routinely dismissed claims in amended complaints where the court granted leave to amend for a limited purpose and the plaintiff filed an amended complaint

exceeding the scope of the permission granted."); *Miles v. City of New York*, 2018 WL 3708657, at *5 (S.D.N.Y. Aug. 3, 2018) (striking portions of complaint that were outside the scope of leave granted); *Higgins v. Monsanto Co.*, 862 F. Supp. 751, 754 (N.D.N.Y. 1994) (disregarding all changes to the complaint not authorized by the court).

The fraudulent inducement claim should be further limited to only those Defendants that SHIP claims made each statement/omission. Accordingly, SHIP's fraudulent inducement claim should be dismissed with prejudice against: (a) the Beechwood companies, except as to the representations/omission in SAC ¶¶ 69-70, 77-78, and 87; (b) Feuer, except as to the representation/omission in SAC ¶¶ 77 and 87; and (c) Taylor, except as to the representations/ omission in SAC ¶¶ 69-70 and 87.

V. SHIP's Fraud Claim (Count VI) Should Be Limited To The Five Representations That Arguably Satisfy Rule 9(b) And To Those Defendants That Actually Made Each Representation

In its December 6 Order, the Court stated that the elements of fraudulent inducement, including the heightened pleading standard in Rule 9(b), are the same for fraud. (Doc. 72 at 21.) The Court went on to identify only two representations that met this standard: (a) an April 9, 2015 Duff & Phelps report that non-party Elliot Feit allegedly sent on BAM's behalf to SHIP on April 20, 2015 (Doc. 1 ¶136; Doc. 72 at 23); and (b) a July 26, 2016 letter allegedly sent by Feuer on the Beechwood companies' behalf stating that there was "no reason to believe that either Beechwood or any of [SHIP's] related portfolios suffered financial harm" and that Beechwood "was in the process of, and was capable of, severing all ties with Platinum." (Doc. 1 ¶ 198; SAC ¶ 265; Doc. 72 at 24.)

The Court then gave SHIP leave to amend its fraud cause of action to satisfy Rule 9(b)'s pleading requirements as to other representations. (Doc. 72 at 25.) In its SAC, SHIP abandoned the allegation concerning the Duff & Phelps report and replaced it with the following additional

allegations that Defendants do not dispute (for purposes of their motion to dismiss) meet the Rule 9(b) standard:

- An April 2, 2015 request by Feit on BAM's behalf for authorization to withdraw $3.5 million as a performance fee for BAM, accompanied by a "Withdrawal Notice" for that amount signed by BAM's president, Daniel Saks, which SHIP claims contained false valuations for the SHIP assets being invested pursuant to the BAM IMA (SAC ¶¶ 165-68);

- A July 15, 2015 request by Feit on BRE's behalf for authorization to withdraw $2.1 million as a performance fee for BRE, accompanied by a "Withdrawal Notice" for that amount signed by Taylor, which SHIP claims contained false valuations for the SHIP assets being invested pursuant to the BRE IMA (*id.* ¶¶ 172-74);

- A February 3, 2016 request by Feit on BBIL's behalf for authorization to withdraw $500,000 as a performance fee for BBIL, accompanied by a "Withdrawal Notice" for that amount signed by Taylor, which SHIP claims contained false valuations for the SHIP assets being invested pursuant to the BBIL IMA (*id.* ¶¶ 178-80); and

- A representation by Feuer "to SHIP that Beechwood was actively courting the sale of certain of its assets through a transaction that would result in a buy-out of all Platinum related investments, including those included in the IMA accounts." (*Id.* ¶ 270.)

Given the foregoing, SHIP's fraud claim should be dismissed with prejudice against: (a) the Beechwood companies, except as to the representations in SAC ¶¶ 165-68, 172-74, 178-80, 265, and 270; (b) Feuer, except as to the representations in SAC ¶¶ 265 and 270; and (c) Taylor, except as to the representations in SAC ¶¶ 172-74 and 178-80.

With respect to Narain, neither the representations previously identified by the Court as sufficiently pled (*see* Doc. 72 at 23-24), nor the principal new alleged representations (*see* SAC ¶¶ 165-68, 172-74, 178-80, 265, and 270), are alleged to have been made by him, and the few newly alleged representations allegedly attributed to him also fail to state a claim against Narain.

