UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff, v. BEECHWOOD RE LTD., et al., Defendants.	Case No. 1:18-cv-06658-JSR

SHIP'S OPPOSITION TO DEFENDANTS'
PARTIAL MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

INTRODUCTORY STATEMENT

Defendants Feuer, Taylor, Narain, and the Beechwood companies have filed a partial motion to dismiss the Second Amended Complaint ("SAC") that ignores this Court's prior rulings in its December 6, 2018 Opinion and Order ("Opinion" or "Op.") and December 26, 2018 Order ("Order"). The motion also misuses existing legal authority and procedural standards. Finally, the motion identifies no basis to dismiss the claims asserted against Narain.[1]

The motion disregards several prior, binding rulings of this Court:

- The Court's Opinion held that SHIP "has adequately pled breach of fiduciary duty as to the Beechwood defendants and Taylor, Feuer, and Levy." Op. at 14. Defendants nevertheless attempt to re-argue that SHIP's breach of fiduciary duty claim against Feuer and Taylor should be dismissed. Mot. at 3-5.
- The Court held that SHIP "has stated a claim for fraudulent inducement" as to all defendants except Narain and Illumin. Op. at 21. Defendants argue that the Court, having upheld the claim, should now "strictly limit" SHIP's future ability to support its fraudulent inducement claim to the specific representations and omissions cited by the Court in upholding that claim. Mot. at 10-12.
- The Court held that SHIP has pled misrepresentations with specificity for fraud and constructive fraud, subject to further pleading on reliance and injury. Op. at 24-25, 27. While Defendants acknowledge that SHIP has satisfied Rule 9(b)'s requirements for fraud and thus now states a claim, they again attempt to prevent SHIP, prior to full discovery, from relying in the future on other supporting evidence that is learned in discovery. Mot. at 12-13.
- The Court held that SHIP "has plausibly alleged that defendants – with the exception of Narain and Illumin – owed SHIP a duty" sufficient to state that element of its gross negligence and constructive fraud claims adequately. Op. at 33; 25-27. Defendants disregard the Court's prior ruling and attempt to re-argue that SHIP's gross negligence and constructive fraud claims should be dismissed for failure to allege the existence of a duty owed by each defendant. Mot. at 9-10.
- The Court's December 26 Order held that SHIP has adequately pled civil conspiracy such that the Court decided "to reinstate the conspiracy claim against all defendants." Order at 3-4. Defendants nevertheless renew their argument that the civil conspiracy claim against Narain should be dismissed. Mot. at 18.

[1] Defendant Levy again filed an Answer that pleads his Fifth Amendment rights against self-incrimination as to all substantive allegations. Levy does not join in the motion to dismiss.

Defendants ask the Court to reverse or alter its prior decisions, but they never moved for reconsideration of those binding rulings, as they were required to do. Defendants instead seek reconsideration here without identifying their requests as such with regard to SHIP's claims for breach of fiduciary duty, gross negligence, and constructive fraud. Defendants' request for reconsideration is untimely under Local Rule 6.3, which requires motions for such relief to be filed within 14 days of a ruling. Defendants also have not identified any purported newly discovered facts, a change in controlling law, or clear error by the Court, as required to justify the relief Defendants request. Accordingly, these prior rulings in the Court's December 6 Opinion and December 26 Order should not be disturbed.

Defendants also misapply the legal and procedural standards applicable at the pleading stage. They attempt, on this preliminary motion and prior to full discovery of evidence, to "strictly limit" SHIP's fraudulent inducement claim to the specific representations and omissions cited by the Court in upholding that claim. They similarly seek to constrain the scope of evidence and proof on SHIP's fraud claim, prior to full discovery. Defendants conflate separate stages of litigation and distinct procedural and legal concepts when they argue that SHIP's final proof in support of its fraudulent inducement and fraud claims should be strictly limited to representations and omissions specifically identified in the complaint, without regard to where the evidence might lead in full discovery.

No legal authority supports such a novel position, which treats a plaintiff's complaint as restraining future proof in the same way that a motion in *limine* or motion for summary judgment at the close of discovery might function. Such a potentially straitjacketing argument at the outset of litigation contradicts the mandate of Rule 8(a) for "short and plain" statements of the claims in order to put the defendants on notice of the claims against them. While Rule 9(b) requires

particularity for certain elements of claims, the rule is intended only to avoid frivolous or unsupportable claims, not to artificially restrict the scope of proof on meritorious claims. That pleading principle in no way restrains the ability of plaintiffs to pursue all facts supportive of their claims based on full discovery, once the claims have passed initial pleading muster.

There can be no doubt that Defendants here are on notice and understand all too well the nature of the claims against them. As the Court summarized in its December 6 Opinion, "[t]he gravamen of SHIP's fraudulent inducement allegation is not that defendants engaged in riskier investments than they had promised SHIP. It is that defendants intended from the outset to use SHIP's assets to enrich themselves and their affiliates." Op. at 21. So too with regard to the fraud and other claims, where Defendants executed on their scheme without ever disclosing it to SHIP. If SHIP attempted to introduce an entirely different theory of the case at some later point, then perhaps a question of whether that theory has been pled properly might arise for the Court's consideration at that time. That concept, however, does not give Defendants license to restrict preemptively the use of discoverable evidence before discovery has even begun.

In addition, Defendants' motion re-hashes arguments made in their prior motion to dismiss regarding SHIP's RICO claims and raises new grounds that are refuted by the facts and law. Defendants also renew their bid to dismiss SHIP's unjust enrichment claim, despite the specific articulation of the basis for that claim in the SAC that puts all defendants on fair notice of what the claim alleges.

Finally, Defendants grossly mischaracterize and minimize the SAC allegations against Narain in a futile effort to save him from answering for his role in misusing SHIP's funds and abusing SHIP's trust and confidence. Defendants cherry-pick allegations from the SAC to support their baseless contention that Narain is named as a defendant based solely on mere

conclusory allegations and his position as a Beechwood executive. With this shuttered view of what is alleged, Defendants advance distinct arguments on Narain's behalf relating to SHIP's claims for breach of fiduciary duty, fraud, RICO, and conspiracy.

