In re Platinum-Beechwood Litigation

2019 | Cited 0 times | S.D. New York | October 7, 2019

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ii UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
---------- X In re PLATINUM-BEECHWOOD LITIGATION
---------- X MELANIE L. CYGANOWSKI, as Equity Receiver for PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL (A) LTD., and

In re Platinum-Beechwood Litigation

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PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC,

18-cv-6658 (JSR)

(JSR) AND ORDER

Plaintiff,

-v- BEECHWOOD RE LTD. et

Defendants. ---------- X

I JED S. RAKOFF,

DATE

On December 19, plaintiff Melanie L. Cyganowski filed

I I I a multi-count Complaiht against numerous ECF No. 1. On March 27, 2019, Washington Insurance Company ("WNIC") and Conseco Life Company

! ("BCLIC") filed an Cross-Claims, and Thitd-Party

I Complaint ("WNIC ECF No. 75. On March 29,

1 2019, plaintiff I filed a First Complaint ("FAC"). ECF No. 81. And on May

I 15, 2019, defendant Senior Health Insurance of Pennsylvania ("SHIP"): and Fuzion Analytics,

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Inc.· ("Fuzion")

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IECF I I filed an Answer, Cross-Claims, and Third-Party

("SHIP TPC"). ECF No. 195.

With respect to the FAC, five motions to dismiss have been filed. They are the motions of: (1) Beechwood

I ("Beechwood Re"), Beechwood Re Investments, LLC B

I Asset Manager LP ("BAM I"), B Asset Manager II ("BAM II"), Beechwood RE Inc. ("Beechwood Beechwood Bermuda Ltd. ("BBIL") , Beechwood Ltd. ("BBL"), BAM Administrative Services LLC ("BAM Mark Feuer, and Scott Taylor, ECF No. 183; (2) Financial Group, Inc. ("CNO") and 40186 Advisors, Inc. ("40186 Advisors"), ECF No. 17 3; (3) PB Investment Holdings, Ltd. , ECF No. 205; (41 SHIP and Fuzion, ECF No. 156; and (5) and BCLIC, ECF No. 168. 1

With respect to the WNIC TPC, ten motions dismiss have been filed. They are the motions of: (1) BAM BAM I, BBL, BBIL, Beechwood Capital Group LLC Capital"), Beechwood Holdings, Beechwood Re, Feuer Family Taylor-Lau Family Trust, Feuer, Dhruv Narain, and Taylor, No. 209; (2)

I Beechwood Trust Nos. 7-14, ECF No. 189; (3) Bodner, ECF

! I No. 186; (4) Murray Huberfeld, ECF No. 153; (5) IHokyong (Stewart) Kim, ECF No. 191; (6) Lincoln LLC ("Lincoln"), ECF No. 181; (7) David Ottensoser, No. 193;

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282 JcF OttenJoser, PBIHL, ECF No. 200; (9) Daniel Saks, ECF No. and (10) Will Slota, ECF No. 231. Beechwood Re has also moved compel WNIC

I I and BCLIC to arbitrate their claims against Re. ECF No. 209.

With respect to the SHIP TPC, fourteen to dismiss

I I were filed prior to the Court's issuing its "bottom-line" ruling on that date. They are the motions of: (1) BAM BAM II, BAM

I I Administrative, Beechwood Re, Beechwood BBL, BBIL, Feuer Family Trust, Taylor-Lau-Family Trust, B Manager GP

I LLC ("BAM GP I"), B Asset Manager II GP LLC GP II"), MSD Administrative Services LLC ("MSD N Management LLC ("N Management"), Beechwood Global Trust, Feuer Family 2016 Acq Trust, Taylor-Lau Family 2016 Trust, and Beechwood Capital, ECF No. 284; (2) Beechwood Nos. 7-14,

I Monsey Equities, LLC, and Beechwood Re LLC Series C

I ("BRILLC Series C"), ECF No. 280; (3) Bodner, No. 278; (4) Kevin Cassidy and Michael Nordlicht, ECF No. 282; (5) Elliot Feit, ECF No. 344; (6) Bernard Fuchs, ECF No. ·

I I

(7) Huberfeld, ECF No. 451 in 18-cv-6658; (8) Kim, No. 291; (9) Lawrence Partners, LLC, ECF No. 356; (10)

ECF No. 276; (11) PBIHL, ECF No. 348; (12) Saks, ECF No. 271; (13) Slota, ECF No. 286; and (14) Whitestar LLC, Whi estar LLC II,

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I and Whitestar LLC III, ECF No. 350. (As noted be ow, a fifteenth motion has now been filed.)

After receiving full briefing from all rele ant parties,

I I the Court held oral argument on August 15, 2019. a "bottom- line" Order issued on August 18, 2019, ECF No. 3f0, the Court granted the FAC defendants' motions in the respects:

I • BAM Administrative: Counts 1-3 (RICO and

conspiracy), Count 4 (Section l0(b) of Exchange Act

I and Rule l0b-5), and Count 18 (Unjust were

I dismissed. • BAM I, BAM II, Beechwood Holdings, BRILL, CNO, 40186

Advisors, Fuzion, Feuer, and Taylor: All claims were dismissed. • Beechwood Re, BBIL, BBL, and PBIHL: Coun s 1-3 (RICO and

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RICO conspiracy) and Count 4 (Section l0(b) of the

were Exchange Act and Rule l0b-5) SHIP, BCLIC, and WNIC: Counts 1-3 (RICO nd RICO conspiracy), Count 4 (Section l0(b) oft e Exchange Act and Rule l0b-5), Count 6 (aiding and abe ting breach of fiduciary duty), and Count 7 (aiding andlabetting fraud)

I were dismissed.

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onl~), All of the above dismissals with respect to ithe FAC were with prejudice. In all other respects, the were denied.

In the same "bottom-line" Order, the Court WNIC TPC

I defendants' motions in the following respects:

I • Bodner, Huberfeld, Kim, Ottensoser, Family Trust,

I I

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Taylor-Lau Family Trust, Beechwood BAM I, BAM

I Administrative, BBL, BBIL, and PBIHL: 1 and 2 (RICO and RICO conspiracy), Count 18 and indemnity), and Count 19 (unjust were dismissed. Feuer, Taylor, Beechwood Capital, and Nos. 7-14: All claims were dismissed.

I I

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Trust

• Lincoln: Counts 1 and 2 (RICO and RICO conspiracy), Count

I 6 (negligent misrepresentation), Count (contribution and indemnity), and Count 19 (unjust were dismissed. • Narain: Counts 1 and 2 (RICO and RICO c9nspiracy), part

I

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of Count 3 (fraudulent inducement part Count 18 (contribution and indemnity), and enrichment) were dismissed.

I Count

(unjust

Saks: Counts 1 and 2 (RICO and RICO Count 3 (fraudulent inducement part

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j I I conspiracy), part of

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7 (aiding and abetting fraudulent part only), Count 18 (contribution and indemnity), and Count 19

I (unjust enrichment) were dismissed. Slota: Counts 1 and 2 (RICO and RICO conspiracy), Count 3

I I (fraudulent inducement and fraud), Count (contribution and indemnity), and Count 19 (unjust were dismissed.

I I All of the above dismissals with respect the WNIC TPC were with prejudice. In all other respects, the were denied, except that, with respect to Beechwood Re's motion to

I dismiss and to compel arbitration, the Court, light of the Court's Memorandum Order dated July 10, 2019, it would hold off decision of that motion until the panel

I resolves the dispute as to whether WNIC and are precluded from bringing their motion to strike Beechwood

1e's motion to I I dismiss and to compel arbitration. ECF No. 333.

I In the same "bottom-line" Order, the SHIP TPC defendants' motions in the following respects: 1

Beechwood Global Distribution Trust, Family 2016 Acq Trust, and Taylor-Lau Family 2016 Trust: Count 1 (aiding and abetting fraud), Count 2 and abetting breach of fiduciary duty), Count 5 (civil conspiracy),

I . h) . d and Count 7 (unjust ment were .

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In re Platinum-Beechwood Litigation

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l (qivil • Bodner, Feit; Huberf eld, Kim, Saks, Slota,, BAM I I,

I Beechwood Trust Nos. 7-14, BRILLC Series C, Lawrence Partners, LLC, Monsey Equities, LLC, LLC, Whitestar LLC II, and Whitestar LLC III: ,Count 5 (civil conspiracy) and Count 7 (unjust enrichment) were dismissed. • Cassidy: Count 5 (civil conspiracy) was

I ismissed. • Fuchs, Michael Nordlicht, Beechwood Hold'ngs, BBL, PBIHL,

BAM Administrative, Beechwood Capital, BM GP I, BAM GP II, MSD Administrative, N Management, Feuer Family Trust,

I I and Taylor-Lau Family Trust: All claims dismissed.

• Ottensoser: Count 7 (unjust enrichment) dismissed. All of the above dismissals with respect the SHIP TPC were with prejudice. In all other respects, were denied.

In addition, after third-party defendant Steinberg

I was belatedly served with the SHIP TPC, he was permission to file his motion to dismiss after the Court issued the bottom- line Order on August 18, 2019. ECF No. 387. Court hereby grants Steinberg's motion to dismiss Count 5 conspiracy) and Count 7 (unjust enrichment) but denies his :motion in all other respects.

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Master ! This Opinion and Order sets forth the reaso s for the Court's rulings in the ·"bottom-line" Order issue on August 18, 2019 and for the Court's rulings regarding Stein erg's motion to dismiss

the SHIP TPC.

Background I. FAC

The following allegations are taken from assumed true for the purposes of assessing the dismiss the FAC.

Parties

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FAC and are I

to

I Melanie L. Cyganowski is the receiver for the "PPCO Funds" consisting of the following entities: (i) Platinum Partners Credit Opportunities Master LP ("PPCO Master Fund"), (ii) Platinum Partners Credit Fund

1 (BL) LLC ("PPCO Blocker Fund"), and (iii) the P CO Feeder Funds (consisting of Platinum Partners Credit Opportu ities Fund (TE) LLC, Platinum Partners Credit Opportunities Fun LLC, Platinum

I Partners Credit Opportunities Fund International Ltd., and Platinum Partners Credit Opportunities Fund (A) Ltd.). FAC 25-31, 68-70, 76. Each PPCO Fund was,

I through PPCO Blocker Fund, a creditor of PPCO Fund. Id. 75.

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1 Fundd."

1 j Defendants in the FAC consist of the FAC Be chwood Defendants (as defined below), SHIP, Fuzion, BCL C, WNIC, CNO, 40[86 Advisors, and John Does 1-100. Id. Fuzion is affiliated with SHIP and was formed in 2012 to administrative and management services to care

1 insurance companies, including SHIP. Id. 121. is a holding company that owns WNIC, BCLIC, and 40186 Id. 130-31. WNIC and BCLIC operate CNO's legacy long-term business lines and are advised by 4 0 I 8 6 Advisors. Id. 1,27.

The FAC Beechwood Defendants include the Beechwood

I Entities (as defined below), Feuer, and Taylor. 47-49. The FAC Beechwood Entities include (i) Beechwood BRILLC, (iii) BAM I, (iv) BAM II, (v) Beechwood (vi) BBIL, (vii) BBIHL, (viii) BBL, (ix) BAM Administrativ4, and (x) the WNIC and BCLIC Reinsurance Trusts (consisting o BRe BCLIC Primary, BRe BCLIC Sub, BRe WNIC 2013 LTC Prima y, and BRe WNIC 2013 LTC Sub). Id. 1 46.

PPCO Master Fund, Platinum Partners Liquid Opportunity Master Fund, L.P. ("PPLO") and Platinum Partners Value Arbitrage Fund, LP ("PPVA") were New York City-based between 2003 and 2005. Id. 65. The PPCO, of funds are referred to as the "Platinum

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funds founded I

and PPVA family Id. I

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I~ als~ assetls The following non-defendants are relevant t the FAC. Mark Nordlicht, the Platinum Funds' Chief Investment fficer, founded the Platinum Funds with Huberfeld and Bodner. Id 57, 59-60. Levy was Beechwood's Chief Investment Officer and in 2015, he rejoined the Platinum Funds as co-Chief/ Investment

I I Officer with Nordlicht. Id. 58. The FAC that both

- I Nordlicht and Levy were jointly and solely for the investment decisions of PPCO Master Fund. Id. Platinum Credit Management LP ("PPCO Portfolio Manager") as portfolio manager for PPCO Master Fund and the Feeder Funds. Id. 76. The FAC alleges that Nordlicht the PPCO Portfolio Manager breached their fiduciary duty to PPCO Master Fund and the PPCO Feeder Funds. Id. 78.

Financial Conditions of PPVA and PPCO the End of 2013

In 2012, the PPVA Funds faced a severe liq idity crisis, because (1) investors were increasingly seeking redemption, (2) most of their investments (e.g., Black Elk, Gol

1 den Gate) were illiquid, high-risk, and overvalued, and (3) of the PPVA Funds' portfolio companies needed capital. Id. 91.

Like the PPVA Funds, PPCO Master Fund faced a liquidity crisis, because the PPCO Funds' were mostly

! illiquid, high-risk, and overvalued. Id. 101, 103. At the end

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I of 2013, PPCO Master Fund had just $5.7 million and was unable to meet the increased redemption adequately fund its portfolio companies. Id.

Creation of Beechwood Re

cash on hand

or 01, 105.

To solve the PPVA and PPCO Funds' liquidity crisis, Huberfeld and Nordlicht conspired with Feuer, and Levy to form a reinsurance company, Beechwood Re. 59, 108. The goal was to attract investment from insurance and to use the reinsurance trust assets to benefit thereby

I enriching Platinum's and Beechwood' s owners. 108.

Nordlicht, Huberfeld, Bodner, and Levy and controlled Beechwood. Id. 1 110. Taylor and Feuer ostensible and

I nominal management authority as, respectively, and Chief Executive Officer of Beechwood. Id. Many of Beechwood's management team were former Fund employees.

I Id. 111. Beechwood made no effort to hide BCLIC, WNIC,

I and SHIP its deep ties to the Platinum Funds. 112.

BCLIC, WNIC, CNO, and SHIP By 2012, long-term care carriers such as WNIC, and SHIP were facing increasing claims payments and increasing

I capital requirements. Id. 114. Beechwood such long- term care insurers with troubled legacy portfolios. Id. 115.

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ti Prior to 2008, SHIP had been owned SHIP's liquidity needs and ways

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I . y CNO, to reduce the

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supported strain of supporting SHIP's underwriting losses." Id. 11 . CNO spun off SHIP in November 2008. Id. 118. Even after the spinoff, SHIP's ratio of claims to premiums steadily increased 2009 and 2013, and it faced challenges to satisfying the fegulatory surplus requirements under applicable Indiana in urance law. Id.

123-24. By 2013, SHIP had virtually no option for obtaining reinsurance or other arrangements to off-load long-term care

I risk other than through Beechwood. Id. 126. /

I BCLIC and WNIC faced similar situations. Id. 127. Furthermore, CNO was "highly incentivized to, did, direct the actions of [CNO's subsidiaries] WNIC and because its financial health was dependent on BCLIC and Id. 132. The Executive Vice President of BCLIC and WNIC also the Chief Investment Officer and President of 40\86 Advisors. Id. 134. Consequently, all actions taken by WNIC and BCLIC in the FAC were done in concert with, or at the of, 40\86 Advisors. Id.

Beechwood's Relationship with BCLIC, WNIC, CNO, and SHIP In October 2013, WNIC and BCLIC

entered Reinsurance

I Agreements with Beechwood by ceding a portion of their legacy, runoff long-term care business Beechwood Re.

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I Beechwood

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I Id. 1 141. Beechwood Re created the

WNIC and Reinsurance Trusts, because Beechwood Re was an

unauthorized/offshore reinsurer in New York and Indiana where BCLIC an WNIC were domiciled. Id. 1 145. The FAC alleges that CNO w s incentivized to be an "active participant" in the parties' performance of the Reinsurance Agreements, because

CNO would be for any

I unsatisfied claims if Beechwood

Re was unable to replenish the WNIC and BCLIC Reinsurance Trusts. Id. i 151.