First, leaving aside any alleged representations about the $50 million non-IMA investment, which are barred for the reasons stated in Point IV, SHIP alleges only that Narain

made two statements: (1) on August 9, 2016, that the Beechwood companies were making efforts to reduce their "exposure [to Platinum controlled-entities] as soon as practicable" (SAC ¶ 256); and (2) in October 2016, regarding Platinum's payments to its hedge fund clients, that "no one will get paid anything [by Platinum] until we [the Beechwood companies] are paid off" (*Id.* ¶ 257). However, SHIP nowhere alleges that Narain knew these statements to be false, that SHIP relied on these statements, or that any specific injury resulted therefrom. Indeed, the last performance fee payment that SHIP claims was made to the Beechwood companies was on August 2, 2016 – seven days before Narain's email.

Second, even if the Court did consider the alleged misrepresentations about the $50 million non-IMA investment and related Agera transactions, none of them sufficiently pleads the elements of fraud or satisfies Rule 9(b). (*See* SAC ¶¶ 232, 236, 239-242, 250.) For example, SHIP alleges that Narain sent a May 26, 2016 email proposing a "strawman structure" and representing that the structure would comply with certain "industry standards," "investment guidelines," and "insurance regulations," and that "Beechwood would sell certain limited partnership interests in the IMA accounts." (*Id.* ¶ 236.) It also alleges that Narain sent a June 1, 2016 email stating that "we have a motivated seller who very much needs the money," and that "we are really trying to close and fund on Monday[, June 6, 2016]." (*Id.* ¶ 239.) But SHIP does not allege that those representations were false, that Narain knew they were false, or that SHIP specifically relied on those statements. *See Kaufman v. Amtax Planning Corp.*, 669 F. Supp. 573, 575 (S.D.N.Y. 1986) (dismissing fraud claim where the plaintiff "failed to allege that anything [the defendant] said was untrue, or that he knew or should have known that such statements were false"). In another instance, SHIP alleges that "Narain, however, assured SHIP that [managing director Kevin] Cassidy would be leaving Agera Energy after the transaction and

would have no future role in the enterprise" but that "as Narain knew, that was entirely false." (SAC ¶ 252.) But SHIP fails to allege where or when the statement was made, or how SHIP relied on that statement. *See Gregor v. Rossi*, 992 N.Y.S.2d 17, 18 (1st Dep't 2014) (dismissing fraud claim "because the words used by defendants and the date of the alleged false representations [we]re not set forth").

Finally, the fraud claim against Narain should be dismissed for failure to plead injury for the same reasons discussed in Point I.B regarding the breach of fiduciary claim, which centers on the exact same course of conduct in the context of the Agera transactions. Thus, for these additional reasons, SHIP's fraud claim against Narain should be dismissed with prejudice.

VI. SHIP's Civil RICO Claims (Counts VIII-X) Should Be Dismissed

SHIP's civil RICO claims are all based on Platinum's purported securities fraud, and therefore cannot serve as predicate acts for civil RICO claims. Section 1964(c) of the PSLRA explicitly bars any civil RICO action predicated on the purchase or sale of securities. 18 U.S.C. § 1964(c). This bar is broad. "[I]f the alleged conduct could form the basis of a securities fraud claim against *any* party – be it against, or on behalf of, the plaintiff, defendants or a non-party – it may not be fashioned as a civil RICO claim." *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 644 (S.D.N.Y. 2017). The law is also clear that any conduct by Defendants to participate in or aid and abet Platinum's alleged securities fraud falls squarely within the scope of the RICO exclusion. *Id.* at 643.

That, however, is exactly the type of conduct in which SHIP accuses Defendants of engaging. In fact, SHIP's entire theory of RICO fraud is that the Beechwood companies induced SHIP to contribute capital under the IMAs so they could invest SHIP's capital in Platinum assets to further Platinum's alleged Ponzi-like scheme. This is a mere regurgitation of the SEC's allegations against Platinum in its civil complaint, which charges Platinum and affiliates with

engaging in securities fraud under §§ 17(a) and 10(b) of the Securities Exchange Act of 1934. Indeed, SHIP directly and repeatedly relies on the SEC complaint and the Criminal Indictments (that also allege securities fraud) against various Platinum-related parties in setting out its RICO enterprise allegations. For example, SHIP alleges that:

- ". . . the Beechwood [companies] and their related entities were formed as a mechanism to funnel money into Platinum [], a Manhattan-based hedge fund founded by [] Nordlicht [], [] Huberfeld [], and [] Bodner [] to prolong their existing Ponzi-like scheme." (SAC ¶ 17.)