Mischaracterizations aside, the SAC alleges that Narain served as Chief Investment Officer of BAM from January 2016 forward. SAC ¶ 27. No later than April 2016, Narain was heavily involved as the principal architect of Defendants' effort to arrange a sale of Agera Energy and exit that investment. *Id.* ¶ 225. That scheme, as set forth in great detail in the SAC, *see id.* ¶¶ 224-52, involved artificially driving up Agera's purported value in order to funnel additional money into the Platinum funds. *Id.* ¶ 225. Narain, along with Feuer, flew to SHIP's Carmel, Indiana, offices on May 19, 2016 to solicit SHIP in person for the Agera exit scheme, which was Narain's idea. *Id.* ¶¶ 231-32. Feuer and Narain touted Narain's background and experience as an investment manager to SHIP's Wegner and Lorentz, among others, and noted that Narain was a Series 7 registered representative. *Id.* ¶ 231. Narain described his intimate understanding of Agera Energy and its purported value and presented the scheme to SHIP as an opportunity in its best interest, *id.* ¶ 232, with the knowledge and understanding that the deal was designed to enrich Platinum, Beechwood, and their related parties at SHIP's expense.

Impressed by Narain's background and knowledge, Wegner and Lorentz overcame their initial hesitancy and went along with Narain's pitch. *Id.* ¶ 233. They flew to New York on May 25, 2016 to attend meetings with Narain, Feuer, and representatives from Agera Energy, including Kevin Cassidy, to learn more about the opportunity. *Id.* ¶ 234. Narain ran the meetings and introduced the SHIP team to several advisors working on the Agera Energy transactions. *Id.* Narain personally proposed that SHIP commit to a $75 million investment outside the Investment Management Agreements ("IMAs") and directly into the Agera scheme.

Id. ¶ 235. In a May 26, 2016 email, Narain reassured Wegner and Lorentz that he would comply with standards restricting SHIP's types of investments and with SHIP's investment guidelines and limitations, and he proposed a specific structure where SHIP would invest $50 million in AGH Parent outside the IMAs and an additional $20.5 million through the IMAs. *Id.* ¶ 236. In order to win SHIP's commitment, Narain agreed in his conversations with Wegner and Lorentz that no additional Agera investments would be made from the IMA accounts without express approval from SHIP, and he committed that Beechwood would purchase back $25 million of SHIP's direct investment in AGH Parent within a few months. *Id.* ¶ 237.

Based on Narain's direct appeals and representations, SHIP committed to invest in the Agera scheme. *Id.* ¶ 238. SHIP would come to regret this decision after its money disappeared into the labyrinth of transactions and, as intended by Narain and the other Defendants, enriched others at SHIP's expense, as alleged in the detailed description of the transaction in the SAC. Given the nature of how these deals operated and Narain's role as chief transaction architect, SHIP's allegations that he understood what he was doing are sufficient. Indeed, it is implausible that he did not appreciate and intend the favoring of others over SHIP. In any event, Rule 9(b) expressly provides that knowledge and intent may be alleged generally.

As the Agera Energy transactions neared conclusion in June 2016, it was Narain who closed the deal by pressuring Wegner and SHIP to move forward, which they did. *See id.* ¶¶ 239-52. Narain also told SHIP in June 2016 that Cassidy, a convicted felon, would not remain involved in Agera Energy after the transactions, even though Narain knew from an April 2016 email with Platinum and others that Defendants intended to "take care of Kevin [Cassidy]" in relation to the Agera exit scheme. *Id.* ¶ 252. And in fact they did take care of Cassidy. *Id.*

Defendants' motion also ignores entirely SHIP's factual allegations in the SAC regarding Narain's involvement in the PEDEVCO transaction. While the original deal may have been structured in 2014 before Narain arrived, by May 2016 the PEDEVCO deal was in distress and in need of additional financing. *Id.* ¶¶ 198-99. Narain came to the rescue. *Id.* ¶ 199. The SAC describes in detail the May 2016 Note Purchase Agreement that Narain negotiated and executed on behalf of SHIP. *Id.* ¶¶ 199-203. This transaction was part of a scheme that subordinated SHIP's interests in PEDEVCO to their detriment and to the benefit of Beechwood-related parties, which resulted in those favored parties recovering their PEDEVCO investment principal while SHIP recovered only pennies on the dollar. *Id.* ¶¶ 200-03.

Finally, the SAC describes in factual detail how Narain remained actively involved in the management and manipulation of the SHIP relationship well into 2017. In July 2016 and later, after the Beechwood connections to Platinum that Defendants had concealed and omitted from their disclosures for years finally began to come to light, Narain reassured Wegner and Lorentz that their money was not exposed to risk from Platinum even though he had to know this was not true. *See id.* ¶¶ 256-58. SHIP authorized the payment of unearned performance fees after these misrepresentations. Moreover, despite CIO Narain's assurances that no more IMA funds would be spent on Agera, assurances designed to coax SHIP to close the June 2016 Agera transactions, Beechwood in July 2016 caused IMA funds to be used to purchase an additional investment in AGH Parent. *Id.* ¶¶ 254-55. In November 2016 and into 2017, Narain participated directly in the negotiation and execution of the sale of Agera assets in a manner that aided Beechwood-related parties in recovering their investment proceeds and further harmed SHIP's financial interests in direct breach of the fiduciary duties he owed to SHIP. *Id.* ¶¶ 259-62.