I Between 2014 and 2016, CNO directed WNIC BCLIC to transfer approximately $592 million to pursuant to the

j Reinsurance Agreements. Id. i 168. WNIC and were "agreeable to the valuation of the assets to them by Beechwood because so long as the Reinsurance appeared to satisfy the amounts required by Indiana and state law, they could stay in compliance with their Id. i 152.

I Similarly, SHIP, acting by and through entered into

I three Investment Management Agreements "IMAs")

I with three Beechwood entities. Id. i 162. All three IMAs

I I guaranteed SHIP a 5.85% annual investment return on the net

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Fuzion depended on the continued existence SHIP for its financial survival, which is why Fuzion "was incentivized to, and did, direct the actions of SHIP in mosti, if not all, investment decisions." FAC i 160.

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WNiq, iniesting asset value of the assets SHIP contributed; a would be made up by Beechwood, whereas the surplus would taken by Beechwood as a "Performance Fee." Id. i 163. the IMAs provided

that Beechwood must invest in a manner by

i SHIP's corporate investment guidelines. Id. i Over time, SHIP invested approximately $270 million with and its affiliates. Id. i 166.

From WNIC, BCLIC, CNO, and SHIP's the above transactions saved them from their tough situations. By 2013, over "90% of all long-term care policy exited the industry" and "reinsurance was scarce under onerous terms." Id. i 221. Reinsurance was "virtually for books of legacy long-term care business, such a those of BCLIC and WNIC" except under very onerous terms. Id. 137. Beechwood was their "white knight." Id. ! 115. Furthermor, for WNIC and

I BCLIC, if the fiction of overvalued investments could be maintained by Beechwood, they could maintain a to their

I shareholders, investors and rating agencies

they

had successfully wound down their legacy runoff Id. i 221.

I I FAC Beechwood Defendants' Assistance to Fraudulent Scheme

I Upon receipt of the funds from BCLIC, and SHIP, Beechwood, in early 2014, immediately began into the

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inves,ments. Platinum Funds and their portfolio companies thr purchase of equity in non-arm's length transacti

loans and Id. 1 169. The loans to the portfolio companies of the PPCO Funds allowed the PPCO

Portfolio Manager to collect millions o dollars in unearned, excessive management and performance based on

I overvaluation of the PPCO Funds' assets. Id. 1 1 4. The PPCO Portfolio Manager in turn distributed these fees to various individual Beechwood defendants. Id.

The FAC alleges that neither Nordlicht his fiduciary duty to the PPCO Funds in any

nor fulfilled

non-arm's length transaction, despite their substantial m nagerial role in both Platinum and Beechwood. Id. 11 171-72. The FAC further alleges that Feuer and Taylor substantially ass·sted in each of these problematic transactions identified in th FAC. Id. 1 173.

WNIC and BCLIC's Knowled e of the Beechwoo -Platinum Relationship

The FAC alleges that CNO, BCLIC, WNIC, and SHIP knew about Beechwood's investments into the Platinum Funds but chose to not lose white knight" with whom they had substantial portion of their future claims For example, Beechwood's quarterly reports

' offloaded a

Id. 174-75. to BCLIC, and WNIC - which were required under the Agreements -

I were full of references to Platinum Fund Id. 1 196.

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j regu~atory Other evidence of WNIC and BCLIC's knowledge of Beechwood Platinum relationship includes, among others, an1email with Levy's biography which described Levy's position as Chief Investment Officer of PPVA and which was among WNIC, BCLIC, CNO, and 40\86 Advisors. Id. 200. Also,] as further

I evidence, 40186 Advisors told CNO in February that 85% of Beechwood's private loan holdings were associated with the

I Platinum Funds. Id. 203.

I I The FAC notes that, despite this knowledge,/ WNIC and BCLIC chose not to immediately terminate the Agreements.

j Only in mid-2016 did WNIC, BCLIC, CNO, Advisors actively seek to separate their Beechwood ment from

1 Platinum-related portfolio companies. Id. WNIC and BCLIC terminated the Agreements in September 29 2016, only after the public indictment of Huberfeld the Platinum Funds to become a "public relations liability" WNIC and BCLIC. Id. 205. I

SHIP's Knowledge of the Beechwood-Platinu Relationship

I SHIP also received monthly and quarterly from Beechwood that "made clear" that the assets by Beechwood

I had "significant connections to the Platinum Id. 208.

I In February 2015, SHIP entered into a non-arm'¥ length transaction with Beechwood to satisfy its capital

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I PPCO!Master requirements, which showed that SHIP was "not being swindled by Beechwood. On the contrary,

a investor

aware of the Beechwood/Platinum relationship, SHIP was

the scheme." Id. 1 211-19.

i · 11 · Wl 1ng to, and did,

The December 2015 Fraudulent Conveyance Harmed PPCO Later when "Beechwood's investments into Platinum Funds were floundering, [WNIC, BCLIC, CNO, 40186 AdviJors,] and SHIP directed Beechwood to consummate several conveyance transactions with the PPCO Fund[s] between 2015 and 2016, which had but one goal: rid the insurers of bad by dumping them into the PPCO Funds and/or securitize the they were unable to dispose of by obtaining a lien in sub tantially all of the PPCO Funds' assets." Id. 1 176. In doing so they also "aided and abetted the Platinum/Beechwood fraud and their respective breaches of fiduciary duty." Id. 1

In December 2015, PPCO Master Fund issued la $15. 5 million note to SHIP ("SHIP Note"). Id. 225. The Note was secured by almost all assets of PPCO Master Fund and of its direct and indirect subsidiaries (collectivelyj "MSA PPCO Subsidiaries"). Id. 1 226. The funds that Fund

I received by issuing the SHIP Note were siphonef from the PPCO

I Funds in the following ways: I

I • Disbursement by BAM Administrative (as :agent for SHIP) to

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of all indebtedness owed by LC Energy, a Platinum Fund affiliate, to the WNIC and BCLIC Reinsurance Trusts. Id.

233. These debts were also worth well below the value that WNIC, BCLIC, and Nordlicht ascribed to it. Id. 234. On January 20, 2016, SHIP loaned an additional $2 million to PPCO Master Fund, which again was secured by the MSA PPCO Subsidiaries. Id. 235. The outstanding amount loaned by SHIP rose to $17.5 million (the "First Amended SHIP Note"). Id.

These transactions were "nothing more than a mechanism through which to place the bad loans to Desert Hawk and LC Energy onto the PPCO Funds' books for the benefit of SHIP and BCLIC and WNIC" Id. 238. The FAC alleges that "the PPCO Funds and its creditors, including the PPCO Feeder Funds, and the PPCO Blocker Fund, were the victims of actual fraud which is subject to avoidance under New York State law" and argues that "the

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~o liens granted on the assets of PPCO Master Fund Subsidiaries should be avoided." Id. 239.

the MSA PPCO

The March 2016 Fraudulent Conveyance that PPCO On March 21, 2016, PPCO Master agent, SHIP, and the WNIC and BCLIC

Fund, BAM Administrative, as

I . I Reinsurance entered

' into an approximately $69.1 million Note Agreement (the "March NPA"), which amended and restated the Amended SHIP Note and authorized the sale of additional notes by PPCO Master

' Fund. Id. 240. These additional notes were by certain other PPCO Fund subsidiaries and affiliates ("NA Guarantors").

I An additional $52.5 million received (on top of million already loaned under the First Amended SHIP was channeled back to SHIP, WNIC, and BCLIC in exchange for and BRe WNIC

I 2013 LTC Primary (one of the WNIC and BCLIC Trusts)

I assigning debts they held in Northstar Offshore! (the "Northstar

I Debt") to PPCO Master Fund, and in the form loan to PPVA, the proceeds of which, in turn, was used to purchase the

I I remaining Northstar Debt from SHIP. Id. 11 246-48.

The purchase of the Northstar Debt to a fraudulent conveyance, because the valuation of the Northstar Debt was "substantially overstated." Id. 1 250. Essentia·lly, the above

. l transactions were consummated to SHIP and WNIC 2013 LTC Primary of the Northstar Debt that had "little no chance of

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l trusts frbm performing." Id. 249. "In the end, the PPCO and their portfolio companies were left with liens on substantially all of

I I their assets while being saddled with an interest in a company Northstar Offshore on the verge of bankruptcy a receivable

I from an equally financially precarious PPVA."

I I The December 2015 and March 2016 transactio'ns were allegedly "structured, negotiated and consummate'.d with the substantial assistance" of Beechwood, WNIC, BCL]C,

CNO, 40186 Advisors,

I SHIP, and Fuzion. Id. 253. II.

TPC I

' The following allegations are taken from WNIC TPC and

d f h f

' . t are assume true or t e purposes o assessing emotions o dismiss the WNIC TPC.

Parties WNIC and BCLIC are insurance companies domiciled

I I York and Indiana, respectively. WNIC TPC 479. both subsidiaries of CNO. Id. 470. They allege that

I

in New They are each of the cross-claim and third-party defendants took part in the conspiracy in which these defendants made misrepresentations to (1) induce WNIC and to enter

i '

into the Reinsurance Agreements with Beechwood Re, through which WNIC and BCLIC invested $600 million in reinsurance managed by

I Beechwood Re, and (2) prevent WNIC and BCLIC terminating

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j the Reinsurance Agreements and withdrawing investment, whereby such money was used as a "piggybank for Id.

474. The "linchpin of the conspiracy" was to hide from WNIC and BCLIC that Beechwood Re and Beechwood were

I controlled and owned by Platinum and other PlatJnum-affiliated

I people such as Nordlicht, Huberfeld, and Bodner ,I because

I otherwise WNIC and BCLIC would not invest with Beechwood entities given Platinum individuals' checkered Id. 533. The injuries to WNIC and BCLIC as a result of conspiracy are claimed to exceed $195 million. Id. 683.

Cross-claim/third-party defendants in the TPC are: • Nordlicht, Huberfeld, and Bodner, of

Platinum. Id. ii 480-82. Nordlicht ultiJately controlled

•

•

I the assets WNIC and BCLIC entrusted; and Bodner conducted the conspiracy's day-to-day through a

I secretary. Id. Feuer and Taylor, former President, respectively,

Chief Officer and

j of Beechwood Id. 483,

I 485. They also were founders of Beechwood Re and the

I principals of most Beechwood entities. Ii.:_

. l t Feuer Family Trust and Taylor-Lau Trust, truss

I ' I with Feuer's and Taylor's families as b neficiaries,

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j respectively. Id. 484, 488. These protection vehicles for siphoning off ga ns

I ' I

were asset from the fraudulent schemes. Id. • Levy, Senior Manager of Platinum and

as well as former Chief Investment Officer of

1

Re and BAM I. Id. 489. He directed the investment of WNIC and BCLIC's reinsurance trust assets. Id. • Hodgdon, Slota, Leff, Manela, Saks, Kim,I and Poteat, all

senior managers of Platinum. Id. 493, 498, 500,

•

' 504, 505, 506. They misrepresented (and others misrepresented them) to WNIC and BCLIC respectively, Managing Director/Chief Underwriting Chief

I Operating Officer, Portfolio Manager, Portfolio Manager, Chief Investment Officer, Chief Risk Of icer, and Chief Technology Officer of Beechwood Re and Id. Small, Managing Director of Platinum. 496. He misrepresented himself (and others him)

I

to I WNIC and BCLIC as a Portfolio Manager Beechwood Re and BAM I. Id. • Ottensoser, General Counsel of Beechwood Re,

I BAM I, and BAM Administrative. Id. 502. • Narain, Chief Investment Officer of Re and BAM

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tJat andiBCLIC.

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anl Id.Ii

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Bodter

I I starting in January 2016. Id. directed the investment of WNIC's and BCLIC's reinsur nee trust assets in Platinum-controlled funds and entitiel. Id. • Beechwood Re, a Cayman Islands insurer entered into

I the Reinsurance Agreements with WNIC Id.

509. • Beechwood Holdings, a Delaware and the parent

I of Beechwood Re. Id. 511. • Beechwood Capital, a Delaware limited paktnership and

I I agent for Beechwood Re. Id. 512. • BAM I, a Delaware limited partnership agent and

investment manager for Beechwood Re. 513.

l • BAM Administrative, a Delaware limited company

and agent for Beechwood Re and BAM I in Jadministrating

I all aspects of the Reinsurance along with

I Beechwood Re and BAM I. 514. • BBL, BBIL and BBIHL (predecessor-in-intJrest to PBIHL),

Bermuda entities and the transferees "capital"

I I of Beechwood Re as discussed below. 515-17.

I • Beechwood Trusts No.1-20, trusts and

! controlled by Nordlicht, Huberfeld, or Levy. Id.

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Beechwood Series A through I, vehicles established and controlled by Nordlicht, Huberfeld or for funding and controlling Beechwood. Id. 1 520. Also, they were asset protection vehicle for siphoning gains from the fraudulent schemes. Id.

I I Lincoln, a valuation vendor that and Beechwood

I retained from early 2014 to early 2015.

I Creation of Beechwood Re By 2013, when Platinum's

"key investment properties, including Black Elk and Golden Gate, were red ink,"

I Platinum started "relying almost exclusively investments and inter-fund loans to fund investor redemptions." Id. 1 523.

I Specifically, Nordlicht, Huberfeld, and Bodner outside funding from institutional investors such as and BCLIC. Id.

524. However, they knew institutional investo s would not invest in Platinum because of their high-risk

I strategy and their "checkered past" of making s eculative investments with unsavory companies, getting in scandals, and having criminal records. Id.

I To attract capital from WNIC and BCLIC, - through Nordlicht, Huberfeld, Bodner, and Levy - into a conspiracy with Beechwood Capital through and Taylor whereby they agreed to establish and use a company,

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Nordlicht,

I Beechwood Re, to induce WNIC and BCLIC to "hand funds to Beechwood, via reinsurance agreements or so that Beechwood could use those funds to keep afloat." Id.

532.

Misrepresentations Prior to the Entry into the Reinsurance Agreements

I To induce WNIC and BCLIC to enter into the]Reinsurance

l I Agreements with Beechwood Re, Nordlicht, Bodner, Feuer, Taylor, Levy, Hodgdon, Slota, Small, Leff, Manela, Ottensoser, Kirn, Saks, Poteat, and Lincoln ("coJconspirators•: made representations regarding: who owned ieechwood Re and

I other Beechwood entities, (b) Beechwood Re's ital, (c) how

I Beechwood Re would invest the assets that WNIC BCLIC would transfer to Beechwood Re under reinsurance and (d)

1 who would control and operate Beechwood Re and Beechwood entities." Id. 537.

First, from the earliest contacts with WNIC and BCLIC in

I I . 2013 through the signing of the Reinsurance Agr;eements

I 1 February 2014, Beechwood Capital and Beechwood repeatedly misrepresented the ownership structure of by stating that Feuer, Taylor, and Levy owned and Beechwood Re, Beechwood Holdings, and BAM I. Id. 538-41.]n fact,

I Beechwood's internal documents reveal that

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I and Bodner controlled and owned a substantial in these entities. Id. 542.

Second, starting in the summer of 2013, Capital and Beechwood Re repeatedly misrepresented that had

I over $100 million in capital when in fact Re and Beechwood Holdings had less than $300,000 in Id. ! 543. Specifically, Nordlicht, Huberfeld, and Bodner BRILLC to issue a demand note in the amount of $100 million (the "Demand Note") to Beechwood Re. Id. 545. Based on Beechwood

I i continued to represent to WNIC and BCLIC that had over $100 million in capital, while hiding the true of the Demand Note from WNIC and BCLIC. Id. 545-46. 1The collateral that backed the Demand Note "took the form of P atinum- controlled funds and entities, which . were fraudulently overvalued." Id. 548.