- Platinum's "performance was grossly overstated, as set forth in criminal complaints and indictments brought against Huberfeld [,] Nordlicht, Levy, and others . . . in December 2016 (collectively, the "Criminal Indictments"), as well as in the [SEC] complaint brought against certain Platinum entities, Levy, and others in December 2016 . . . (the "SEC Complaint"). (*Id.* ¶ 19.)

- ". . . Platinum surreptitiously partnered with Feuer, Taylor, and Levy (Huberfeld's nephew) to form the Beechwood [companies] and their related entities and devised a plan to secure access to the assets of insurers. The Beechwood [companies] entered into [IMAs] and reinsurance treaties with insurance companies, took control of insurance company assets, and then secretly funneled those assets to Platinum [] and related parties." (*Id.* ¶ 23.)

- "SHIP brings this action to recover the losses it has sustained as a result of Beechwood's . . . participation in a fraudulent scheme and racketeering activity that has resulted in multiple criminal indictments [against Platinum-related parties]." (*Id.* ¶ 37.)

- "These RICO enterprises shared common purposes and a structure. The primary purpose was to use the vehicles of [the Beechwood companies] to obtain funds from institutional investors, particularly insurance companies, and to use them to enrich the [Platinum] co-conspirators while furthering their ongoing Ponzi-like scheme, all to SHIP's detriment." (*Id.* ¶ 277.)

- "SHIP has been injured in its business and property by reason and a proximate result of each of Defendant's violations of 18 U.S.C. § 1962(c) . . . by reducing the value of SHIP's assets through investments that are speculative, risky, or simply sham transactions, all of which were made to benefit Platinum . . . ." (*Id.* ¶ 365; *see also id.* ¶¶ 372, 380.)

The foregoing conduct is precisely the type covered by the RICO amendment. This Court has specifically recognized that the PSLRA exception covers conduct allegedly undertaken

to keep a Ponzi scheme alive. *See, e.g.*, *Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012) (Rakoff, J.) (dismissing RICO claim based on allegation that defendants "kept Madoff Securities' Ponzi Scheme alive" and conspired "to conceal the fact that their funds[] only fed into Madoff Securities" under the PSLRA's RICO amendment). For this reason alone, SHIP's civil RICO claims should be dismissed with prejudice against all Defendants.

SHIP's civil RICO claims also fail because they are too narrow in number of victims, time, and purpose to constitute a continuous pattern of racketeering. At best, SHIP identifies a conspiracy limited to itself and two other alleged victims (Bankers Conseco Life Insurance Company and Washington National Insurance Company), all of which at one time or another were part of the CNO Financial Group; which occurred over the course of four years; and which had a singular purpose: "to attract new, unsuspecting institutional investors . . . without revealing that such investors were being committed to investment through Platinum Partners." (SAC ¶ 379.) Such allegations fall far short of alleging the "kind of broad-based unlawful activity that RICO was designed to address." *Feirstein v. Nanbar Realty Corp.*, 963 F. Supp. 254, 260 (S.D.N.Y. 1997) (four predicate acts over a three year period did not satisfy the continuity factor to establish a RCIO claim); *Lefkowitz v. Bank of New York*, 2003 WL 22480049 (S.D.N.Y. Oct. 31, 2003) (no closed-ended continuity where the complaint alleged that a small number of parties engaged in activities with a narrow purpose directed at a single or at most three victims: namely, defrauding plaintiffs), *rev'd in part on other grounds*, 528 F.3d 102 (2d Cir. 2007).