These well-pled allegations are more than sufficient to state claims against Narain for breach of fiduciary duty, fraud, RICO violations, and conspiracy. Narain secured a direct relationship of personal trust and confidence with Wegner, Lorentz, and SHIP. He abused that trust to benefit Beechwood and its related parties to SHIP's detriment. He participated in a fraudulent investment scheme and actively solicited SHIP for specific investments by making misrepresentations and by concealing and omitting material information that, if known, would have permitted SHIP to protect itself rather than continuing to serve as an unwitting victim being dragged further and further into the investment hole Defendants had dug for them.

APPLICABLE LEGAL STANDARD

SHIP incorporates by reference the legal standard from its opposition to Defendants' partial motion to dismiss the original complaint and respectfully refers the Court to its December 6 Opinion. Op. at 8-9; Dkt. No. 66, SHIP Opp. at 5-6.

ARGUMENT

I. The SAC States a Claim for Breach of Fiduciary Duty Against Each of the Individual Defendants

A. The SAC, Like the Original Complaint, Pleads a Claim for Breach of Fiduciary Duty Against Feuer and Taylor

The Court's December 6 Opinion denied Defendants' motion to dismiss and upheld SHIP's claims for breach of fiduciary duty against defendants Taylor, Feuer, and Levy, concluding that SHIP had adequately alleged that those defendants "personally induced SHIP to invest with Beechwood." Dkt. No. 72, Op. at 13. Unsatisfied with the Court's decision, Taylor and Feuer improperly use this motion to seek reconsideration of the Court's earlier dismissal.

Defendants' recycled motion to dismiss the fiduciary duty claim against Feuer and Taylor should be denied because it disregards the Court's earlier ruling, it is untimely, and, even ignoring its procedural failings, it does not present any valid basis for reconsideration. Taylor

and Feuer remain wrong on the merits concerning SHIP's pleading of this claim. Feuer and Taylor attempt to rely (as they did in their original motion) on an expansive reading of the Second Circuit's unpublished summary order in *Krys v. Butt*, 486 F. App'x 153 (2d Cir. 2012), to suggest that this Court previously upheld an aiding and abetting breach of fiduciary duty claim rather than a direct breach of fiduciary duty claim. Feuer and Taylor's attempt to escape liability for breach of fiduciary duty should be rejected for several reasons.

First, the SAC states a direct claim for breach of fiduciary duty under any reasonable interpretation of the applicable case law. The Court's December 6 Opinion notes that "the elements of a breach of fiduciary duty claim are '(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.'" Op. at 9 (quoting *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 114 (S.D.N.Y. 2009)). "In determining whether a fiduciary duty exists, the focus is on whether one person has reposed trust or confidence in another and whether the second person accepts the trust and confidence and thereby gains a resulting superiority or influence over the first." *Id.* at 13 (quoting *Indep. Asset Mgmt. LLC v. Zanger*, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008)). Moreover, whether a fiduciary duty exists "is usually a fact specific inquiry." *In re Refco Inc. Securities Litigation*, 826 F. Supp. 2d 478, 523 (S.D.N.Y. 2011). Thus, "[o]n a motion to dismiss, it is often impossible to say that plaintiff will be unable to prove the existence of a fiduciary relationship." *Childers v. N.Y. & Presbyterian Hosp.*, 36 F. Supp. 3d 292, 308 (S.D.N.Y. 2014).

If, as the Court has already held, the original complaint's allegations met the pleading standard for breach of fiduciary duty, then the SAC's allegations do as well. The SAC – like the original complaint – contains detailed factual allegations that give rise to a plausible, compelling inference that Feuer and Taylor directly owed SHIP fiduciary duties. *See, e.g.*, SAC ¶¶ 69-78.

Those allegations include direct representations by Feuer and Taylor – who held themselves out to SHIP as Beechwood's founders, owners, and controlling officers – designed to instill trust and confidence, including that Feuer and Taylor "were highly accomplished in dealing with insurance companies and in investment" and were the core of a "[s]table and experienced" management team with a "[p]roven record of outperformance in various market environments." *Id.* ¶¶ 73-74. SHIP in turn handed over discretionary investment responsibility to them. *Id.* ¶¶ 93, 104, 122, 140. Such allegations sufficiently plead "the existence of a fiduciary relationship" owed by Feuer and Taylor to SHIP. *See Childers*, 36 F. Supp. 3d at 308.

Second, the SAC carefully sets forth the manners in which Feuer and Taylor breached the trust SHIP placed in them, and these allegations cannot be negated by Defendants' quibbling over the Court's use of the phrase "knowingly participate[d]" in explaining the reasons for its denial of the previous motion to dismiss. As Defendants note, the First Department employed that phrasing – which traces its roots to the New York Court of Appeals' decision in *Wechsler v. Bowman*, 285 N.Y. 284, 291, 324 N.E.2d 322 (1941) – to uphold a *direct* claim for breach of fiduciary duty against an officer of the corporate defendant. *See Talansky v. Schulman*, 2 A.D.3d 355, 359-60, 770 N.Y.S.2d 48, 53 (1st Dep't 2003). This Court did likewise. Defendants nevertheless seem to argue that *Talansky* was incorrectly decided, contending that the concept of knowing participation may apply only in the context of a claim for aiding and abetting. *See* Motion at 4 (citing *Krys*, 486 F. App'x at 156-57). To the contrary, the SAC alleges, as the December 6 Opinion recognized, the existence of fiduciary duties owed by Feuer and Taylor and their direct, knowing participation in actions that constitute the breach of those duties. As the Court has already held, the original complaint alleges that Feuer and Taylor "personally induced

SHIP to invest with Beechwood," Op. at 14, and they convinced SHIP to "repose[] trust or confidence in" them, *id.* at 13; *see also Zanger*, 538 F. Supp. 2d at 709. No more is required.[2]