Third, Beechwood entities and the misrepresented Beechwood Re's intentions and as to how

I it would invest $600 million funds that WNIC BCLIC placed in

I their reinsurance trust accounts, who would ser:ve on the

I Beechwood investment committee, and so forth. 550-51, 563-64, 566-71. In addition, Beechwood Re

that it

I would grant only WNIC and BCLIC a first security interest in those reinsurance trust accounts (as required by

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misrepr~sentations, Agreeme~ts Reinsur~nce insurance laws and regulations), but it granted a · · · .

y security interest those to Nomura Securities in order to get this prime broker to credit to Beechwood Re and BAM I to make further in Platinum- controlled funds and entities. Id. ii 556-57. Ndither WNIC and BCLIC nor Nomura knew of this simultaneous of a first priority security interest. Id.

I I Fourth, starting in July 2013, Feuer, and Levy represented other employees of Beechwood as Beeqhwood employees to WNIC and BCLIC, when in fact they were employees receiving paychecks from Platinum. Id. ii 572-73. The co-

' conspirators made conscious efforts throughout years to maintain this optic of separation between and Beechwood

I in the eyes of BCLIC, WNIC, and federal and regulators. Id. ii 574-91.

Misre resentations After the Entr into Reinsurance Agreements

I Relying on the above four kinds of WNIC

j and BCLIC entered into the Reinsurance on February

I I 10, 2014. Until the termination of the Agreements in September 29, 2016, Nordlicht, Huberfeld, Bodn r, Levy, Feuer, and Taylor directed other cross-claim and thir -party defendants and used the reinsurance trust assets to enric themselves and

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l Platinum entities. Id. 1 606. In addition, the four types of misrepresentations continued in the following/manner, for the purpose of preventing WNIC and BCLIC from the

! Reinsurance Agreements. First, in 2014 and 2015, when WNIC and BCLIC pressed Feuer,

I Taylor and/or Levy about the relationship Platinum and Beechwood - prompted by over $100 million of trust assets invested in Platinum-controlled funds such as Black Energy Offshore Operations LLC ("Black Elk"), Gate LLC ("Golden Gate"), and ALS Capital Ventures ("ALS") Feuer, Taylor and/or Levy repeatedly denied

Elk Oil

of any relationship between Beechwood and Platinum. 1 611. The co conspirators' ju•stification for

putting money the Platinum entities was because "Levy was familiar with and believed

I they were valuable investments based on his employment with Platinum." Id. 1 612.

Second, with respect to Beechwood Re's on or about May 16, 2014, the co-conspirators amended and the Demand Note downward from $100 million to $25 million without communicating this to WNIC and BCLIC. Id. 1 $75 million in "capital" was diverted to Beechwood Bermuda to (a)

j I satisfy applicable Bermuda insurance law that these Bermuda entities be adequately capitalized and1 (b) purchase

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1 I I certain assets. Id. 618, 625. Meanwhile, December 2014 to January 2015, Feuer and Taylor repeatedly WNIC and BCLIC that Beechwood Re had over $100 million in "capi al." Id. 621. In January 2015, Taylor was forced to tell the truth to WNIC and BCLIC, upon which Taylor also falsely claimed the "Beechwood Companies [had] an irrevocable right to the assets

I I within a Delaware Series LLC" and that "considers the entirety of Beechwood's capital as available tojsupport any

I I liabilities within our companies . first foremost being

I the WNIC and BCLIC blocks." Id. 623. The of $75 million in the Demand Note from Beechwood Re Beechwood Bermuda entities left Beechwood Re grossly Id.

626.

Third, the Beechwood management team wore Beechwood and Platinum hats but tried concealing this by, for instance, only using their Beechwood email addresses when communicating with WNIC and BCLIC. Id. 629. By the end of 2014, Feuer and Taylor finally admitted that Levy had been his investment

I discretion inappropriately, promising to WNIC BCLIC that

1 Levy would be separated from Beechwood and Beechwood Re and its agents would "divest the trust assets of Platinum-controlled

I funds and entities." Id. 631. Levy was replaced with Saks, but, behind the scene, Levy continued di ecting Beechwood

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/ Re's investments of trust assets with direction Nordlicht. Id. 632-34. In addition, during 2015 and Beechwood Re

I and its agents divested only some of investments and also added additional Platinum-c/ntrolled investments to the WNIC and BCLIC trusts' not fulfilling the promise. Id. 633.

I I Fourth, misrepresentations continued as to trust assets

I would be invested. In 2014 and 2015, the sought

to establish additional prime brokerage in addition to the arrangement with Nomura above, by

I granting them a first priority security Id. 639-40. Furthermore, Feuer, Taylor, Levy, Kim, Saks, Levy repeatedly assured WNIC and BCLIC of the "prudency of investments" whenever WNIC and BCLIC confronted them about trust

I assets into illiquid and speculative Level 3 and ventures, including JF Aircorp, Trilliant, Kennedy RH Holdings LLC, and Platinum-controlled funds entities such as Agera, LC Energy, PPCO and Golden Gate Oil. Id. 642, 644. Also, they represented that these transactions were at "arm's- length." Id. 644.

Breach of the Reinsurance Agreements by Re

I Beechwood Re also allegedly breached the 401lowing

I provisions of the Reinsurance Agreements:

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~n th~esholds, Bejchwood va~uations. '.Il

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fo • In "each of the primary trust accounts WNIC and

BCLIC, Beechwood Re was required to and maintain

of assets that had an aggregate fair market/value of 102% the expected future liabilities for the that WNIC or BCLIC (as applicable) ceded." 658. This was

I I meant to serve as collateral for Re's obligation to pay future claims on the policies. Id. This requirement was not satisfied, part because

' Beechwood relied on inflated valuations asset and the

l fair market values impermissibly investments in Platinum-controlled funds. Id. 659-60,, 662.

I • If the fair market value of the assets the trusts fell

below the aforementioned contractual Beechwood Re was required to top up. top up, as it relied on the inflated 661.

Re did not

Id. I I • If the fair market value of the assets the trusts were

above the contractual thresholds, Re could withdraw "surplus" from the funds and as it saw fit. Based on the inflated Beechwood Re

I repeatedly withdrew these unearned Id. 662.

I I • Beechwood Re "breached its obligations divest the

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I l / a&d Beebhwood Platinu~-controlled

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I trust accounts of investments that did comply with the investment guidelines." Id. 664. , • Upon termination of the Reinsurance on

September 29, 2016, Beechwood Re was to pay WNIC and BCLIC (1) "cash or admitted having a

I ' fair market value equal to the statutory/reserves attributable to the liability [WNIC and BCLIC] recaptured" and (21 proportionate of the Negative Ceding Commission". Id. 668-68. According

I these provisions, WNIC and BCLIC were over $150 million, which has not been paid. Id. Exposure of the Fraud

to

On June 8, 2016, Huberfeld was arrested, news broke out that Huberfeld and Nordlicht had been using Re to attract institutional investors for the

I funds and entities. Id. i 677. In reaction, and BCLIC began reviewing and auditing the trusts' investments,1 discovering many issues. Id. Finally, WNIC and BCLIC terminated Reinsurance

i Agreements on September 29, 2016. Id. i 681.

Lincoln's Participation in the Fraud

, The remainder of the allegations focus

' participation in the scheme. As the Reinsurance Agreements were

I getting finalized, Beechwood Re needed "a firm to

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!reinsurance ! reports)based information.~~

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2[, these ?012), supporting issue quarterly reports that would show WNIC BCLIC the reinsurance trust assets were being safely and invested," which would require "mak[ing] look legitimate." Id. 691. Lincoln, eager to get and more businesses from Platinum, filled in this role. 692, 700- 02. Before the engagement, Lincoln "understood Platinum had

I established Beechwood Re as an affiliated that it controlled for the specific purpose of Platinum with 'permanent capital,' including by 'leverag[ing] premiums as a source of capital.'" Id. 699. I

Lincoln knowingly issued valuation on incomplete, false, and misleading 707. For instance:

I • Lincoln accepted without verification inflated, self-

reported and unsupported net asset figures in valuating the Platinum fund Id. 711. • When Lincoln

requested

financial statements,

investment memoranda, and offering memo

1 anda of Golden I Gate, PPCO, and Black Elk on February 2014, Lincoln received only financial statements of entities (and for Black Elk, the statements were for and it did

I I not press further for necessary documentation. Id. 712.

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I Lincoln wrote negative assurance lettersjstating there was "nothing that came to our attention would lead us to believe that management's fair estimates as shown are unreasonable," based on financial information supplied without any documentation. Id. 714.

I I • As for positive assurance valuations, Beechwood Re often

dictated which methodology Lincoln to use - or Lincoln changed its methodology on its to make sure that the desired valuation falls within ranges produced by a chosen methodology. Id. 726, 745-47. • Lincoln knew that Beechwood Re and Platinum entities were

' related and that, therefore, the transa9tions involving

I Beechwood Re, BAM I, and BAM investments

I into Platinum-related entities and could not have

I I been at arm's length. Id. 718, 733. Jonetheless, Lincoln continued to assign a fair valu¢ of 100% as if these transactions were at arm's Id. 733. • Lincoln did not maintain independence, because it

"capitulated to Beechwood Re, [BAM I] BAM Administrative's requests to change descriptions and

I I to remove ratings, references to and any

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j discussion of 'speculative assets' from valuation reports." Id. 737-42. Lincoln's reports, including the negative letters and positive assurance valuations, justified Re's withdrawal of "surplus" from the trusts while its obligation to top up. Id. 721. And WNIC and relied on these documents - of which reliance Lincoln was of - to assume their reinsurance trust assets were reliable and

I I valuable." Id. 728, 752-53. By 2014, it became for Lincoln to simply ignore the issues with Beechwood Re, I], and BAM Administrative's investment values, collateral, and countless self-dealing

investments in Platinum Platinum related entities." Id. 760. For the first in its 2014 Q4 valuations, Lincoln dropped the positive valuations from previous 100% fair value to roughly 70-90% range for various Platinum-related investments. Id. On February 5,

I 2015, a Lincoln employee directed other to "go back and cleanse your files on the Beechwood valuati;ons in accordance

I I with our record retention policy. Please any draft models or reports and just hang onto the final models analyses.• Id. 1 774. On February 19, 2015, Lincoln sent notice of termination to Beechwood. Id. 780.

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ind j Id. -,- III. SHIP

The following allegations are taken from SHIP TPC and

l are assumed true for the purposes of assessing motions to dismiss the SHIP TPC.

I Parties Cross-claim and third-party defendants

I • Beechwood Capital, a New York limited ty company.

SHIP TPC 9. • Beechwood Re, a Cayman Island

company and I party to an IMA, dated June 13, 2014,

11.

SHIP. Id.

• Beechwood Holdings, a Cayman Islands and the

parent of Beechwood Re. Id. 12. •

BBIL, a Bermuda reinsurance company

and,party

I

to another IMA, dated May 22, 2014, with SHIP. 13. • BBL and BBIHL (predecessor-in-interest to PBIHL), Bermuda

reinsurance entities. Id. 14-15. • BAM I, a Delaware limited partnership party to the

third IMA, dated January 15, 2015, Id. 16.

I •

BAM II, a Delaware limited partnership investment advisor for other Beechwood entities. 17.

' • Beechwood Asset Management Trust I and Beechwood Asset

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Famill/ Management Trust II, entities through Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Tayl r owned BAM I.

I Id. 1 18. • BAM GP I and BAM GP II, Delaware limitedlliability

companies. Id. 1 19. •

BAM Administrative and MSD Delaware limited liability companies. Id. 1 20.

I • Nordlicht, Huberfeld, and Bodner, of

Platinum. Id. 21-24. They exerted control over the entire Platinum-Beechwood affairs

I I and orchestrated investment decisions. I:d. • Platinum Management (NY) LLC ("Platinum a

Delaware limited liability company and general partner of PPVA. Id. 1 25. Its risk, and

I valuation committees set valuations of investments, which permitted them to

I performance fees. Id. • Beechwood Trusts Nos. 1-20, trusts and

I I controlled by Nordlicht, Huberfeld, Bodner or Levy. Id.

I 1 518. Each held ownership interests Holdings and BBL. Id. 26. • Feuer Family Trust and Taylor-Lau Trust, trusts

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Jd. ("N Managementu),

Delaware BRIL~C A-I.

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Mpnagement I organized for Feuer's and Taylor's as beneficiaries, respectively. Id. 27, •

BRILLC Series A through I, vehicles and indirectly controlled by Nordlicht, and/or Bodner. Id. 30. • Dahlia Kalter, the wife of Nordlicht an absolute

j guarantor, along with Nordlicht,

of the Note Purchase Agreement dated January

30, on behalf of Montsant Partners LLC in favor of SHIP. 32. • N Management LLC

liability company and agent to the

33.

I a limited

Series Id. I • Beechwood Global Distribution Trust, Feuer Family 2016

I ACQ Trust, and Family 2016 Trust, trusts created by Feuer, Taylor, Levy, Huberfeld, and Bodner for the August 5, 2016 to conceal

I Nordlicht, Huberfeld, and Bodner's econJmic interest in Beechwood entities. Id. 34. o Feit, Chief Financial Officer of BAM I, for

i calculating any performance fees that Beechwood parties to the IMAs took. Id. 35.

I • Saks, a portfolio manager at Platinum until

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j BAMI

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2014 and Chief Investment Officer of

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starting at the end of 2014. Id. 1 37.

I •

Estate of Uri Landesman, representing interests of the late Uri Landesman, who passed away September 14, 2018 and who was former President and partner of Platinum Management. Id. 1 38. •

Small, managing director of Platinum Id . 1 39. • Ottensoser, General Counsel of Platinum panagement, PPVA,

and, during early stages, certain entities. Id. ' 41. • Naftali Manela, Chief Operating Officer of PPVA, employee

of certain Beechwood entities, and membdr of the Platinum Management valuation committee. Id. Kim, a senior manager of Platinum and Chief Risk Officer of Beechwood Re and BAM I. Id. 1 44. •

•

Slota, a senior manager of Platinum and Chief Operating Officer of Beechwood Re and BAM I. Id. 45. • Fuchs, an indi victual with no official tle but had "day-

1 to-day involvement in the management operations of

I Platinum Management and PPVA." Id. 1 46L

I Michael Nordlicht, a nephew of who participated

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entered Ca~ital

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Part1ers,

emp~oyees in the Agera transactions. Id. 48. • Cassidy. Soon after finishing his senten e for securities

frauds, he was appointed as managing dir ctor of Agera Energy by Nordlicht in 2014. Id. 58. The Development of the Platinum-Beechwood By 2012, several of Platinum's flagship in estments were not performing well - and "it was imperative that Nordlicht, Huberfeld, and Bodner find fresh

sources of dollars.

I Their options were limited, however, by their checkered

I reputations [involving their prior criminal and SEC

I investigations]." Id. 55. For this reason, early 2013,

I I Nordlicht, Huberfeld, Bodner, and Levy. into a conspiracy with Feuer, Taylor, and Beechwood . to establish a reinsurance company, Beechwood Re, to use it as

I a vehicle to fraudulently induce insurers to funds to

I Beechwood through reinsurance agreements or other contractual arrangements." Id. 63.

Beechwood and Platinum had shared and were in fact integrated: Beechwood

i management and control,

operated out of Platinum's offices, various individuals mainta{ned email

I accounts with both Beechwood and Platinum Platinum employees with no actual role at Beechwood partlicipated in

I I Beechwood transactions, and many Beechwood were former

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j or concurrent employees of, or

Nordlicht, Levy, Slota, Beren, and Kim). Id. 103-09, while Nordlicht, Huberfeld, and

I deeply connected to, Platinum Ottensoser, Manela, Saks,

j 120-24. All of this occurred Bodner control over Beechwood investments regardless of their Id. 110-17.

I Such tie between Platinum and Beechwood not disclosed

I to SHIP or other insurers.