These claims are even more obviously deficient with respect to Narain, who did not even join Beechwood until January 2016, more than two years after the alleged RICO conspiracy began. As this Court recognized in its December 6 Order, "predicate acts occurring over less

than a two-year period may not be deemed a pattern." (Doc. 72 at 29.) The alleged predicate acts attributed to Narain – alleged misrepresentations relating to the Agera transactions – all took place within the span of two weeks in May and June 2016. (SAC ¶ 361(h).) Where, as here, the "alleged predicate acts attributed to [a particular defendant] . . . do not extend over a sufficiently long period of time to satisfy the requirements of closed-ended continuity," a district court "properly dismisse[s]" the substantive RICO claims "as alleged against [that defendant]," as well as any related claims alleging conspiracy or improper investment of RICO proceeds. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 182 (2d Cir. 2004).

VII. SHIP's Civil Conspiracy Claim (Count XI) Against Narain Should Be Dismissed

The civil conspiracy claim against Narain should also be dismissed with prejudice. SHIP cannot sustain a claim for civil conspiracy unless it has established an underlying tort, and even then must plausibly allege "(1) [a] corrupt *agreement* between two or more persons, (2) an overt act, (3) their *intentional* participation in the furtherance of a plan or purpose, and (4) the resulting damage." *Pope v. Rice*, 2005 WL 613085, at *13 (S.D.N.Y. Mar. 14, 2005) (citation omitted; emphasis added). Here, SHIP alleges that Defendants conspired to commit two torts: fraudulent inducement as to "the three IMAs" and "other investments" and fraud in the performance by "misrepresenting the nature and performance of SHIP's investments." (SAC ¶¶ 383-84.) But as the Court previously found, Narain could not have conspired to fraudulently induce SHIP to enter into the IMAs, all of which were executed before he joined Beechwood (Doc. 72 at 30-31), and per the Court's December 26 Order, SHIP has not stated a claim for fraudulent inducement relating to any "other investments" (Doc. 83 at 3).

Nor can SHIP's allegations regarding fraud support a civil conspiracy claim again Narain because SHIP fails to allege that Narain entered into any agreement to defraud SHIP, or that he intentionally participated in any alleged fraud. Indeed, SHIP asserts the existence of an alleged

conspiracy formed in 2013 (SAC ¶ 59), but Narain is not alleged to have joined BAM until several years later in 2016 (*id.* ¶ 68), the same year SHIP reasserted control over its funds (*id.* ¶ 272). In addition, SHIP has not alleged that Narain ever learned of, let alone knowingly or intentionally participated in, any alleged scheme to defraud SHIP. Instead, SHIP assumes that by virtue of his employment by BAM, Narain was automatically complicit in some alleged scheme, without "plead[ing] any facts regarding when – and how – [Narain] would have been made aware of [an alleged] overall scheme to defraud of which [he is] alleged to have acted in furtherance." *Sanchez v. ASA Coll., Inc.*, 2015 WL 3540836, at *9 (S.D.N.Y. June 5, 2015); *see also Gym Door Repairs, Inc. v. Young Equip. Sales, Inc.*, 206 F. Supp. 3d 869, 916 (S.D.N.Y. 2016) (dismissing civil conspiracy claim where the plaintiff failed to allege that the defendant agreed with others to commit the underlying tort, took overt steps to further the alleged conspiracy, or intentionally participated in the furtherance of the alleged conspiracy). Absent any specific factual allegations that plausibly suggest that Narain learned of *and* affirmatively agreed to join any conspiracy to defraud SHIP, the civil conspiracy claim against him should be dismissed with prejudice.

VIII. SHIP's Unjust Enrichment Claim (Count XIII) Should Be Dismissed

In its December 6 Order, this Court dismissed SHIP's unjust enrichment claim, but granted SHIP leave to amend "to plead unjust enrichment based on funds invested outside of the IMAs or to plead in a nonconclusory fashion that the Individual Defendants were enriched." (Doc. 72 at 36.) SHIP, however, has failed to amend its SAC in a manner sufficient to assert an unjust enrichment claim against any Defendant.