Third, Defendants' argument ultimately is self-defeating, as they concede that the Court upheld a claim against Feuer and Taylor, though they would like to restyle it as one for aiding and abetting. As this Court and many others have stated, a "plaintiff's own labeling of its claim is not determinative; rather, a court must look beneath the surface of the language in the Complaint to determine the legal nature of the claim." *Durabla Mfg. Co. v. Goodyear Tire & Rubber Co.*, 992 F. Supp. 657, 659-60 (S.D.N.Y. 1998) (Rakoff, J.); *see also Lindner v. Int'l Bus. Machs. Corp.*, No. 06 Civ. 4751, 2008 WL 2461934, at *10-11 (S.D.N.Y. June 18, 2008) (Sullivan J.) (applying Rule 8(d)'s instruction that "[n]o technical form [of pleading] is required" and concluding that complaint "may be reasonably construed as asserting claims for defamation and tortious interference," even though such claims were not explicitly pled). This approach comports with the well-established standard of review on a motion to dismiss for failure to state a claim, which requires courts to disregard a complaint's labels and legal conclusions and focus solely on the factual allegations. *See, e.g., N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 120 (2d Cir. 2013) ("[L]abels and conclusions or a formulaic recitation of the elements of a cause of action will not do." (internal quotation marks omitted)).

Thus, even accepting Defendants' re-construction of the Court's original holding, it does not merit dismissal or support an argument that no actionable claim has been pled. A claim for aiding and abetting breach of fiduciary duty consists of three elements: "(1) breach of fiduciary

[2] Feuer and Taylor's direct interactions with SHIP further distinguish this case from *Krys*, as the complaint there contained not a single specific allegation to suggest a fiduciary duty running directly from the individual defendant to the plaintiffs. 486 F. App'x at 156. Rather, the complaint alleged only that the defendant "was an officer of RAI who oversaw *all* of RAI's commodity pools." *Id.* (emphasis in original).

obligations to another of which the aider and abettor had knowledge; (2) the defendant knowingly induced or participated in the breach; and (3) plaintiff suffered actual damages as a result of the breach." *In re MF Global Holdings Ltd. Inv. Litig.*, 998 F. Supp. 2d 157, 182 (S.D.N.Y. 2014) (internal quotation marks omitted). The Court's Opinion supports a finding that SHIP's allegations satisfy all three of these elements as to Feuer and Taylor. *See* Op. at 12-13 (sustaining direct breach of fiduciary duty claim against Beechwood); *id.* at 13-14 (Feuer and Taylor "knowingly participate[d]" in Beechwood's breach); *id.* at 20-21 (explaining harm to SHIP resulting from Defendants' misappropriation of funds). In the end, then, the original complaint and the SAC state *both* a direct claim for breach of fiduciary duty *and* a claim for aiding and abetting breach of fiduciary duty against Feuer and Taylor.

Fourth, Defendants also are wrong factually when they argue that any alleged breach is limited to the pre-IMA time period. The SAC alleges that Feuer and Taylor fraudulently induced the relationship giving rise to fiduciary duties owed to SHIP and then directly participated in further breaches of those duties through their repeated and consistent malfeasance as trusted advisors and investment professionals exercising discretionary authority. Feuer and Taylor helped negotiate the second and third IMAs while they performed on the first, and their actions contrary to SHIP's best interests continued throughout the relationship. By way of example, the SAC alleges that: (i) just one day after execution of the BBIL IMA, Taylor was already in contact with Mark Nordlicht of Platinum to discuss equity allocations for SHIP's investments, SAC ¶ 110; (ii) Taylor executed transaction documents related to SHIP's investment in Platinum-influenced PEDEVCO, *id.* ¶ 196; (iii) Feuer and Taylor concealed their ownership position in AGH Parent, a vehicle through which tens of millions of dollars were funneled to Beechwood- and Platinum-controlled entities, *id.* ¶ 214; (iv) Feuer was directly involved in

meetings with SHIP concerning SHIP's potential investment in Agera Energy, *id.* ¶¶ 231, 234, 238; and (v) Feuer, Taylor, and Narain made concerted efforts in the summer of 2016 to reassure SHIP that its investments were safe, at a time when they knew Platinum was imploding, *id.* ¶ 256. These actions and others by Feuer and Taylor as set forth in the SAC favored related parties over SHIP and plead breaches of fiduciary duty throughout the relationship.

The SAC also pleads proximate cause, as Feuer and Taylor's actions in leading SHIP into conflicted investments that did not prioritize SHIP's financial interests necessarily harmed SHIP. Feuer and Taylor helped orchestrate the investments, they communicated with Platinum executives about SHIP's available funds and investments, they concealed from SHIP the conflicts of interest inherent in their investments, they requested and collected unearned performance fees for their businesses, and they persuaded SHIP to remain invested and to contribute money outside the IMAs, all to SHIP's detriment as its asset values disappeared.

The Court's December 6 Opinion held that SHIP has pled a claim for breach of fiduciary duty against Feuer and Taylor. Defendants provide no valid basis for disturbing that conclusion.

B. SHIP States a Claim for Breach Of Fiduciary Duty Against Narain

Narain's attempt to avoid a breach of the fiduciary duty claim likewise is without merit. SHIP's allegations with specific regard to Narain are not "conclusory and derivative," as Defendants suggest. Mot. at 6. Defendants isolate attention on two specific paragraphs in support of that assertion, *id.*, to the exclusion of the myriad allegations that describe Narain's conduct in painstaking detail, including the date and time of the alleged conduct in several instances. *See* Introductory Statement, *supra*; *see e.g.*, SAC ¶¶ 224-61; *cf. In re Philip Servs. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 475-76 (S.D.N.Y. 2004) (rejecting defendant's attempt to "secure dismissal by cherry-picking only those allegations susceptible to rebuttal and disregarding the remainder"). SHIP's detailed allegations place Narain on notice of the specific

conduct that forms the basis of SHIP's breach of fiduciary duty claim against him. Rule 9(b) requires nothing more. *See, e.g., Refco*, 826 F. Supp. 2d at 525-26 (plaintiffs "sufficiently pled the 'who, what, where, when' details required by Rule 9(b)").