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Id. 75. This was furthered through "Beechwood's intentionally complex to avoid

j revealing 11

Nordlicht, Bodner, and Huberfeld's over the investments to SHIP and other clients. Id. 79i For instance, ownership of common shares in Beechwood and BBL was

I split among 22 trusts most of which had names such as Beechwood Trust Nos. 1-20 and one individual, in order to "deceive investors 11

and claim that Beechwood a new and independent venture owned by Feuer, Taylor and Id. 85- 86. Also, the Platinum-Beechwood "constantly and consistently lied about and hid the connection, including to the SEC, state bodies, clients, potential clients, and business Id. 100.

l Beechwood's Misrepresentations to Induce SHIP to Enter into the IMAs

I Starting with an email on April 10, 2014, I SHIP started receiving "sales pitch 11

from Taylor, Feuer, an, other Beechwood

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fhe individuals in oral and written forms. Id. i The April 10, 2014 document included statements such as of Beechwood's Investment Strategy is Superior Management Capabilities," which includes "[d]etailed analy is of underlying

I forms of collateral," a "[f] ocus on appropriate ,deal controls," "active monitoring and due diligence," and party

I controls, independent valuation, compliance Id. 139. Furthermore, in various presentations, Levy "retterated

I Beechwood's consistent themes of strong security and collateralization, conservative approach, and aiguaranteed

I return for SHIP," and Beechwood "represented that the investments were over-secured by collateral Beechwood could seize in the event that a loan or other was not repaid, which would enable Beechwood to recover the value of any investment." Id. 147, 151. During the course of these sales pitches, Platinum's controlling role was conce led. Id. 144- 49.

The Investment Management Agreements On May 22, 2014, June 13, 2014, and 15, 2015, SHIP entered into three IMAs with BBIL, Bermuda Re, BAM I, all of which contained a similar set of provisions. 162. Each IMA contractually guaranteed to SHIP an annual return of

' I 5.85% of the net asset value of the assets in relevant

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o~ account, and in the event that there was a the Beechwood counterparty was required to make up difference (with a slight modification for the IMA with I). Id. 11 168-

1 69; 188-89; 207-08. On the other hand, the counterparty could retain investment returns the 5.85% return as a performance fee. Id. 11 170, 181, The IMAs obligated the Beechwood counterparties to with (1) SHIP's Investment Policies and (2) (except for the BAM I) the

1 Beechwood counterparties' investment all of which had certain collateralization and risk profile investments using SHIP's funds. Id. 11 176-77,

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The Beechwood counterparties failed to with their

I own investment guidelines and SHIP's Investment/ Policies. Id. 1 178, 198, 215. For instance, prior to June Platinum caused

I BBIL to acquire the Black Elk notes at their value, even though they were only worth a fraction of that Id. i 180. Beechwood never "disclosed to SHIP the connection

I I to other assets in which SHIP was invested, Platinum was directing SHIP's investments, that Platinum Beechwood insiders were personally benefiting from fees charges related to those investments, or the nature of

I such transactions and the inherent conflicts interest that such ties reflect." Id. 1 181.

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Consultants, (?) 268-32J.

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Furthermore, to the extent the Receiver is to hold liable for acts or omission taken in with SHIP's status as a "Client Indemnified Party" as SHIP is entitled to indemnification under IMAs. Id. 217-31.

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the IMAs, 18 of the

Numerous Related-Party Transactions Between May 2014 and June 2016, SHIP $270 million

I in total to Beechwood pursuant to the IMAs, $50 million outside of the IMAs. Id. 138. These f,nds were placed into "investments that were highly speculative, adequately

I secured, opaque, and not appropriately to SHIP" and/or investments tied to Platinum that were complex, inadequately collateralized, and often Id. 233, 237. Also, the investments in the Platinum and entities were not made at arm's length, involved inflated

I and unsupportable valuations," and were not in interests of SHIP. Id. 234. The examples include: (1) Gate Oil, LLC., id. 240; (2) Milberg Hamilton Capital dredit Facility,

I id.; (3) Lumens Energy Group LLC, id.; (4) Chirla Horizon

I Investment Group, id.; (5) Kennedy Sobli id.; (6)

I Montsant Partners, LLC, id. 240, 249-256; PEDEVCO Corp., id. 257-67; (8) Agera Energy, id. Many loans made to these entities using SHIP's funds "carried high

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j I I interest rates and were subject to fees and upfiont payments

I that were not reasonably supported by the condition or outlook of the obligors." Id. 244.

The SHIP TPC further describes the last thtlee transactions

I above, as follows:

Montsant Partners, LLC. Two weeks after IMA was signed, BAM I purchased, on SHIP's behalf, an unsecured1term note issued

' 1 by Montsant a wholly-owned subsidiary of in the principal amount of $35,500,000, pursuant to a Purchase

1 Agreement ("Montsant NPA") dated January 30, Id. 249-

, I 50. The Montsant NPA, which was not provided specifies that Montsant "shall use the proceeds of the of the Notes to disburse to its parent company, PPVA." Id. note was never properly secured; after nine amendments to the collateralization deadline, it was collateraliz, d by assets that also served as collateral for debt to be under two other defaulted investments in which Beechwood invested SHIP's policy reserves. Id. 252-53. SHIP "not been paid back its principal and has not received any payment of interest

I I on this note." Id. 255. Furthermore, in conjunction with the

-- Montsant NPA, Nordlicht and Kalter "jointly severally guarantee[d] that the Obligations [of the NPA] will be

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Id.1 ':II':II ---i A~era A,era

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46 I paid strictly in accordance with the terms oft e Documents," none of which was paid. Id. 256.

PEDEVCO Corp. Funds deposited in the BAM I IMA account were used to acquire, on SHIP's behalf, debt interes sin PEDEVCO, a

' I highly speculative oil business, from other Beeqhwood entities. Id. 257-58. Not only was an investment of type "entirely unsuitable" for SHIP given the speculative but also this

I investment occurred after the prices of oil gas had declined by 50% between March 2014 and April which meant PEDEVCO was financially struggling. Id. through a series of transactions, the PEDEVCO

In 2016, interests were restructured to subordinate SHIP's rights or repayment under Beechwood's rights for repayment. Id. 262-64. Eventually, PEDEVCO and SHIP collected only pennies on the dollar becau$e of the subordination of their rights for repayment. 266-67.

Energy, LLC. In May and June 2014, Energy issued a secured convertible note to Principal Strategies LLC ("PSG"), an entity owned 55% by PPVA and by PPCO. Id.

I I 270-71. This note was shortly after amended to convertible to 95.01% of the equity interests Agera Energy ("Convertible Note"). Id. 271. In June 18, Beechwood

I entities, including Beechwood Re, acquired $51 million of

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AdH ite - ! ' senior secured debt issued by Agera Energy, $30 million came from SHIP's accounts. Id. 274. Agera used these proceeds to purchase the assets of Gla6ial an electricity and natural gas retailer. Id.

Holdings Inc., though SHIP's money was used to finance this purchase and the transaction report on SHIP's account stated that SHIP's would receive 14% interest, SHIP was not paid any interest on Id. 274- 75. In April 2015, Beechwood and Platinum a few similar asset acquisitions by Agera Energy, $14 million

I I from SHIP's account without any interest to SHIP. Id. 277.

In 2016 and 2017, Narain and orchestrated the sale and resale of [PGS's] Note to investors, including SHIP, in a series of that ultimately resulted in the transfer of $65 in cash and $105 million in other assets to PGS in order to up PPCO and PPVA." Id. 2 8 0. This was accomplished through series of complex transactions, one of which was Beechwood's "formation of AGH Parent to acquire the Convertible Note from PGS for $170 million" in June 2016. Id. 281-301. The $170 illion that AGH Parent paid came from Beechwood investors, including SHIP who invested $50 million outside of the IMAs into Parent. Id. This $170 million valuation of the Convertible a result

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of negotiation between Narain and another entity - was grossly overvalued, because this Convertible Noe had been

I valued at $15 million two months prior. Id. 2 4. These transactions were motivated by Platinum's need or cash to "satisfy demands for investor withdrawals, to s pport distressed investments, and to provide the appearance of Platinum funds." Id.

I j

assets in

Finally, around June 2017, Beechwood sold interests in various Beechwood assets for over $1 billion to 1

aff iliates of Eli Global. Id. 318. Beechwood's interests in Parent were

I I included in the sale, but SHIP's were not, allowing Beechwood, its insiders, and certain Platinum to cash out interests in the Agera enterprise for which had

I I invested no funds and had taken no risk, while SHIP with nearly $70 million of funds tied up in illiquid interests of questionable worth in an entity now controlled b Eli Global." Id.

Excessive Performance Fees Based on Overval ation

I The co-conspirators also "grossly the investments in SHIP's portfolio, and fed the independent valuation firms misleading information, tailored to achieve the desired result: inflated values." Id. 321. The goal was to create an overall annual return over the 5.85%

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Jased !Beechwood Id.] Pla~inum's exJmple

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l ex~ricating in~estments" tde Norjdlicht

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~rusts, threshold to take performance fees. Id. 1 322. Over time, tens of millions in performance fees were collected on its consistently false representations to SHIP, and never made any true-up payments to SHIP's account. 11 341-44.

Beechwood often delegated valuations, as the Golden Gate

valuation to overvaluation shows. Id.

I 11 333-35. Both the Platinum valuation committe1, in charge of "reviewing the values of all of PPVA's investments," and the Platinum risk committee, in charge of investment strategy for Platinum Management and !analyzing new investment opportunities," had a significant asset values reported by PPVA. Id. 1 326.

Continued Concealment Beechwood also prevented SHIP and other

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on the net

from finding out about Beechwood's scheme and from their

I funds from the "irresponsible and conflicted at an earlier time. Id. 1 367. For instance, during SEC investigation that started on July 10, 2014, "lied and told his attorneys that the companies had differ 1

ent General Counsels," which was false as Ottensoser was the General Counsel to both Platinum and Beechwood. Id. 368. numerous asset-protection schemes, including the use of were

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I employed to "put their pilfered profits beyond reach of creditors like SHIP and enrich themselves." Id. 379-83.

When CNO started confronting Beechwood relationship between Beechwood and Platinum

the and asked to divest CNO's investments from "Platinum-controlled and entities," Beechwood feared that "CNO would catch onto the Beechwood Scheme." Id. 11 373-77. Then, "diverted most if not all of those investments into SHIP's saddling SHIP with all of the inappropriate

I investments," as evidenced by an email sent on 23, 2015. Id. 1 376.

I I After Huberfeld was arrested in June 2016 the media started exposing the sent an email letter

Beechwood-Platinum Beechwood to SHIP on July 26, 2016,

' representing that, inter alia, (1) it was in process of severing all ties with Platinum; (2) "Beechwood currently owned 99% through family trusts of Messrs. and Taylor; and (3) "no fund or institution of any kind has had any ownership of Beechwood." Id. 11 386-87. Ten after, Feuer and Taylor, through Feuer Family 2016 ACQ Trust Taylor-Lau

j Family 2016 ACQ Trust, acquired the equity interests

I I of Nordlicht, Huberfeld, Bodner, and Levy in entities in exchange for secured promissory notes more than $20C

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l million (the "August 5, 2016 Transactions"), kept the economic interests of Nordlicht, Huberfeld, and Levy intact. Id. 389. Afterwards, Beechwood sold a portion of its assets to an affiliate of Eli Global, which a change of control provision under the promissory notes agreement that made a material portion of the proceeds of the of those assets to "flow[] directly into the hands of Huberfeld, Bodner, and Levy." Id. 396.

Into the fall of 2016, SHIP continued to assurances that its investments were "sound, secured by collateral, and appropriately valued." Id. By the time SHIP discovered the scheme and took mitigating in November 2016, "much of the damage already was done." Id. 405- 07. IV. Overview of the Counts

The FAC contains 19 counts, including, as here:

i • Claims against Beechwood Re, BRILLC, I, BAM II,

In re Platinum-Beechwood Litigation

2019 | Cited 0 times | S.D. New York | October 7, 2019

Beechwood Holdings, BBIL, PBIHL, Bermuda,

I Fuzion, CNO, 40186 Advisors and John 1-100 for RICO and RICO conspiracy (Counts 1-3), lO(b) of the Exchange Act and Rule l0b-5 (Count 4), and abetting breach of fiduciary duty and abetting fraud (Count 7);

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' 6), and aiding

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fraud SH~P 101(b) lOb-5 alding

(Countl6),

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Holdings, here:

I • Claims against Feuer and Taylor for RICO1 and RICO

I conspiracy (Counts 1-3), Section l0(b) the Exchange

I Act and Rule l0b-5 (Count 4), Section of the Exchange Act (Count 5), aiding and abetting of fiduciary duty (Count 6), and aiding and abetting (Count 7); • Claims against BAM Administrative and for RICO and

I RICO conspiracy (Counts 1-3), Section of the Exchange Act and Rule (Count 4), and abetting abetting

breach of fiduciary duty aiding and fraud (Count 7), fraudulent con eyance (Counts

I I 8-17), unjust enrichment (Count 18), declaratory

I I relief (Count 19); and

I • Claims against BCLIC and WNIC for RICO RICO

1 conspiracy (Counts 1-3), Section l0(b) the Exchange

I Act and Rule l0b-5 (Count 4), aiding abetting breach of fiduciary duty (Count 6), aiding and fraud

I (Count 7), fraudulent conveyance 13-17), unjust

I enrichment (Count 18), and declaratory (Count 19). The WNIC TPC contains 19 counts, includingi as relevant

• Claims against Huberfeld, Bodner, Feuer 1

Family Trust, I I Taylor-Lau Family Trust, Beechwood and

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1 1 conspirrcy

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j fraud

lduty Beechwood Trust Nos. 1-20 for RICO and conspiracy (Counts 1 and 2), aiding and abetting (Count 7),

I I aiding and abetting breach of fiduciary (Count 12),

I contribution and indemnity (Count 18), unjust enrichment (Count 19);

I I I • Claims against Slota and Ottensoser for

I

and RICO

•

I conspiracy (Counts 1 and 2), fraudulent and

I fraud (Count 3), aiding and abetting (Count 7), aiding and abetting breach of fiduciary (Count 12), contribution and indemnity (Count 18), unjust enrichment (Count 19);

L I Claims against Kim, Saks, Narain, BAM I, and BAM

I I Administrative for RICO and RICO (Counts 1 and 2), fraudulent inducement and fraud 3), aiding and abetting fraud (Count 7), breach of duty (Count 11), aiding and abetting breach of duty (Count

i 12), contribution and indemnity (Count and unjust

I j enrichment (Count 19); : • Claims against BBL, BBIL, and PBIHL for and RICO

conspiracy (Counts 1 and 2) , fraudulent linducement and fraud (Count 4), aiding and abetting (Count 7), aiding and abetting breach of fiduciary (Count 12),

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fraudulent conveyance (Counts 14-17), contribution indemnity (Count 18), and unjust (Count • Claims against Lincoln for RICO and RICO conspiracy

and 19) ;

(Counts 1 and 2), fraudulent misrepresen ation (Count 5), negligent misrepresentation (Count 6), and

I abetting fraud (Count

8), conspiracy to fraud

I (Count 9) , aiding and abetting breach fiduciary duty

I (Count 13), contribution and indemnity 18), and unjust enrichment (Count 19);

i I I • Claims against Beechwood Re for breach contract (Count

I 10) and contribution and indemnity (Count 18); and

I I • A claim against Feuer, Taylor, and Capital for

contribution and indemnity (Count 18)

I The SHIP TPC contains 8 counts, including, as relevant

• Claims against BAM II, Beechwood Holdingls, BBL, PBIHL,

I BAM Administrative, Beechwood Capital, GP I, BAM GP II, MSD Administrative, N Management, Cassidy, Feit, Fuchs, Huberfeld, Kim, Michael

I Ottensoser, Saks, Slota, and Steinberg aiding and

I abetting fraud (Count 1), aiding and abeitting breach of fiduciary duty (Count 2), civil (Count 5), and

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j Distribu~ion

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unjust enrichment (Count 7); • Claims against Feuer Family Trust, Family

Trust, Beechwood Trust Nos. 1-20, BRILLC Series A-I, Lawrence Partners, LLC, Monsey Equities, LLC, Whitestar LLC, Whitestar LLC II, and Whitestar III for aiding

I and abetting fraud (Count 3), aiding abetting breach of fiduciary duty (Count 4), civil (Count 5), and unjust enrichment (Count 7); • Claims against Beechwood Global Trust, Feuer

Family 2016 ACQ Trust, and Taylor-Lau 2016 ACQ

I Trust for aiding and abetting fraud (Counts 1 and 3), aiding and abetting breach of fiduciary (Counts 2 and 4), civil conspiracy (Count 5), and enrichment

' (Count 7); and i • A claim against Beechwood Re, BAM I, BBIL for

declaratory judgment for contract (Count 8) •

Legal Standards I. Standard of Review

In order to survive a motion to dismiss, must

I a claim to relief that is plausible on face."