First, while SHIP has added allegations regarding the $50 million non-IMA investment, it still fails to allege exactly how the Beechwood companies were unjustly enriched as a result of this investment. (*See* SAC ¶¶ 399-404.) SAC ¶ 402 simply states that the Beechwood

companies "improperly benefited from that extra-contractual investment to SHIP's detriment." As this Court noted in its December 6 Order, merely alleging a general, non-specific benefit is insufficient to plead an unjust enrichment claim. (Doc. 72 at 35-36.) *See also Gillespie v. St. Regis Residence Club*, 2018 WL 4681617, at *14-15 (S.D.N.Y. Sept. 28, 2018) (dismissing unjust enrichment claim because the complaint failed to plead specific facts showing how any single defendant might have profited from the alleged scheme or how the money was diverted to them). Accordingly, SHIP's unjust enrichment claim against the Beechwood companies relating to the $50 million non-IMA investment should be dismissed with prejudice.

Second, SHIP also fails to allege in a nonconclusory fashion how that the Individual Defendants were purportedly enriched. In its December 6 Order, the Court noted that SHIP had only made conclusory allegations that the Individual Defendants were enriched, citing to ¶¶ 96, 112, 127 and 130 of the initial complaint. (Doc. 72 at 35-36.) Notably, in its SAC, SHIP does not amend any of those paragraphs to specify the alleged benefit received by each of the Individual Defendants. (Compare Doc. 1 at ¶¶ 96, 112, 127, 130 with SAC ¶¶ 109, 127, 144, 149). The only new allegation by SHIP is SAC ¶ 401, which states, in pertinent part:

> To the extent Individual Defendants received the proceeds of unearned Performance Fees and thus were enriched, and those proceeds are not recoverable in contract or collectible from any other party, they were unjustly enriched in a manner that harmed SHIP and should be ordered to repay amounts they received, as a matter of equity.

(SAC ¶ 401.)

As demonstrated by the precatory nature of SHIP's allegation, SHIP does not have a good faith basis to allege that any Individual Defendant actually received any specific benefit that unjustly enrich him. Mere speculation that a defendant "might" have received a benefit is woefully insufficient to meet SHIP's pleading requirements.

Moreover, such an allegation is far too vague and conclusory to assert a viable claim for unjust enrichment against any of the Individual Defendants. *See Gillespie*, 2018 WL 4681617, at *14-15; *Prime Mover Capital Partners, L.P. v. Elixir Gaming Techs., Inc.*, 793 F. Supp. 2d 651, 679 (S.D.N.Y. 2011) (plaintiff's allegation that revenue from stock purchases went to defendant "for the ultimate benefit of the [individual defendants]" insufficient to support unjust enrichment claim) (internal citations omitted); *M+J Savitt, Inc. v. Savitt*, 2009 WL 691278, at *10 (S.D.N.Y. Mar. 17, 2009) (requiring that a plaintiff allege a "specific and direct" benefit, rather than an "indirect benefit," to plead an unjust enrichment claim under New York law, and holding that an allegation that an individual defendant benefited by plaintiff's loan to defendant's company was insufficient to support an unjust enrichment claim against him).

In light of the above, SHIP's unjust enrichment claim should be dismissed with prejudice against all Defendants.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court:

(a) dismiss Counts IV (breach of fiduciary duty), VII (constructive fraud), and XII (gross negligence) of the SAC against the Individual Defendants;

(b) dismiss Count V (fraudulent inducement) of the SAC against: (a) the Beechwood companies, except as to the representations/omission in SAC ¶¶ 69-70, 77-78, and 87; (b) Feuer, except as to the representation/omission in SAC ¶¶ 77 and 87; and (c) Taylor, except as to the representations/omission in SAC ¶¶ 69-70 and 87;

(c) dismiss Count VI (fraud) of the SAC against: (a) the Beechwood companies, except as to the representations in SAC ¶¶ 165-68, 172-74, 178-80, 265, and 270; (b) Feuer,

except as to the representations in SAC ¶¶ 265 and 270; (c) Taylor, except as to the representations in SAC ¶¶ 172-74 and 178-80; and (d) Narain;

(d) dismiss Counts VIII-X (civil RICO) and XIII (unjust enrichment) of the SAC against all Defendants;

(e) dismiss Count XI (civil conspiracy) against Narain; and

(f) grant Defendants such other and further relief as this Court deems just and proper.

Dated: January 7, 2019

Respectfully submitted,

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It is hereby certified that on this 7th day of January, 2019, a copy of the foregoing was served through the Court's electronic filing system to all parties who have entered an appearance in this adversary proceeding:

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