The SAC sets forth in detail Narain's direct interactions with and solicitation of SHIP, and therefore, SHIP's allegations are not "derivative" of the fiduciary duties BAM owed to SHIP, as Narain contends. Mot. at 7. The SAC alleges that, after Narain became BAM's CIO in January 2016, SHIP met him for the first time on May 19, 2016 when Narain traveled to Ohio to pitch a proposal. SAC ¶¶ 224, 231. At that meeting, which was part of a concerted effort to secure SHIP's unwitting participation in the scheme Narain and the other Beechwood Advisors already had hatched to secure Defendants' exit from their Agera Energy investments, *id.* ¶¶ 224-30, 232, Narain touted his "background and experience as an investment manager" and his status "as a Series 7 registered representative," *id.* ¶ 231, much like Feuer, Taylor, and Levy had done during their meetings with SHIP prior to execution of the IMAs. *Id.* ¶¶ 69-78.

In a further effort to win SHIP's confidence, Narain made representations about his deep knowledge of the energy industry and the extensive due diligence he had performed with respect to Agera Energy. *Id.* ¶¶ 232-33. Though SHIP's executives were hesitant at first, they eventually became convinced that they could trust Narain to manage SHIP's assets wisely and prudently. *Id.* ¶ 233. Narain repaid the trust that SHIP had placed in him by shepherding tens of millions of dollars of SHIP's funds through the fraudulent scheme that he and his associates had devised. *See id.* ¶¶ 234-47. Narain further breached SHIP's trust by orchestrating revisions to the PEDEVCO investment terms, where he arranged for SHIP's interests to be subordinated in favor of the interests of Beechwood and its related parties. *Id.* ¶¶ 198-203.

The allegations in the SAC adequately plead that Narain owed fiduciary duties to SHIP distinct from the duties that BAM owed to SHIP. *See* Op. at 13. That is especially so given the "fact-specific inquiry" involved in determining whether a fiduciary duty exists. *Refco*, 826 F. Supp. 2d at 523. This case is nothing like *Krys*, where the complaint relied on the bare allegation that the defendant "was an officer of RAI who oversaw *all* of RAI's commodity pools." 486 F. App'x at 156 (emphasis in original). The SAC details direct, personal interactions between Narain and SHIP where Narain made numerous representations designed to inspire confidence and give SHIP comfort that Narain was someone who could be trusted.

Narain's contention that his alleged conduct could not have proximately caused any harm to SHIP is also without merit. He restructured the PEDEVCO priorities to favor Beechwood and its related parties at SHIP's expense. SAC ¶¶ 199-203. His conduct in the Agera transactions directly caused the transfer of SHIP's cash in exchange for illiquid assets of uncertain (and unrealized) value in a complicated series of transactions intentionally designed to confuse and obfuscate; these Agera transactions were rushed and occurred just as the walls began closing in around Platinum, and thus ultimately around Beechwood too. Narain then prevented SHIP from learning the truth about these investments with repeated misrepresentations and omissions about the status of the assets and the security of SHIP's funds. *See id.* ¶¶ 255-58, 263. SHIP also was forced to spend significant amounts of money to uncover the problems with these Narain-induced investments. *Id.* ¶ 263. When SHIP finally recovered control over its invested assets, their value was far less than Beechwood had consistently represented. *Id.* All the while, Beechwood continued to collect unearned performance fees into August 2016 while Narain served as CIO and had to be aware that the artificial and harmful transactions in which he forced

SHIP's participation could not substantiate the payment of fees that purported to represent a portfolio return in excess of 5.85% on SHIP's behalf. *Id.*

II. Defendants Concede That SHIP's Fraud Claim Is Adequately Pled, and Their Arguments for Dismissal Solely As to Narain Should Be Rejected

The Court's December 6 Opinion held that SHIP's initial complaint pled misrepresentations with specificity, but did not allege reliance and injury adequately. Defendants concede on this motion that SHIP's additional allegations meet the Rule 9(b) standard. Defendants also do not dispute that the SAC pleads reliance and injury. All Defendants except Narain thus accept that SHIP's fraud claims are adequately pled, at least with respect to certain representations. Mot. at 13. Instead, Defendants seek to limit the scope of SHIP's fraud claim, as discussed in Point III below.

As to Narain, he cannot secure dismissal of the fraud claims against him by contending, inaccurately, that SHIP only alleges he made two misstatements. In reality, and as discussed throughout this opposition, the SAC details numerous misstatements and omissions by Narain. With respect to soliciting SHIP's 2016 investment in the Agera Energy deal, for example, SHIP alleges that Narain "assured SHIP that 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. SHIP also alleges that Narain "took the lead" in convincing SHIP to invest in the Agera exit scheme that "Narain had contrived for the benefit of Platinum and Beechwood investors." *Id.* ¶ 232. SHIP alleges that in order to convince SHIP to complete the proposed Agera Energy scheme, Narain promised SHIP that Beechwood would "arrange for the purchase of $25 million of SHIP's direct investment in AGH Parent within three to four months." *Id.* ¶ 237. Narain falsely represented to SHIP that no more of its IMA funds would be invested in connection with Agera. *Id.* ¶¶ 237, 254. When the Agera Energy scheme closed,

Narain told SHIP "you have our commitment that we will do everything in our power to make this the very (sic) investment for you that we can." *Id.* ¶ 250. SHIP alleges that these statements by Narain were false.

SHIP further alleges that Narain knew that the PEDEVCO transaction changes he structured in 2016 favored the interests of Beechwood's related parties over SHIP's interests, and yet he concealed this information from his client. *Id.* ¶¶ 198-203. More generally, the SAC alleges that Narain, as the CIO and architect of numerous transactions, knew that SHIP's best interests were not being protected, yet he concealed that information as well. These omissions rendered his solicitation of and statements to SHIP about the investments false. *Id.* ¶¶ 257, 263.