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111 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) .

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claim has facial plausibility when the plaintiff pleads factual ontent that allows the court to draw the reasonable inferen,e that the defendant is liable for the misconduct alleged. Id. When adjudicating a motion to dismiss, the Court all factual allegations in the complaint and all reasonable inferences in the plaintiff's favor." ATSI Inc. v.

I Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir.

"Although Fed.R.Civ.P. 8 does not demand t,at a complaint be a model of clarity or exhaustively present facts alleged, it requires, at a minimum, that a complaint each defendant fair notice of what the plaintiff's claim is the ground upon which it rests." Atuahene v. City of Hartford, F. App'x 33, 34 (2d Cir. 2001) (summary order). Where a "lump[s] all the defendants together in each claim and no factual basis to distinguish their conduct, [it 1

fail [s] to satisfy this minimum standard." Id.

However, "[t]he group pleading doctrine is an exception to the requirement that the fraudulent acts of eac defendant be

I identified separately in the complaint." Assocs., L.P.

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Unless otherwise indicated, in quoting cases quotation marks, alterations, emphases, footnot!es, are omitted.

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I v. Hayes, 141 F. Supp. 2d 344, 354 (S.D.N.Y. "The group pleading doctrine allows particular statements omissions to be attributed to individual defendants even the exact source of those statements is unknown." Anwar Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 405 2010). "Group

I pleading allows plaintiffs only to connect to

I statements - it does not also transitively scienter." Id. at 406.

"In order to invoke the group particular defendant the complaint

I I ! pleading must allege

I

against a indicating that the defendant was a corporate insider, direct involvement in day-to-day affairs, at the entity issuing the

I I statement." In re Alstom SA, 406 F. Supp. 2d 433, 449 (S.D.N.Y.

I 2005); cf. Luce v. Edelstein, 802 F.2d 49, 55 Cir. 1986) ("[N]o specific connection between fraudulent rlpresentations in

I the Offering Memorandum and particular is necessary

I I where, as here, defendants are insiders or participating in the offer of the securities question.").

Furthermore, "[w]hile it is settled that group pleading doctrine is an exception to the requirement the fraudulent acts of each defendant be identified in the complaint, this does not imply that the group doctrine applies only to fraud claims; rather, it whenever Rule

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b.s.c. 9(b) applies, which is whenever the alleged con uct of defendants is fraudulent in nature." Schwartzco Enter rises LLC v. TMH Mgmt., LLC, 60 F. Supp. 3d 331, 350 2014). For example, "[t]he group pleading doctrine applies breach of fiduciary duty claims that are rooted in Id. at 352-53.

I I II. Claim-Specific Legal Standards I

I A. Civil RICO Under 18 U.S.C. § 1962(c)

Section 1962(c) of the Racketeering and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 makes it "unlawful for any person employed by or with any enterprise engaged in, or the activities of affect, interstate or foreign commerce, to conduct or directly or indirectly, in the conduct of such affairs through a pattern of racketeering To plead

I I any RICO violation, moreover, a plaintiff must allege that

I defendant engaged in at least two predicate of "racketeering activity," where "racketeering ac ivity" is

I defined to include a host of state and federal See 18 U.S.C. §§ 1961(1), (5). In the present case, FAC and the

1 WNIC TPC allege that relevant defendants in the predicate acts of mail and wire fraud under 18 §§ 1341, 1343.

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l I In addition to alleging two predicate acts, 1 plaintiff must plead continuity and

a RICO to establish i that the racketeering activity constitutes a Continuity, in turn, "is both a closed- and concept, referring either to a closed period of repeated]conduct, or to past conduct that by its nature projects into future with a threat of repetition." H.J. Inc. v. Nw. Bell Co., 492 U.S.

I 229, 241 (1989). Where, as here, the pattern is]closed-ended, the Second Circuit has held that "predicate occurring over less than a two-year period may not be deemed a pattern." First Capital Asset Mgmt., Inc. v. Satinwood, Inc., F.3d 159, 168 (2d Cir. 2004). I

B. Civil RICO Under 18 U.S.C. § 1962{a)

The RICO provision under 18 U.S.C. § "unlawful for any person who has received

I I

makes it any derived,

I directly or indirectly, from a pattern of activity

. to use or invest, directly or indirectly,:any part of such

I income, or the proceeds of such income, in of any

I interest in, or the establishment or operation any

I enterprise which is engaged in, or the of which

I I affect, interstate or foreign commerce."

C. Civil RICO Conspiracy Under 18 U.S. C. § {d)

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lmay I The RICO conspiracy provision under 18 § 1962(d) makes it "unlawful for any person to conspire violate any of the provisions of [18 U.S.C. § 1962(a)-(c)] ." order to state a Section 1962(d) claim, "a plaintiff must as to each alleged co-conspirator: (1) an agreement to the conspiracy;

' (2) the acts of [that] co-conspirator in of the conspiracy; (3) that the co-conspirator participated in the same." Odyssey Re (London) Ltd. v. Cooke Brown Holdings Ltd., 85 F. Supp. 2d 282, 303 (S.D.N.Y.j 2000) (summarizing Hecht v. Commerce Clearing House, 897 F.2d 21, 25 (2d Cir. 1990)). "[M]ere knowledge of a coupled with personal benefit, is not enough to

even liability for a RICO conspiracy." Nasik Breedin & Researdh Farm Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 541 (S.D.N.Y. 2001).

I D. Section lO(b) of the Exchange Act and Rule

Section l0(b) of the Securities Exchange 15 U.S.C. §

I 78a et seq., makes it "unlawful for any person, or indirectly, by the use of any means or instrume9tality of interstate commerce or of the mails, or of any of any

I national securities exchange [t]o use or in

I connection with the purchase or sale of any . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission prescribe as

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l necessary or appropriate in the public interest for the protection of investors." 15 U.S.C. § 78j. this

I statutory provision, Rule l0b-5 states that "it be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate or of the mails or of any facility of any national exchange, (a) to employ any device, scheme, or artifice defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the made, in the light of the circumstances under which were made, not misleading, or (c) to engage in any act, or course of business which operates or would operate fraud or deceit upon any person, in connection with the or sale of any

I I security." 17 U.S.C. § 240.l0b-5.

To state a private civil claim under Sectidn l0(b) of the

I Exchange Act or Rule l0b-5, "plaintiff must (1) a material misrepresentation (or omission); (2) scienter, e., a wrong state of mind; (3) a connection with the security; (4) reliance . . ; (5) economic

I

or sale of a and (6) loss causation, i.e., a causal connection between material misrepresentation and the loss." Dura Pharmaceu{icals, Inc. v. Broudo, 544 U.S. 336, 341-42 (2005).

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~ot In addition to the Rule 9(b) requirement to all claims sounding in fraud, the heightened standards of

I the Private Securities Litigation Reform Act require that plaintiff (1) "specify each statement to have been

I misleading [and] the reason or reasons why the is misleading" and (2) "state with particularity giving rise to a strong inference that the defendant acted the requisite state of mind." Tellabs, Inc. v. Issues &

I Rights, Ltd., 551 U.S. 308, 321 (2007). Absent a fiduciary duty to speak, silence cannot support a claim of Rather, for

' ' liability to attach, there must be "an actual one

I ' that is either untrue outright or misleading by virtue of what

I I it omits to state." In re Vivendi, S.A. Sec. 838 F.3d 223, 239 (2d Cir. 2016).

E. Section 20(a) of the Securities Exchange Adt

Section 20(a) of the Securities Exchange states that "every person who, directly or indirectly, any person

I liable under any provision of this chapter or any rule or regulation thereunder shall also be liable and severally with and to the same extent as such controlled ierson to any

I person to whom such controlled person is liable]. controlling person acted in good faith and did

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w1re (id a4 indirectly induce the act or acts constituting cause of action." 15 U.S.C. § 78t.

violation or

To state a claim under Section 20(a) of th

Exchange Act, plaintiff must show (1) "a primary violation by the controlled person," (2) "control of the primary violator the targeted defendant," and (3) "that the controlling was in some meaningful sense a culpable participant in the perpetrated

I by the controlled person." SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1472 (2d Cir. 1996).

F. Common Law Fraud

Under here applicable New York law, "[t]o a cause of action for fraud, a plaintiff must allege a rep esentation of material fact, the falsity of the representatio, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resul ing injury." Kaufman v. Cohen, 760 N.Y.S.2d 157, 165 (1st 2003). Under Rule 9(b), furthermore, plaintiff must "(1) the statements that the plaintiff contends were fra dulent, (2) identify the speaker, (3) state where and when he statements were made, and (4) explain why the statements Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290

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fraudulent." Cir. 2006). I "In cases where the alleged fraud consists of omission and the plaintiff is unable to specify the time and place because no

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is 9(b~. act occurred, the complaint must still allege: 1) what the omissions were; (2) the person responsible for he failure to disclose; (3) the context of the omissions and he manner in which they misled the plaintiff, and (4) what obtained through the fraud." Odyssey Re (London) Ltd. Brown Holdings Ltd., 85 F. Supp. 2d 282, 293

I ' l' k v. Coo e

I (S.ID.N. Y. 2000).

I I In addition, pure omissions (as opposed to misleading statements) are actionable when defendant had a9 affirmative duty to disclose that information to plaintiff, as when defendant owes fiduciary duty to plaintiff. SNS N. V. v. Citibank, N.A., 777 N.Y.S. 2d 62, 66 (1st Dep't And even

I in the absence of fiduciary duty, a duty to arises if "one party possesses superior knowledge, not available to the other, and knows that the other is on the basis of mistaken knowledge." Aetna Cas. & Sur. Co. v. Arliero Concrete Co., 404 F. 3d 566, 582 (2d Cir. 2005).

G. Fraudulent Inducement

i To state a claim for fraudulent a plaintiff

I I "must allege a misrepresentation or material on which

I [it] relied that induced [it] to enter into an Barron Partners, LP v. LAB123, Inc., 593 F. 2d 667, 670 (S.D.N.Y. 2009). A fraudulent inducement claim also subject to the heightened pleading standard of Rule

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~- H. Aiding and Fraud

establish liability for aiding and fraud under New York law, the plaintiffs must show (1) the of a fraud; (2) the defendant's knowledge of the fra d; and (3) that the defendant provided substantial assistance t advance the fraud's commission." Krys v. Pigott, 7 4 9 F. 3d 1 7, 12 7 (2d Cir. 2014). "Actual knowledge is required to impose l:iability on an aider and abettor under New York law," although "a complaint adequately alleges the knowledge element of an and

I abetting claim when it pleads not constructive Jnowledge, but actual knowledge of the fraud as discerned from the surrounding circumstances." Id.

I. Breach of Fiduciary Duty

I Under here applicable New York law, the elements of a breach of fiduciary duty claim are "(1) that a duty

I existed between plaintiff and defendant, (2) defendant

I breached that duty, and (3) damages as a result the breach."

I Meisel v. Grunberg, 651 F. Supp. 2d 98, 114 (S.D.N.Y. 2009). "In

I determining whether a fiduciary duty exists, focus is on whether one person has reposed 'trust or confid nee in another' and whether the second person accepts the trust and confidence and 'thereby gains a resulting superiority or influence over the

' first.'" Indep. Asset Mgmt. LLC v. Zanger, 538 Supp. 2d 704,

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Duty "A ff

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j 709 (S.D.N.Y. 2008). In particular, where had discretionary authority to manage [plaintiff's] investment accounts, it owed [plaintiff] a fiduciary duty f the highest good faith and fair dealing." Assured Guar. (UK) Ltd. v. J.P.

I Morgan Inv. Mgmt. Inc., 915 N.Y.S.2d 7, 16 (1st ·Dep't 2010), aff'd, 962 N.E.2d 765 (N.Y. 2011).

I ' J. Aiding and Abetting Breach of Fiduciary

claim for aiding and abetting a breach fiduciary duty requires, inter alia, that the defendant knowingly induced or

I participated in the breach." Krys v. Butt, 486 App'x 153, 157 (2d Cir. 2012) (summary order). "Although a is not required to allege that the aider and abettor an intent to harm, there must be an allegation that such defendant had actual

I knowledge of the breach of duty." Id.

Generally "the same activity is alleged to constitute the primary violation underlying both claims" (i.e. claims of fraud and claims of aiding and abetting breach). Id.; see also Fraternit Fund Ltd. v. Beacon Hill Asset M mt. LLC, 479 F. Supp. 2d 349, 360 (S.D.N.Y. 2007). For this rea on, unless otherwise stated, these two claims are analyzed] together

in this Opinion and Order for efficiency's sake.

K. Fraudulent Misrepresentation

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otherwi,e co-conspirato,s." To succeed on a theory of fraudulent under New York law, plaintiff must show the defendant made a material false representation,

I . (2) the intended to defraud the plaintiff thereby,

(3) the reasonably

I relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance."

I I I I ' Bridgestone/Firestone, Inc. v.

Recovery Credit Services, 98 F.3d 13, 19 (2d Cir. 1996).

L. Negligent Misrepresentation

Inc.,

Under New York law, "the elements of misrepresentation are: (1) carelessness in words; (2) upon which others were expected to rely; (3) upon which they

I I did act or failed to act; (4) to their damage. Most relevant,

I I the action requires that (5) the declarant must !express the words directly, with knowledge or notice that will be acted upon, to one to whom the declarant is bound by relation or

I duty of care." Dallas Aerospace, Inc. v. CIS Corp., 352 F.3d

1 775, 788 (2d Cir. 2003). I

M. Civil. Conspiracy

I Under New York law, civil conspiracy is an independent tort. Instead, "[a]ll that an allegation of conspiracy can accomplish is to connect liability, with the acts

nonactors, who might escape of their Burns

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j ray 1 Jackson Miller Summit & Spitzer v. Lindner, 452 80, 93- 94 (2nd Dep't 1982), aff'd, 451 N.E.2d 459 1983). "Where there is an underlying tort, the elements of conspiracy are: (1) the corrupt agreement between two or persons, (2)

I an overt act, (3) their intentional participati4n in the furtherance of a plan or purpose, and (4) the damage." Pope v. Rice, 04-cv-4171 (DLC), 2005 WL 613085, *13 (S.D.N.Y. Mar. 14, 2005). Where a claim of civil conspira{y "involves a conspiracy to breach a fiduciary duty, all of

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the duty to alleged conspiracy must independently owe a the plaintiff." Id.

N. Actual Fraudulent Conveyance in Violation

Debtor and Creditor Law§ 275 or 276 Actual or constructive fraudulent satisfy Rule 9(b).

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New York

claims must

Section 275 of the New York Debtor and Law

I ("NYDCL"), titled "Conveyances by a person aboul to incur

I debts," states: "Every conveyance made and obligation

I incurred without fair consideration when the making the

I conveyance or entering into the obligation or believes that he will incur debts beyond his ability to as they mature, is fraudulent as to both present and fu 1

ture creditors." NYDCL § 275.

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the j Section 276 of the NYDCL, titled made with intent to defraud," states: "Every conveyance and every obligation incurred with actual intent, as from intent presumed in law, to hinder, delay, or either present or future creditors, is fraudulent as both present and future creditors." NYDCL § 276. The party an intentional fraudulent transfer must "specify property that was allegedly conveyed, the timing and of those allegedly fraudulent conveyances, [and] the paid."

I United Feature Syndicate, Inc. v. Miller Syndicate, Inc., 216 F. Supp. 2d 198, 221 (S.D.N.Y. 2002).