The SAC alleges material misrepresentations and omissions by Narain, his knowledge of the falsity of his representations, reasonable reliance by SHIP on their discretionary investment advisor and fiduciary, and massive financial harm as a result. No more is needed for fraud.

III. Defendants Cannot Limit Future Proof of SHIP's Fraudulent Inducement and Fraud Claims Through a Motion to Dismiss

Defendants should not be permitted through this motion to limit artificially SHIP's fraudulent inducement and fraud claims solely to allegations discussed in the Court's December 6 Order or illustrative examples in the SAC. Defendants' argument to place SHIP's claims in a factual straitjacket at the pleading stage, and well before completion of discovery, is unsupported by law and contrary to settled principles of civil litigation. Defendants essentially make a premature motion in *limine* or motion for summary judgment disguised as a motion to dismiss.

While the Court noted in its December 6 Order that claims for fraudulent inducement and fraud are subject to heightened pleading standards, the primary purpose of Rule 9(b) is "to afford defendant[s] fair notice of the plaintiff's claim and the factual ground upon which it is

based." *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000). The SAC easily meets this threshold and appropriately provides fair notice to Defendants of the nature of these claims.

Further, Rule 9(b) does not displace Rule 8(a). Instead, "the Court must balance the requirements of Rule 9(b) and their overall purposes with the requirements of notice pleading under Rule 8(a)." *McCormack v. IBM*, 145 F. Supp. 3d 258, 269 (S.D.N.Y. 2015) (finding that employee-plaintiffs in discrimination suit alleged with sufficient particularity that they were fraudulently induced into signing separation agreement). The "notice pleading standard" under Rule 8(a) "relies on liberal discovery rules and summary judgment motions *to define disputed facts and issues and to dispose of unmeritorious claims*." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 585 (2007) (emphasis added). This liberal standard dovetails with the intended purposes of discovery, which include helping to "define and clarify the issues" and unearth relevant facts and evidence involved in a case. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 507 (2002) (before discovery, it may be difficult to plead certain facts and circumstances). Because fraud flourishes in secrecy, it will be the rare instance where the plaintiffs know the full details of the fraud *before* discovery.

On a motion to dismiss, the relevant inquiry is whether the complaint contains allegations sufficient to satisfy the Rule 9(b) pleading standard; the purpose is not to restrain or prevent the ability of the parties to conduct discovery, to follow the evidence where it leads, and to develop the facts that they will seek to prove at trial. No legal basis exists for the constricting and illiberal approach that Defendants propose. The SAC contains well-pled allegations supporting SHIP's fraudulent inducement and fraud claims against all Defendants, individually and collectively. The Court's analysis need not go any further than that.[3]

[3] Defendants do not cite a single case in which a Court limited a fraud claim on a motion to dismiss in the manner Defendants request here, and no such authority exists. Defendants instead

IV. SHIP's Constructive Fraud Claim Is Adequately Pled

Defendants devote two sentences to their re-argument that SHIP's claim for constructive fraud (Count VII) should be dismissed against the Individual Defendants for failure to allege a duty. In doing so, Defendants admit that if SHIP "allege[s] the existence of a fiduciary or confidential relationship between it and each defendant," then the constructive fraud claim survives. Mot. at 10; *see also LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 524 (S.D.N.Y. 2014) (constructive fraud claim replaces actual fraud claim's "scienter requirement with the requirement that Defendants maintained either a fiduciary or confidential relationship with Plaintiff"). The Court's December 6 Opinion already recognized the existence of fiduciary duties, and the SAC pleads fraud adequately against each Individual Defendant and establishes the existence of a fiduciary relationship with each of the Individual Defendants. SHIP thus has alleged a duty and stated a claim for constructive fraud against all Defendants.

V. The Court Should Reject Defendants' Disguised Request for Reconsideration of Its Previous Ruling on SHIP's Gross Negligence Claim

Defendants likewise seek to re-argue that the claim for gross negligence against Feuer, Taylor, and Narain should be dismissed for failure to allege the existence of a duty. As noted above, however, the Court has already held that SHIP adequately alleged a breach of fiduciary duty against Feuer and Taylor. Op. at 32-33. Defendants' improper attempt to reargue or move for reconsideration of that holding now violates Local Rule 6.3, even if they style it as a motion to dismiss. The motion also fails on the merits since the SAC establishes a fiduciary duty owed by Narain to SHIP. Defendants' argument to dismiss the gross negligence claim thus fails.

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are left to cite cases holding that no claim had been stated and thus the claim was subject to dismissal, which is not relevant here. Mot. at 14-15.

VI. SHIP's RICO Claims Are Not Subject to the RICO Amendment, and Defendants' Concessions on SHIP's Fraud Claim Establish Continuity of the RICO Scheme

In again seeking dismissal of SHIP's RICO claims, Defendants re-plow the same ground that they did in their previous motion to argue that SHIP's claims are grounded in securities fraud and thus subject to dismissal based on the RICO Amendment. *See* 18 U.S.C. § 1964(c). That statutory provision applies, however, only where "the conduct pled as the predicate offenses is actionable as securities fraud." *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 644 (S.D.N.Y. 2017) (internal quotation marks omitted). To be actionable as securities fraud, the allegedly fraudulent conduct must be "in connection with the purchase or sale of" a security, which the Supreme Court has interpreted to mean that "the fraud alleged [must] coincide with a securities transaction …." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006). "In other words, the fraud itself must be integral to the purchase and sale of the securities in question. Conduct that is merely incidental or tangentially related to the sale of securities will not meet the 'in connection with' requirement." *Leykin v. AT&T Corp.*, 423 F. Supp. 2d 229, 241 (S.D.N.Y. 2006) (internal citations and quotation marks omitted).

Any fair reading of the SAC establishes that the underlying predicate acts alleged here plead traditional common law fraud rather than securities fraud. These predicate acts all concern Defendants' countless fraudulent misrepresentations concerning Beechwood's control, its financial backing and security, its professed intention as a fiduciary with discretionary authority to prioritize SHIP's interests (and not those of Defendants' related parties), its overall investment strategies, the status and value of SHIP's investment portfolio, and the nature of the relationships among Beechwood, Platinum, and their key executives. *See* Compl. ¶¶ 58-92, 146-263, 361. The fraudulent nature of these misrepresentations was laid bare by the numerous risky and improper investments of SHIP's money in assets with deep ties to Platinum. *Id.* ¶¶ 146-263.

The principal object of the criminal enterprise was to entice SHIP to part with its money through false promises of guaranteed returns and other misrepresentations designed to instill confidence and trust, so that Defendants could convert those funds for their own improper purposes. That objective was achieved when SHIP transferred its funds to Defendants and granted Defendants complete discretion to invest those funds as they saw fit. That Defendants further betrayed SHIP's confidence by funneling those funds to Platinum through what appeared on their face to be "otherwise legitimate [securities] transaction[s]" does not transform the underlying predicate acts into violations of the federal securities laws. *Leykin*, 423 F. Supp. 2d at 242.

The transactions Defendants entered on SHIP's behalf were merely a means to an end – the fact that those transactions may have qualified individually as "securities transactions" is immaterial. Likewise, the fact that Platinum may have committed securities fraud with its own customers remains one large step removed from the gravamen of the SAC. The RICO Amendment does not mean that every fact pattern that involves an investment negates RICO's reach. Rather, it serves to prevent plaintiffs from super-charging traditional securities fraud claims that involve specific misrepresentations or omissions about specific securities sold to stockholders (or a class of stockholders) into racketeering claims based on those identical allegations.[4] The SAC focuses on a different kind of misconduct that "is merely incidental or tangentially related to the sale of securities," *id.* at 241; the RICO Amendment thus cannot apply. *See Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 457 n.9 (S.D.N.Y. 2009) (application of RICO Amendment was "too broad," even though the underlying tax fraud scheme "could not have occurred without the sale of securities," since "the securities transactions [were] only incidental to any underlying fraud"); *see also Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694

[4] If SHIP had asserted a securities fraud claim, Defendants no doubt would have sought dismissal because the SAC does not concern specific misrepresentations about specific securities.

F.3d 783, 791 (6th Cir. 2012) (citing *Kottler* and rejecting application of RICO Amendment "because the fraud and the securities transactions were essentially independent events").[5]

This Court also should reject Defendants' newfound argument that the conduct alleged here is too narrow to fall within RICO's scope. Defendants could have argued this point in their original motion to dismiss, but did not, and it should not be entertained here. In any event, the case law on which Defendants rely is dated and inapposite. In *Feirstein v. Nanbar Realty Corp.*, 963 F. Supp. 254, 260 (S.D.N.Y. 1997), the court dismissed the plaintiffs' RICO claims because the underlying predicate acts consisted "only of four acts . . . over a three year period" – solely the mailing of tax returns – and the court determined this alleged conduct was too sporadic and inconsistent to satisfy the continuity requirement. In *Lefkowitz v. Bank of New York*, No. 01 Civ. 6252, 2003 WL 22480049, *9 (S.D.N.Y. Oct. 31, 2003), the court dismissed the plaintiff's RICO claims against the executor of her parents' estates, who allegedly sought to disinherit her by fraudulent means.

The SAC does not allege isolated and personal conduct but rather continuous and aggressive actions in connection with pervasive and far-reaching enterprises. Defendants concede that the alleged fraudulent scheme extended from at least April 2014 through August 2016, *see* Mot. at 13, more than the two years required to establish closed-ended continuity – in fact, the SAC alleges actions well into 2017 that did further harm to SHIP's interests. *See* SAC ¶ 361; *e.g.*, *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999)

[5] This Court's ruling in *Picard v. Kohn*, 907 F. Supp. 2d 392 (S.D.N.Y. 2012), is not to the contrary. There, the defendants were accused of conspiring to market their investment funds as diversified, when in fact they fed investor funds exclusively to Madoff Securities. *Id.* at 396. The Court concluded that "the defendants obtained the money they provided by engaging in conduct that could be prosecuted as securities fraud." *Id.* at 398 n.2. Further, the allegation there that the fund was being marketed and sold as part of the RICO enterprise (thus triggering application of the RICO Amendment) is not found here. Defendants do not assert that the conduct alleged in the SAC is itself independently prosecutable as securities fraud.

(two-year period satisfies closed-ended continuity). As detailed throughout the SAC, the enterprises involved numerous individual and corporate participants and claimed multiple victims, including SHIP, BCLIC, and WNIC, among others. *See, e.g.*, SAC ¶¶ 11-22, 58-68, 359-60. SHIP's RICO allegations pass muster, and indeed this Court has previously sustained RICO claims based on far less. *See, e.g.*, *Related Companies, L.P. v. Ruthling*, No. 17-cv-4175, 2018 WL 3315728 (S.D.N.Y. July 5, 2018) (single real estate company adequately stated RICO claim by alleging that defendant fraudulently overbilled them); *Lavastone Capital LLC v. Coventry First LLC*, No. 14-cv-7139, 2015 WL 1939711 (S.D.N.Y. Apr. 22, 2015) (single plaintiff adequately stated RICO claim by alleging that defendants fraudulently marked up insurance policies for resale in violation of their agreement and their fiduciary duties to plaintiff).

The crux of Narain's argument for dismissal is that he joined the criminal enterprise too late and engaged in too few fraudulent acts over too short a time period. That is not the law. "[T]here is no requirement that all participants in an enterprise be involved in the scheme for equal or similar amounts of time. Indeed, an individual or entity can join a RICO enterprise long after it originates." *Chevron Corp. v. Donziger*, No. 11 Civ. 0691, 2012 WL 3223671, at *2 & n.28 (S.D.N.Y. May 24, 2012) (citing *United States v. Coonan*, 938 F.2d 1553, 1560 (2d Cir. 1991)). The SAC's allegations establish Narain's participation and complicity in the fraudulent scheme. Narain thus cannot avoid RICO liability simply because he joined the scheme later in time.