Section 278 of the NYDCL, entitled "Rights of creditors whose claims have matured," states:

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1. Where a conveyance or obligation fraudulent as to a creditor, such creditor, when claim has matured, may, as against any person a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one has derived title immediately or mediately from a purchaser,

a. have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or b. disregard the conveyance and ttach or levy execution upon the property conv yed. 2. A purchaser who without actual fra dulent intent has given less than a fair considerat on for the conveyance or obligation, may retain property or obligation as security for repayment.

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thi NYDCL § 278. I

0. Constructive Fraudulent Conveyance in of New York

Debtor and Creditor Law§ 273, 274, or 277 j Under New York law, certain transactions deemed to operate as if they were fraudulent conveyances. such circumstances, there is no requirement to show an intent to defraud. Englander Capital Corp v. Zises, Misc. LEXIS 5282, *8 (1st Dep't 2013).

I Thus, Section 273 of the NYDCL, titled "Conveyances by insolvent," states: "Every conveyance made and obligation incurred by a person who is or will be thereby

I insolvent is fraudulent as to creditors to his actual intent if the conveyance is made or the is

I I incurred without a fair consideration." NYDCL §1273.

Similarly, Section 274 of the NYDCL, tit1e4 "Conveyances by

I persons in business," states: "Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction which the property remaining in his hands after the is an

I unreasonably small capital, is fraudulent as to 1

creditors and as to other persons who become creditors during continuance of such business or transaction without regard to intent." NYDCL § 274.

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lf85 Finally, Section 277 of the NYDCL, titled of partnership property," states: "Every conveyanc of partnership property and every partnership obligation incur ed when the

I partnership is or will be thereby rendered is fraudulent as to partnership creditors, if the ionveyance is made or obligation is incurred, b. To a not a partner without fair consideration to the partn rship as distinguished from consideration to the individJa1 partners." NYDCL § 277.

Contribution and Indemnify "As a matter of law, there is no right to ¢ontribution under RICO." Dep't of Econ. Dev. v. Arthur & Co., F. Supp. 922, 932 (S.D.N.Y. 1990); see also v.

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Hartmann, 787 F. Supp. 411, 415, 417 (S.D.N.Y.

In the Second Circuit, indemnification is ordinarily available in a case where "the party seeking has knowingly and willfully violated the federal seturities laws."

I In re Residential Capital, LLC, 524 B.R 563, (Bankr. S.D.N.Y. 2015). However, contribution securities law is allowed among joint

for violations of federal

Stratton I Group, Ltd. v. Sprayregen, 466 F. Supp. 1180, (S.D.N.Y. 197 9) .

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ebriched, cofscience Under New York law, a party cannot itself against its own intentional torts," which inclu es intentional acts of fraud claims. Barbagallo v. Marcum, (JBW), 2012 WL 1664238, at *4

(E.D.N.Y. May 11, 2012); v. Niagara Mohawk Power Corp., 487 NE. 2d 267, 267 (N.Y. 1985). However, a claim for contribution allows a tort to seek apportionment of liability among joint equal to

l the relative fault of each tortfeasor. D'Ambros·o v. City of New York, 435 N.E.2d 366, 369 (N.Y. 1982); see also Dole v. Dow Chemical Company, 30 N.Y.2d 143, 143 (1972) common

I law contribution among all joint tortfeasors York).

Under Article 10 of the New York Debtor Creditor Law, "there is neither an express nor implied right indemnification or contribution." Edward M. Fox & James Gadsden, Rights of Indemnification and Contribution Amon Persons Liable for Fraudulent Conveyances, 23 Seton Hall L. Re . 1600, 1605 (1993) .

Q. Unjust Enrichment

To state a claim for unjust enrichment New York law,

I plaintiff must allege that "(1) defendant was (2) at plaintiff's expense, and (3) against permitting defendant

' I I equity and good militate to retain what plaintiff is seeking

I to recover." Briar atch Ltd., L.P v. Phoenix Pi tures, Inc., 373

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~ffirmative F.3d 296, 306 (2d Cir. 2004). Relief for unjustienrichment is "available only in unusual situations when, the defendant

I has not breached a contract nor committed a tort, circumstances create an equitable obligation ruAning from the defendant to the plaintiff." Corsello v. New York, Inc., 967 N.E.2d 1177, 1185 (N.Y. 2012). Accordingly, unjust enrichment claim is not available where it duplicates, or

I replaces, a conventional contract or tort Id.

I R. The Wagoner Rule and the Doctrine of In Delicto

The Wagoner rule stands for the "well-settled proposition that a bankrupt corporation, and by extension, entity that

I stands in the corporation's shoes, lacks standing to assert claims against third parties for defrauding the corporation

I where the third parties assisted corporate in committing the alleged fraud." Cobalt Multifamily Inv'rs I, LLC v. Shapiro, 857 F. Supp. 2d 419, 425 (S.D.N.Y. The

. I Wagoner rule applies not only to bankruptcy trustees, but also

I to liquidators and court-appointed receivers. Bullmore v. Ernst & Young Cayman Islands, 861 N.Y.S.2d 578, 1

586-87 (N.Y. Sup. Ct. 2008); Cobalt, 857 F. Supp. 2d at 425.

The doctrine of in pari delicto is similar to the Wagoner rule. Instead of functioning as a prudential of standing,

I however, the doctrine of in pari delicto is an

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In re Platinum-Beechwood Litigation

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20[1) becau~e bankru~tcy defense under New York law that "generally precludes a wrongdoer

. from recovering from another wrongdoer." v. HSBC Bank PLC, 454 B.R. 25, 29 (S.D.N.Y. 2011), sub nom. In re Bernard L. Madoff Inv. Sec. LLC, 11 Civ. (JSR), 2011 WL 3477177 (S.D.N.Y. Aug. 8, 2011), aff'd sub nom. re Bernard L. Madoff Inv. Sec. LLC, 721 F.3d 54 (2d Cir. and aff'd sub nom. In re Bernard L. Madoff Inv. Sec. LLC, 721 F.3d 54 (2d Cir. 2013); see Kirschner v. KPMG LLP, 938 N.E.2d 950 (N.Y.

I 2010) ("The doctrine of in pari delicto that the courts will not intercede to resolve a dispute between two wrongdoers.") .

3 S. Alter Ego

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During the oral argument held on August 15, 2 19 regarding the instant motions to dismiss, the Receiver submitted for the Court's consideration the decision in In re Bankest, L.C., 04-17602, 2010 WL 2926023, at *3 (Bankr. S.D. Fa. July 23, 2010), which held that "[t]here is substantial' aw that imputation and in pari delicto do not apply to a Court-appointed

I receiver." The Court declines to follow that for two reasons. First, a holding by a bankruptcy the Southern District of Florida applying Florida law has no precedential value for this Court in the present case. Secon, that holding

I is inconsistent with the case law in this See, e.g., Shearson Lehman Hutton, Inc. v. Wagoner, 944

114, 118 (2d Cir. 1991) (holding that the doctrine of in delicto applies to court-appointed bankruptcy trustees, noting that bankruptcy trustee ... may only assert held by the bankrupt corporation itself."); Cobalt Inv'rs I, LLC v. Arden, 857 F. Supp. 2d 349, 362 (S.D.N.Y. ("[T]he Wagoner rule applies to [an SEC] receiver he fulfills a role sufficiently analogous to that of a trustee.").

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j account~ble New York law, "piercing the veil requires a showing that: (1) the owners exercised domination of the corporation in respect to the transaction and (2) that such domination was used to commit a or wrong

I against the plaintiff which resulted in plaintlff's injury."

I Morris v. New York State Dep't of Taxation & 623 N.E.2d 1157, 1160-61 (N.Y. 1993). "While complete domi ation of the corporation is the key to piercing the corporat

veil, especially when the owners use the corporation as a mere device to further their personal rather than corporate business, such domination, standing alone, is enough; some showing of a wrongful or unjust act toward plaintiff is required." Id. at 1161. "Typically, piercing is used

I to hold individuals liable for the actions of a;corporation they control. However, New York law recognizes piercing, which . . seeks to hold a corporation for actions

I of its shareholders." Am. Fuel Corp. v. Utah Energy Dev. Co., 122 F.3d 130, 134 (2d Cir. 1997).

Legal Analysis - FAC I. Common Argument - Whether the Receiver's C aims Are Barred

by the Wagoner Rule and the Doctrine of In Pari Delicto Various FAC defendants argue that the Wa o er rule and the doctrine of in pari delicto bar the Receiver's laims generally,

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wpuld (N.Y~ because the PPCO entities were involved in the misconduct of which the FAC accuses these defen ants. See ECF No. 184, at 9; ECF No. 157, at 9-11; ECF No. 16, at 18; ECF No. 207, at 10.

I According to the FAC, there are two types ?f events that

I 1 affected the PPCO entities: (1) the ones that harmed and benefited the PPCO entities, such as the overvaiuation of PPCO

I assets starting from before 2013, which helped PPCO entities sustain their business but also harmed the PPcolentities by

l causing excessive management fees, FAC 186-87; and (2) the ones that harmed but did not benefit such as the 2015 and 2016 fraudulent conveyance transactions or the Black Elk transaction that was for the "sole benefit the PPVA

I Funds," id. 180, 225-58, 324(iii), 335(iii).

I As to the latter type of events, there is wrongdoing on

I ' the PPCO entities' part, so the Wagoner rule the doctrine of in pari delicto are not applicable.

4

Each and one of the Receiver's claims against the FAC defendants some basis in the 2015 and 2016 fraudulent conveyance so none of

If, for some reason, the allegedly by the officers and controllers of the PPCO entities are imputed to the PPCO entities, the adverse interest exception apply. See Kirschner v. KPMG LLP, 938 N.E.2d 941, 952 2010).

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faced these claims should be categorically barred by the Wagoner rule and the doctrine of in pari delicto.

As to the former type of event, the Wagone rule and the doctrine of in pari delicto may be applicable, o the Court looks to see if any exceptions apply. Under the adverse interest exception, the Wagoner rule and in pari delicto·doctrine will

' not apply where a corporate officer "totally the corporation's interests and [is] acting for his own or another's purposes." Kirschner v. KPMG LLP, 938 1 N.E.2d 941, 947

I (N.Y. 2010). The adverse interest exception be invoked

I merely because [the officer] has a conflict of interest or because he is not acting primarily for his Center v. Hampton Affiliates, Inc., 488 N.E.2d 828, 830 1985). Indeed, New York law "reserves this

most exceptions

I for those cases - outright theft or looting or $mbezzlement

I where the insider's misconduct benefits only or a third party; i.e., where the fraud is committed a corporation rather than on its behalf." Kirschner, 938 at 952. The

1 PPCO Funds benefited somewhat from the alleged tvervaluations,

I which helped maintain the of financial in the eyes of their creditors and investors and there y attracted additional capital from investors such as WNIC, BCLIC, and SHIP to solve the liquidity crisis the PPCO Funds at or before

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1 (JSR),

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- the end of 2013. See, e.g., FAC the adverse interest exception does not apply with espect to the former type of events.

Nor does the insider exception apply with espect to the former type of events. Under the insider "in pari delicto/Wagoner does not apply to the actions fiduciaries who are insiders in the sense that they either are the board or in management, or in some other way control thelcorporation." In re Refco Inc. Sec. Litig., (JSR), (JSR),- 08-cv-3086 (JSR), 08-cv-7416 (JSR), 08-cv-8267 2010 WL 6549830, at *16 (S.D.N.Y. Dec. 6, 2010), report and recommendation adopted in art, rejected in ar on other grounds

sub nom. In re Refco Sec. Litig., 779 F. Supp. 2d 372

j (S.D.N.Y. 2011), aff'd sub nom. Krys v. Butt, F. App'x 153

I I . (2d Cir. 2012); see also Glob. Crossing Estate v. Winnick, 04-cv-2558 (GEL), 2006 WL 2212776, at (S.D.N.Y. Aug. 3, 2006) ("Courts have held that the and 'in pari

I delicto' rules do not apply to claims against insiders

I I for breach of their fiduciary duties."). Nordlicht, Levy, and

I the PPCO Portfolio Manager who allegedly controlled, or owed fiduciary duties to, the PPCO entities- would as

I I "insiders," but they are not defendants in the present FAC action. None of the FAC Beechwood Defendants ven Taylor and

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exception. (S.D.N.Y.12013)

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l Feuer - are alleged to control or owe

to the I PPCO entities, and do not fit within the definition of "insiders" for the purpose of the insider See In re

I Madoff Sec., 987 F. Supp. 2d 311, 321 (holding that insider exception is used "narrowly to only for suit [] against a fiduciary of the []corporation, against third

I parties who are alleged to have aided and short of control by the third party" over

In sum, to the extent that a portion premised on the overvaluation of the PPCO

the [] fraud, I the of a claim is

the Wagoner rule and the doctrine of in pari delicto of the claim. However, no FAC claim is

I Wagoner rule or the doctrine of in pari

such portion barred by the

II. Common Argument - Whether Receiver's RICO

by the PSLRA

Are Barred

Section 107 of the PSLRA - also referred as the "RICO Amendment" provides that "no person may reli upon any conduct

' that would have been actionable as fraud in thelpurchase or sale

I of securities to establish a violation of 1962." 18

! U.S.C. § 1964(c). The Receiver claims that her claims may

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In addition, "in pari delicto is not a to a fraudulent conveyance suit." FIA Leveraged Fund Ltd. v. Thornton LLP, 150 A.D.3d 492, 497 (N.Y. App. Div. 2017) In re Verestar, Inc., 343 B.R. 444, 480 n. 19 (Bankr. ;s.D.N.Y. 2006)).

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transaftions] ." not be dismissed because of the PSLRA "[u]nlessj and until Court rules that the Receiver has alleged an

I securities fraud claim against at least one in

this

connection with her RICO claim," ECF No. 256, 17; but this

I I argument is incorrect as a matter of law. In the RICO Amendment "bars any claim that is actionable fraud in the

' purchase or sale of securities, even in

• 1,

where a i plaintiff lacks standing or is otherwise from asserting a valid claim under the securities Zohar COO

I 2003-1, Ltd. v. Patriarch Partners, LLC, 286 Supp. 3d 634, 643 (S.D.N.Y. 2017) (emphasis in original); MLSMK Inv.

I Co. v. JP Morgan Chase & Co., 651 F.3d 268, Cir. 2011).

l Further, the Receiver claims that the offenses of her RICO claims are not securities frauds, but (1) "actions constituting aiding and abetting and others'] breach of fiduciary duty and fraud" (2)

l "participating in the structuring and of the

I I fraudulent [December 2015 and March 2016 Id. at

l 18. The Court disagrees with this characterization. As the FAC

I I Beechwood Defendants note, ECF No. 184, at 15, the FAC itself

I alleges the following as predicate acts for thel Receiver's RICO claims:

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I ex9luded,

kicO I I Nordlicht and his cohorts in their of fiduciary duty to the Platinum Fund investors ahd creditors ..

[and] in perpetuating a fraud on investors and creditors of the Platinum Funds; actively participate in the and consummation of [and transmit and documents that facilitated] the fraudhlent conveyance

transactions in or about December and March 2016 which saddled the PPCO Fund with on substantially all of its assets, and of its subsidiaries, without receiving fair consideration in return I

l FAC i 283. The latter category consists transactions: (1) the December 2015 transactionr

of securities consisted of "PPCO Master Fund issu[ing] a $15.5 million note," secured by substantially all of the assets of the MSA Subsidiaries, to

I I SHIP, where the money received from the note issuance was used to purchase Desert Hawk debt, id. ii 221-35; (2) the March 2016 transactions consisted of a sale of notes" by PPCO Master Fund in the amount of $52.5 million!, where the money received was either exchanged with Northstar or loaned out to PPVA which then purchased additional Northstar debt from

I SHIP, id. 240-48. In addition, a large porti'on of the former

I category of predicate acts is based on the 2015 and

I March 2016 transactions, as well as other transactions involving the Black Elk interest.