VII. The SAC Pleads a Claim for Civil Conspiracy Against Narain

The Court's December 26 Order concluded that SHIP had adequately pled a civil conspiracy claim in its original complaint and permitted SHIP to reinstate that claim "against all defendants." Dkt. No. 83, Order at 4. Despite the Court's clear directive and the additional factual allegations in the SAC, Narain contends that the claim is not adequately pled as to him.

A "plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan." *Ray Legal Consulting Grp. v. DiJoseph*, 37 F. Supp. 3d 704, 723 (S.D.N.Y. 2014) (citation omitted). To "properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement." *Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dep't 2012). The SAC alleges each of these elements.

The SAC alleges multiple underlying torts that this Court has already sustained and that Defendants have conceded are adequately pled. Moreover, the SAC adequately alleges that Narain directly committed fraud and breached the fiduciary duties he owed to SHIP. Narain argues, however, that the SAC does not allege an agreement between Narain and the other conspirators to commit those torts. That argument cannot be reconciled with the SAC's well-pled allegations which plainly establish that Narain was aware of and directly participated in the scheme to defraud SHIP. The SAC details Narain's central role in orchestrating the fraudulent PEDEVCO transaction revisions and the series of Agera-related transactions that served to enrich Defendants and Platinum. *See* SAC ¶¶ 198-203, 231-63. The SAC alleges Narain's awareness of Platinum's connections and his knowledge that Platinum executives had personally seen to it that convicted felon Kevin Cassidy be "installed as managing director at Agera Energy …." *Id.* ¶ 252. These allegations are sufficient to establish a corrupt agreement by Narain to participate in the fraud. *See IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 759 F. Supp. 2d 363, 387 (S.D.N.Y. 2010) (plaintiff's allegations of "a tacit agreement among" defendants was "sufficient to meet the requirement of an agreement between the parties."). The SAC – like the prior iterations of the complaint – accordingly states a claim for civil conspiracy against Narain.

VIII. SHIP States a Claim For Unjust Enrichment

The Individual Defendants assert that the SAC's unjust enrichment claim is inadequately pled, relying on buzzwords such as "conclusory," "non-specific," and "general." What Defendants actually are attempting to do, however, is impose an unreasonably high standard of proof on SHIP at the notice pleading stage. The Court should reject their efforts. *See, e.g.*, *Transcience Corp. v. Big Time Toys, LLC*, 50 F. Supp. 3d 441, 452-53 (S.D.N.Y. 2014) ("[E]ven though Plaintiffs may not ultimately *recover* under both the breach of contract and unjust enrichment claims, courts in this Circuit routinely allow plaintiffs to *plead* such claims in the alternative.") (emphasis in original).[6]

As to the $50 million invested outside the IMAs, the SAC alleges in detail how the Individual Defendants were enriched at SHIP's expense as a result of that "investment." Those funds were directed to AGH Parent, an entity with deep ties to Platinum in which Taylor and Feuer maintained "significant ownership positions . . . by way of no less than four separate entity layers." SAC ¶¶ 214, 246-47, 252. The purpose of inducing SHIP's investment, as alleged in the SAC, was to ensure "that [the] insiders received unearned equity interests in the Agera enterprise, Beechwood retained complete control over Agera Energy, and the Beechwood, Platinum, and other related parties would essentially siphon off any profit." *Id.* ¶ 226. The scheme worked and Defendants ultimately were able to exit at a handsome profit, leaving SHIP to hold the bag. *See id.* ¶¶ 260-63. These allegations state a claim for unjust enrichment.

The SAC also responds to the Court's initial observations about SHIP's broader unjust enrichment claim. *See* Op. at 35-36. SHIP alleges that Feuer, Taylor, and Levy are owners of

[6] Under New York law, "a plaintiff must allege that '(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.'" Op. at 34 (quoting *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004)). The SAC unquestionably pleads each of these elements.

Beechwood through the family trusts which bore the generic names "Beechwood Trust No. 1" through "Beechwood Trust No. 20." SAC ¶ 61. SHIP alleges that, as Beechwood's ultimate owners, Feuer, Taylor, and Levy were the ultimate beneficiaries of the performance fees paid to the Beechwood Advisors. *Id.* ¶ 401. Moreover, the SAC alleges that Defendants sold assets for large sums of money in 2017; the proceeds of any such transactions would have gone to the owners, including the Individual Defendants. *See id.* ¶ 262. SHIP further alleges that the Beechwood Defendants did not "true up" any shortfalls in their payments owed under the IMAs and this allowed the Individual Defendants, who are not parties to any contracts with SHIP, to be enriched unjustly by the diverted proceeds. *See id.* ¶¶ 100-02, 118-20, 137-38.

Defendants' contention that "SHIP does not have a good faith basis to allege that any Individual Defendant actually received any specific benefit that unjustly enrich [sic] him," Mot. at 20, is baseless. In fact, the SAC details vast sums of money and financial benefit that went to Defendants. The fact that SHIP cannot presently trace the flow of funds from SHIP through a labyrinthine maze of obscure transactions to their final destination in the Individual Defendants' hands does not provide a basis for dismissal at the pleading stage. Defendants control that information, which will be learned through discovery and proof. The fraudulent scheme's central mission was to secure control over SHIP's money, assets, and financial positions and to convert them to Defendants' own purposes at SHIP's expense. That is precisely what happened here. The Individual Defendants were not working for free, nor have they renounced their ownership interests in the entities to which SHIP's funds undisputedly flowed. Equity and good conscience require that the Individual Defendants be held to account for their unjust enrichment.

CONCLUSION

For all these reasons, Defendants' partial motion to dismiss should be denied.

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