I Once those securities transactions are the only remaining candidate for predicate acts for the claims is

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1 l ba~red the "misrepresentation and overvaluation of the PPCO Funds' net

I I asset value," which allowed Nordlicht and the Portfolio Manager to charge "millions of dollars of management and incentive fees" and left the PPCO Funds poor." Id. 191, 324(i), 335(i). These actions also fail qualify as

' predicate acts for the same reasons discussed Trott. In an almost identical scenario in Trott, this Court concluded that

I I misstatements concerning the funds' net asset which led

I to "the attendant withdrawal of unearned fees,"j may be "less obviously integral to the purchase and sale of but when they were made "in substantial part to defendants' Ponzi scheme," they are not "merely incidental tangentially related to the sale of securities." Trott et v. Platinum Management (NY) LLC et al., 18-cv-10936 (JSR), WL 2569653, at *5 (S.D.N.Y. June 21, 2019); see also v. Koh, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012). And, as the Circuit explained, "conduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in with the

I I purchase and sale of securities." MLSMK Inv. Co. v. JP Morgan Chase & Co., 651 F.3d 268, 277 n.1 (2d Cir. .

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Alternatively, if and based on such predicate

to the extent that the fICO claims acts, they would be by the

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f~led t~e in'. In sum, all predicate acts of the are related to the purchase or sale of PSLRA bars the Receiver's RICO claims. its "bottom-line" Order, dismissed all claims.

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RICO claims securities, and so the

the Court, in of the RICO

III.

Common Argument - Whether the Receiver's Claims Should Be Dismissed

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Frau I I Wagoner rule and the doctrine of in pari as discussed above.

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When the Court dismissed a claim in the FAC, WNIC TPC, or the SHIP TPC in its "bottom-line" Order issued 18, 2019, such dismissal was with prejudice, for the following reasons.

I First, the parties had been on notice for many - since the Court's Opinion and Order issued on 6,

2018 disposing of the motion to dismiss the complaint in the SHIP action - as to how this Court analyzed these Indeed, on and after December 6, 2018, the Court had no less than four Opinions and Orders disposing close to 30 to dismiss in the SHIP and Trott actions. SHIP, was a party to that process in the SHIP action; and most of the claims in the FAC, the WNIC TPC, and the SHIP TPC are to those claims in the relevant complaints in the SHIP Trott actions. Second, the Receiver, WNIC, and SHIP have been possession of relevant underlying documents for a substantial! period of time. The fact that they cannot put forth specific allegations against respective defendants highly doubtful that granting them leave to replead ld result in new versions of complaints that would cure the pleading failures discussed in this Opinion and Order. Third, because on March 8, 2019 WNIC, BCLIC, CNO, and 40186 Advisors had the motions to dismiss the Receiver's original complaint, Receiver had been on notice before filing the FAC on April 11, 2019 as to what kind of arguments the defendants would raise attempting to dismiss the FAC. ECF Nos. 58, 63.

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~o ~6-17; ~hese ~ot ~ismissal j l Various defendants moved to dismiss the Receiver's Rule l0b-5 and Section 20(a) claims. See, e.g., ECF 184, at 17- 19; ECF No. 157, at 14-19; ECF No. 207, at ECF No. 169, at 13-14. In its "bottom-line" Order, the those motions, as the FAC fails to adequately plead misrepresentation element in compliance with Rule 9(b) and PSLRA heightened pleading standards. See also ECF No. 184, at 17-19.

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Basically, the FAC describes the

I I I I misrepresentations in the following words:

I I •

I In fact, it was clear at the time of transaction that the Desert Hawk debt was not the value it was ascribed by Nordlicht and SHIP. Whether the parties used a discounted cash flow a comparable companies analysis or a transactions analysis, they knew the besert Hawk debt had an estimated fair market value th twas well below the value misrepresented by them int e SHIP Note transaction. [FAC 232] • The June 3, 2014 Secured Term Note also known to

be worth well below the value ascribed to it by CNO Defendants and Nordlicht. Using a cash flow approach with proper adjustments to LC Energy's financial projections to reflect morej reasonable operating assumptions and a discount (cost of capital) more reflective of a development stage mining company, the LC Energy loan was not w:orth even close to par. . Thus, at the execution bf these 'Movants put forth other, independent grounds dismiss the securities fraud claims in the FAC. See, e.g., ECF No. 157, at 18-20; ECF No. 184, at 17-19; ECF No. 157, at ECF No. 301, at 2. The Receiver argues against each of points. ECF No. 256, at 25-35; ECF No. 310. The Court does reach these issues, because it is sufficient to ground the on the FAC' s failure to adequately plead the misrepreslentation element.

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' I securities purchases, BCLIC and WNIC that the purchase price was fair. 234] • The remaining $21.35 million under the March

NPA Notes was "loaned" by PPCO Master Fund to PPVA to allow it to purchase the remaining No thstar Indenture Debt from SHIP. However, no cash changed hands as the cash "loaned" to PPVA was directed tol SHIP. As before, at the execution of these securities purchases, SHIP and CNO Defendants misrepresented the purchase price was fair. [Id. 238] • [T]he Beechwood, CNO and SHIP were able to,

and in fact, did engage in employ, a plan, scheme and conspiracy to defraud PPCO Funds connection with the purchase and sale of the Purchased Securities, and did materially to the PPCO Funds that the true value of Purchased Securities was their par value as set

1 forth in the transaction documents for the PPCO Transactions and Securities Purchases, and knowingiy omitted or concealed that the true value of the Purchased Securities was only a fraction of value. [Id. 311] Generally, to meet the Rule 9(b) and PSLRA pleading standards, more specificity is required than broad and

I group-pled allegations quoted above.

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In addition, the first excerpted paragraph su{fers from the fact that it is unclear who "them" is. One reading is that "them" refer to Nordlicht and SHIP. possible reading is that "them" is referring to the to the Desk Hawk debt purchase. A third reading is that refers to those present at the earlier note issuance. fact that the Court has to speculate on what "them" refers underscore a problem with this type of broad and group-pled

The second excerpted paragraph also from ambiguity and raises a plausibility issue. The paragraph with the discussion of the knowledge of "CNO Defendants Nordlicht" but at the end concludes, "Thus, . BCLIC WNIC

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I excerpt above (which is a conclusory statement on impermissible group pleading), the FAC needs clear if each of the above misrepresentations is an explicit statement or a silent omission. If the former, of the above excerpts fails to "specify the statements it were false or misleading, give particulars as to the respect in which

I I plaintiff contends the statements were frauduleht, state when and where the statements were made, and those responsible for the statements." Cosmas v. Hassett, 886 F.2d 8,

' I 11 (2d Cir. 1989). If the latter, the FAC fails! to explain why there was a duty to disclose held by most of the defendants, who were not even parties to the transactions. if grounded on

i omission, the above allegations fail to plead with

I particularity, for instance, "the [entity] respbnsible for the failure to disclose" and "the context of the and the manner in which they misled the plaintiffs" v. Berg Harmon

l misrepresented that the purchase price was FAC 234. Putting aside the fact that the usage of "CNO relies on impermissible group pleading, the paragraph some plausibility issue as to why the knowledge of Defendants and Nordlicht is suddenly attributed to BCLIC and without any additional explanation. Furthermore, there gap in the allegations as to how WNIC and BCLIC misrepresert the price at the "execution of these securities purchases," they were

I not even parties to the transaction.

The third excerpted paragraph relies on impermissible group pleading, lumping together six entities and failling the particularity requirement.

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asse~s Assocs., 816 F. Supp. 919, 924 (S.D.N.Y. 1993).

To avoid dismissal for failing to plead misrepresentation element, the Receiver argues her opposition brief that the Second Circuit has found conduct in connection with the sale of securities to be misrepresentations under Section l0(b) and l0b-5 without the uttering of words." ECF No. 256, at 26. Receiver is referring to securities fraud claims based on sµbsections (a) and (c) of Rule l0b-5, but to rely on those sub ections rather than subsection (b) of Rule l0b-5, plaintiff mu t prove that defendant committed an inherently deceptive or manipulative act that is independent from any alleged misstatemebt or omission. See, e.g., Lentell v. Merrill Lynch & Co., 396 F.3d 161, 177 (2d

I Cir. 2005) (rejecting liability based on (a) and (c) of Rule l0b-5, where the only basis for such is alleged misrepresentations or omissions); see also In Parmalat Sec. Litig., 376 F. Supp. 2d 472, 503 (S.D.N.Y. 2005) ("Subsections (a) and (c) are not a backdoor into liability those who help

I others make a false statement or omission in of subsection (b) of Rule l0b-5."). For this reason, the Receiver cannot rely on subsections (a) and (c) of Rule when the gravamen of her securities claims are and

I omissions regarding the true price of the PPCO Master

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1the tne dismissed.' Fund received, rather than any deceptive or act committed by the relevant defendants. /

' I . In the Court the motion to the Section 20(a) claims Feuer and Taylor, because no "primary violation by the person" under Section l0(b) was found for the reasons siated above. SEC

' I v. First Jersey Sec., Inc., 101 F.3d 1450, Cir. 1996) .

1 0 IV. Common Argument - Whether the Receiver's U just Enrichment

Claim Should Be Dismissed Under New York law, unjust enrichment are "available only

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unusua wen, tough the has not breached a contract nor committed a recognized ort, circumstances create an equitable obligation ru ning from the

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The Section 20(a) claims against Feuer and fail for an independent reason that the FAC does not make a y particularized allegation tying them to the December 2015 and, arch 2016 transactions or any other allegedly fraudulent transactions. See, e.g., FAC 318 ("Beechwood,

1 through Levy, with the substantial assistance of Feuer and ably assisted the Platinum Funds in perpetrating fraud that the Platinum Funds' assets were worth significantl more than in reality by entering into the transactions above.") .

As to the Section 20 (a) claim against CNO,, which is not in the FAC, the Receiver argues in her opposition that the claim was omitted from the FAC because of a "scrivener's error." ECF No. 256, at 35 n.11. However, an brief to a motion to dismiss cannot cure the defect in FAC itself. But even if the Court had granted leave to replead and the Section 20(a) claim against CNO was properly stated in FAC, it would have been dismissed for the same reason that Section 20(a) claims against Feuer and Taylor were

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I plaintiff." v. VerizoA New York, Inc., 1185 (N.Y. 2012). "An unjust claim where it simply duplicates, a

I conventional contract or tort claim." Id.

In the present case, unjust enrichment claims are not completely duplicative of the contracts and claims, as they are framed as an alternative to the conveyance claims. See FAC 418 ("If this Court that [certain

I parts of the December 2015 and March 2016 are not

I voidable under New York law," the Receiver requ

1 sts the Court to I hold for the Receiver on the unjust enrichment J1aim.); ECF No. 169, at 25 n.23. Although not binding on this various bankruptcy courts have refused to dismiss unjusi enrichment claims on the basis that they were duplicative fraudulent transfer claims, noting that "it is conceivablelthat the plaintiff could recover under one theory but the other." In re Operations N.Y. LLC, 490 B.R. 84, 100 S.D.N.Y. 2013);

I see also Silverman v. H.I.L. Assocs. Ltd., 387 365, 412

I (Bankr. E.D.N.Y. 2008) ("While there can be no aoubt that the

I Trustee would not be entitled to duplicative there similarly is no doubt that at the pleadings a plaintiff is not required to elect a single theory upon to

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I proceed."). The Court chooses to follow this

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e articulated by bankruptcy courts.

I I i I However, while the FAC adequately pleads BCLIC, WNIC, and SHIP may have been enriched through the 2015 and

I I March 2016 conveyance transactions, the FAC to adequately allege facts as to how BAM Administrative from the allegedly fraudulent transactions at issue. The 'efore, the Court dismisses the unjust enrichment claim against BM Administrative only. V. FAC Beechwood Defendants

I Certain FAC Beechwood Defendants - Beechwood Re, BRILLC,

I I BAM I, BAM II, Beechwood Holdings, BBIL, BBL, Administrative, Feuer, and Taylor - moved to di miss all claims against them, except the fraudulent conveyance nd declaration relief claims. See ECF No. 184, at 3. With resp ct to the claim for aiding and abetting breach of fiduciary these moving defendants argue that the FAC fails to plead elements of the claim with "sufficient particularity under 9(b) ," by

I failing to allege, for example, that "Feuer or ,Taylor had

I knowledge concerning PPCO's net asset value, [December 2015 and March 2016 transactions], or the Black Elk transaction." Id. at 23.

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I The Receiver responds that the claims for and abetting breach of fiduciary duty are subject the Rule B(a) pleading standard, not Rule 9(b), because those allege that Nordlicht and the PPCO Portfolio Manager their

I duties of loyalty and good faith to the PPCO by causing

I the PPCO Funds to enter into transactions that detrimental

I to the PPCO Funds, which is not dependent on party having

I committed fraud" or on "allegations of misreprelentations or

I omissions." ECF No. 256, at 37.

I I The Receiver's argument to recharacterize claims as not

I rooted in any fraudulent conduct by Nordlicht the PPCO

I Portfolio Manager is misplaced. The primary by Nordlicht and the PPCO Portfolio Manager on which the and abetting claims are premised, according to the FAC, are:j

(i) Systematically misrepresenting overvaluing the PPCO Funds' net asset value for the purpose of, inter alia, paying certain select insiders the PPCO Funds unearned fees, resulting in the paymeht of, among other amounts, unearned management professional fees believed to be tens, if not of millions of unnecessary investments by the Funds in underwater investments; (ii) Causing PPCO Master Fund's into [the December 2015 and March 2016 conveyance transactions]; and (iii) Causing PPCO Master Fund to ma ea temporary purchase of an interest in Black Elk for the sole benefit of the PPVA Funds, which resulted in a $24 million damages settlement against the

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1 I I Receivership Estate by the bankruptcy of Black Elk. I

I FAC i 324. It is impossible not to read these as grounded in fraud. In fact, the Receiver's at such recharacterization is, frankly, disingenuous, that the FAC

i almost verbatim restates these three as the primary fraud upon which the claim for aiding and fraud rests. Id. 335.

Under Rule 9(b), the aiding and abetting must be

' pled with particularity for each of the FAC

I Defendants. Lumping them together as "BeechwoodiDefendants," which involves 13 different Beechwood entities, generally be considered insufficient to meet this See id. 41,

l 46, 49. Further, the claims against Beechwood and BAM II must be dismissed for the independent that there is not a single, particularized allegation each of them. Similarly, the claims against BAM I and BRILLC be dismissed

I as well, because the former is mentioned only one instance as

i I a party to the IMA with SHIP, see id. 165, the latter is mentioned only in one instance as part of cert transactions in February 2015, see id. 212-13. Neither a legation is related to the primary fraud and breach of fid ciary duty by

I I Nordlicht and the PPCO Portfolio Manager excerpted above.

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j In contrast, the FAC adequately alleges BAM Administrative, Beechwood Re, BBIL, BBIHL, and were involved in the December 2015 and March 2016 transaction, which are closely related to the primary fraud and breach of fiduciary duty by Nordlicht and the PPCO Portfolio Manage See, e.g.,

230, 246. These entities were an integral of those

I allegedly fraudulent transactions, and thus assistance is adequately pled.

Although less clear cut, the Court also that the knowledge element of the aiding and abetting is

I sufficiently pled. Knowledge is attributed to Administrative, Beechwood Re, BBIL, BBIHL, and in the FAC the following allegations:

Knowing full well that a fraud was afpot, and that Nordlicht and Levy were breaching fiduciary duties, the Beechwood Defendants negotiated and implemented several trrnsactions to

id.

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facilitate the fraud. . . . The Beechwood Defendants, the SHIP and each of the CNO Defendants ... had actual knowledge ... that Nordlicht and the PPCO Manager owed and breached their fiduciary duties to the PPCO Funds [and] breached those duties and . conduct by Nordlicht and the PPCO

Portfolio was fraudulent . . because (i) Nordlicht was hopelessly conflicted in each and every transac ion he negotiated and consummated with them (through B echwood) because he was both the Chief Investment Off'cer of the Platinum Funds while one of the majo ,ity stakeholders and decision-makers in Beechwood and (ii) the PPCO Portfolio Manager was directing the PCO Funds to

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1 r transabtions.

~euer I enter into the PPCO Loan Transactions Securities Purchases, which were not intended to e in their best interests, but rather were structured olely to

I benefit the Defendants.

1 Id. 179, 328, 337. Although the excerpts rely on group pleading, the fact that these entities actively in

I the allegedly fraudulent transactions that are qescribed in detail, combined with the latter excerpts above,! "give [s] rise

I to an inference of knowledge" of the primary and breach of

I fiduciary duty. Krys v. Pigott, 749 F.3d 117, (2d Cir. 2014). Thus, the Court, in its "bottom-line" granted the motion to dismiss the aiding and abetting against

I I Beechwood Holdings, BAM I, BAM II, and BRILLC denied the

l motion to dismiss the aiding and abetting against BAM Administrative, Beechwood Re, BBIL, BBIHL, and

Lastly, the aiding and abetting claims Feuer and Taylor are not adequately pled, because the FACI does not make a

I I single particularized allegation against Feuer Taylor in connection with any of these problematic For this reason, the aiding and abetting claims against and Taylor are dismissed. VI. SHIP and Fuzion

In its "bottom-line" Order, the Court grartted the motion to

I dismiss the aiding and abetting claims against SHIP and Fuzion

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I for failing to satisfy Rule 9(b). First, the purporting to plead substantial assistance and k owledge rely

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' l . . 'bl l . I exc yon e group p eading. In context of the December 2015 and March 2016 transactions, instance, it is alleged that "[t]he CNO and SHIP which include CNO, 40186 Advisors, Fuzion, BCLIC, WNIC, and - actively negotiated and consummated the relevant such as

I I negotiating "the aggregate amounts to be loaned 1by them under the March NPA," "each of the March NPA Notes," 'the terms and conditions of Amended Security Agreement," and forth. These

I allegations rely on impermissible group that does not satisfy Rule 9(b). FAC 254.

I j Second, the only time knowledge is attributed to SHIP and Fuzion is as SHIP and Fuzion correctly at 20-23 - when they are lumped together

point ECF No. 157, with of the other

I I defendants to have "had actual knowledge that conduct by Nordlicht and the PPCO Portfolio Manager was

I [or] that Nordlicht and the PPCO Portfolio owed and breached their fiduciary duties to the PPCO and breached

I those duties." Id. 328, 337. Given that and Fuzion were not parties to the December 2015 and March transactions and that there are no non-conclusory allegations their

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I involvement in these transactions,

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one cannot conclude that the allegations "give rise to an inference of of the primary fraud and breach of fiduciary duty. v. Pigott, 749 F.3d 117, 129 (2d Cir. 2014).

I Lastly, the case for dismissing the aiding/and abetting claims against Fuzion is even stronger. the FAC - as

I SHIP and Fuzion correctly point out, ECF No. at 14 - Fuzion is lumped together with SHIP as the "SHIP Defen'ants," and Fuzion is broadly mentioned as having "advised" SHIP. FAC 7, 10, 11. The allegations lack particularity as t, what and how Fuzion specifically advised SHIP. Essentially, the FAC treats

I I Fuzion and SHIP as interchangeable and identical, when they are

I separate legal entities with different business functions.

For these reasons, the aiding and abetting claims against SHIP and Fuzion are dismissed. VII. WNIC and BCLIC

WNIC and BCLIC moved to dismiss the aiding and abetting

I claims, the fraudulent conveyance claims, and declaratory

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In light of these two points, the Court is persuaded that circumstantial evidence shows SHIP's and actual knowledge that, for instance, "Nordlicht both interests in Platinum and Beechwood while serving in a capacity at various Platinum entities yet consummated a se ies of fraudulent transactions with PPCO Master Fund by which No dlicht openly failed to fulfill his fiduciary duties to Fund." ECF No. 256, at 42-43.

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type l relief claim against them. The motion is only with respect to the aiding and abetting claims, for following reasons.

A. Aiding and Abetting Claims

I The Court dismisses the aiding and abetting claims against WNIC and BCLIC for substantially the same reasons that it dismissed those claims against SHIP and Fuzion.

B. Fraudulent Conveyance Claims

1. Whether the Receiver Has Standing Bring

I Fraudulent Conveyance Claims on Behalf of the NPA Guarantors and the MSA PPCO

I I WNIC and BCLIC divide the fraudulent conveyance claims into two kinds of claims: (1) the claims based on transfers made by PPCO Master Fund, and (2) the claims based on the liens and

I obligations granted by the NPA Guarantors and the MSA PPCO

I Subsidiaries (collectively, the "PPCO Subsidiaries") as security

I for PPCO Master Fund's issuance of notes in 2015 and March 2016. ECF No. 169, at 24-25; see also 373, 381, 388, 397, 405, 411, 415. Then, WNIC and BCLIC argue that the Receiver lacks standing to bring the fraudulentl conveyance claims under New York law to avoid the latter of interests,

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!for nleadings." because she is not a receiver for a "creditor"

the PPCO Subsidiaries. ECF No. 169, at 24-25.12

There are two problems with WNIC and argument. First, the Receiver brings the fraudulent conve ance claims to avoid the liens on the PPCO Subsidiaries on of the receivership entities, not the PPCO The

I I fraudulent conveyance claims are brought to the Receivership Order, which granted the Receiver ihe right to sue for and collect all "Receivership Property," any security interests conveyed by the PPCO even though the Receiver is not a receiver of the Subsidiaries. ECF No. 256, at 57.

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Pursuant to the Order, the

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The parties do not dispute that the Receiver standing to bring the fraudulent conveyance claims with to the former type of interests, as those claims are brought on behalf of the PPCO Feeder Funds and PPCO Blocker creditors to the transferor PPCO Master Fund. FAC §§ 66-75; No. 169, at 24-25; ECF No. 299, at 13-14; ECF No. 256, at 13

Therefore, WNIC and BCLIC's argument that fraudulent

I conveyance claims are brought on behalf of outside the scope of the Receivership entities is incorrectJ. ECF No. 2 99, at

I 14

Standing is "a limitation on the authority ot a federal court to exercise jurisdiction," it is properly within the context of a Rule 12(b) (1) motion. Alliance Envt'l Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, n.6 (2d Cir. 2006). And "[i] n resolving a motion to dismiss lack of subject matter jurisdiction under Rule 12 (b) (l)!, a district court . . may refer to evidence outside the

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piece/ Receiver has the "right to sue for and collect . . from third parties all Receivership Property," which includ s the guarantee interests granted by the PPCO Subsidiaries. ECF 256, at 57. This is because "[e]ach of the [PPCO is majority

I I owned by PPCO Master Fund, with ultimate corporate authority

I I belonging to PPCO Master Fund," and the Property" is defined as "all property interests of the

I Entities, including, but not limited to, monies . claims,

i rights and other assets, together with all . .I other income

I I attributable thereto, of whatever kind, which Receivership Entities own, possess, have a beneficial in, or control directly or indirectly." Id.

Second, WNIC and BCLIC correctly state tha only a creditor of the PPCO Subsidiaries can bring these fraudu ent conveyance claims under New York law, yet incorrectly take a rigid and literal approach to the word "creditor," contra y to the established case law. ECF No. 169, at 24-25; ECF No. 299, at 14.

i I In Eberhard v. Marcu, the case on which WNIC BCLIC rely, the

I Second Circuit addressed the effect of a scope on

I I a receiver's standing to bring a fraudulent claim

Makarova v. United States, 201 F.3d 110, 113 Cir. 2000). Therefore, even though this piece of was presented outside the FAC, the Court considers this of information in order to make a standing determination.

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~n] l l under NYDCL, starting with the following basic "It is well settled that in order to set aside a conveyance, one must be a creditor of the transferor; those are not injured by the transfer lack standing to it." 530 F. 3d 122, 129 (2d Cir. 2008). Therefore, it held, "a

I standing to bring a fraudulent conveyance claim turn on

I ' whether he represents the transferor only or represents a

I creditor of the transferor." Id. at 133.

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1 As to what the Eberhard court meant by "a dreditor of the transferor," "[m]any courts have reasoned that, a receiver sues to recover funds improperly diverted from corporation during a Ponzi scheme, the corporation is acting as a

I creditor,

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Cobalt Multifamily Inv'rs I, LLC v. 46 F. Supp. 3d 357, 362 (S.D.N.Y. 2014). Indeed, Eberhard itself notes that, in Scholes - a Seventh Circuit case that endorses and that involved a Ponzi scheme - the receiver could bring fraudulent transfer claims on behalf of certain corporations

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In Eberhard, the "transferor 11

was a figure who allegedly committed fraud and the entities he controlled in furtherance of the fraud and, unlike here and other cases that found a receiver's a receiver was appointed with authority over the assets of that individual transferor only, and not the allegedly used by the transferor to commit his fraud. 530 at 133-35. Therefore, the Second Circuit found that the receiver lacked standing to bring fraudulent conveyance claims behalf of the individual transferor only. Id.

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the I that were technically transferors of the fraudulent conveyance at issue, because they were "zombies" controlled "completely" by the wrongdoer at issue, rendering such transfers "in essence, coerced." Eberhard, 530 F.3d at 132 (analyzing v. Lehmann, 56 F.3d 750, 752-55 (7th Cir.1995)).

2. Whether NYDCL § 278(1) or Sharp BCLIC and

WNIC from Liability WNIC and BCLIC claim that they were "merel subsequent transferees, with the [WNIC and BCLIC Reinsuran e Trusts] as the transferors" and that recapture was "clearly fo fair consideration" as they were exercising their creditor

I rights to recapture not just the trust assets b

1 t also all of the policyholder liabilities. ECF No. 169, at 2 Because a "fair consideration" was given for this subsequ nt transfer where WNIC and BCLIC were the transferees, WNIC and BCLIC argue that they cannot be liable as per NYDCL § 278(1 . However, WNIC

I and BCLIC cannot raise the NYDCL § 278(1) because they must show, as a matter of law, that the transac,ion was "for fair consideration without knowledge of the at the time of

1 the purchase." NYDCL § 278(1).

Alternatively, BCLIC and WNIC argue that,

I even with WNIC ' I and BCLIC's knowledge of the underlying fraud, holding from Sharp immunizes them from fraudulent conveyance/ liability. ECF

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I I No. 169, at 20-22. By way of background, in Shanp, the bankruptcy trustee sued State Street Bank and Company

I ("State Street") - which was a secured creditor Sharp International Corporation's ("Sharp") - that State Street was aware of Sharp's involvement in fraud but

I ' nonetheless caused Sharp to borrow money from unsuspecting

I creditors so that State Street would be repaid its secured loan. In re Sharp Int'l. Corp., 403 F.3d. 43, 53 (2d Cir. 2005).

I I Referencing Sharp, BCLIC and WNIC claim under the Reinsurance Agreements, they were granted a priority

I security interest" on the BCLIC and WNIC Reinsu¼ance Trust

' ' assets. ECF No. 169, at 20-21. They claim that is "settled law that, in these very circumstances, a party foreclosing on its security interest cannot be liable under fraudulent transfer law, even if it is aware its debtor's

I I fraud and the fact that the foreclosure may the debtor's other creditors." Id. at 21-22 (emphasis in original) (referencing Sharp, 403 F. 3d. at 54-55 (holdingj that "the preferential repayment of pre-existing debts to some creditors does not constitute a fraudulent conveyance" subsequent transferee knew that the funds to "fraudulently obtained")).

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The Court holds that the instant case is from Sharp. First, in Sharp, the was merely

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. t . . . h f d aware o e rau u was no ac par e rau itself; in contrast, in the present case, WNIC BCLIC are

I alleged to have actively participated in the conveyance

I transactions by directing and influencing the to engage

I in the initial conveyance which allegedly did involve fair value consideration. Second, Sharp notes that decisive principle in this case is that a mere between

I creditors does not constitute bad faith." Id. 54. Here, the allegations in the FAC do not paint a picture that the December

I 2015 and March 2016 transactions involved mere issue

' ! among creditor; rather, the allegations paint a picture of faith" on part of WNIC and BCLIC. Indeed, Sharp held that faith" is not "knowledge on the part of the that the transferor is preferring him to other and that it "does not ordinarily refer to the transferee's of the [fraudulent] source of the debtor's monies the debtor obtained at the expense of other and BCLIC's alleged conduct goes

creditors." at 54-55. WNIC far beyond the Second Circuit describes as not constituting bad

Given that the present case is clearly

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from In re Sharp, the Court views the alleged second step transfer of

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fyance th~ becaure assets from the BCLIC and WNIC Reinsurance to BCLIC and WNIC as part of one integrated transaction in fraudulent transfers were made from PPCO Master Fund to, for the benefit of, BCLIC and WNIC. See Orr v. Corp., 991 F.2d 31, 35 (2d Cir. 1993) ("We will not turn a eye to the reality that [two conveyances] constituted a integrated transaction."). This collapsing of the is further supported by the fact that the Reinsurance Truss existed for the sole benefit of BCLIC and Newhouse, 74 Fed. App'x. 152,

WNIC. See, e.g., adle Co. v. 153 (2d Cir. ("Under New

I York law, a creditor may recover money damages parties

I who participate in the fraudulent transfer and either

assets or beneficiaries of conveyance.")

For these reasons, the Court holds that NYDCL § 278(1) nor Sharp immunizes BCLIC and WNIC from fraudulent conveyance claims. Thus, the motion to dismiss fraudulent conveyance claims against WNIC and BCLIC based n NYDCL §§ 273, 274, 275, and 277 16

is denied.

16 WNIC and BCLIC argue that the fraudulent con claim based on NYDCL § 277(a) is not applicable to present case, because this provision applies only to the conveyance of "partnership property" to a "partner" and the FAC makes no allegation that BCLIC and WNIC were partners! of PPCO Master

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Adequately Pled The fraudulent conveyance claim based on § 276 requires an additional analysis, because, claims based on NYDCL §§ 273, 274, 275, and 277, it req

1 ires actual I intent. See NYDCL § 276 ("Every conveyance made every

I obligation incurred with actual intent, as from intent presumed in law, to hinder, delay, or aud either present or future creditors, is fraudulent as to both present and future creditors."). Because proving "[a] intent [under NYDCL § 276] is difficult to establish through direct evidence," the intent may be "inferred from the facts and surrounding the transfer." S.E.C. v. Smith, 646 Fed. App'x. 42, 45 (2d Cir. 2016) (summary order). These so-call,ed "badges of fraud" are facts and circumstances "so commonly !associated fraudulent transfers that their presence gives to an inference of intent." Sharp, 403 F.3d. at 56

with

Wall St. Assocs. v. Brodsky, 257 A.D.2d 526 (1st Dep',t 1999)). Such badges include:

(1) the lack or inadequacy of (2) the

l . h' family, friendship, or close re between the parties; (3) the retentipn of possession, benefit, or use of the property in question; (4) the

I I Fund. ECF No. 169, at 25. This argument is irre)evant, because the Receiver's claim is based on NYDCL § 277(b) not NYDCL § 277 (a).

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~HIP Pico ratified financial condition of the party to be charged both before and after the transaction! in question; (5) the existence or cumulative effect of or series of transactions or course of conduct the incurring of debt, onset of financial or pendency or threat of suits by creditors; and (6) the general chronology of the events and transacti,ns under inquiry. Ford Motor Credit Co. LLC v. Orton-Bruce, (KMK), 2017 WL 1093906, at *9 (S.D.N.Y. Mar. 22, 2017). The puts forth

' I factual allegations that indicate most of these lbadges of fraud,

I I I see FAC §§ 225-53, and thus the Court finds actual intent is adequately pled.

C. Declaratory Relief Claim

I I By way of background, the following from the FAC form the basis for the declaratory relief In December 23, 2015, PPCO Master Fund issued the SHIP Note SHIP pursuant to a December 2015 Master Security Agreement, PPCO Master Fund and the PPCO Subsidiaries gave security in substantially all of their assets to BAM 225-26.

I Admini

1 trative. I I I

FAC

In January 20, 2016, SHIP loaned additional $2 million to PPCO Master Fund pursuant to the 236. In conjunction, PPCO Master

I First Amended Note. Id. Fund and the Subsidiaries

I entered into a Ratification Agreement, which the

I . December 2015 Master Security Agreement and reaffirmed the

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l guarantee obligations of PPCO Master Fund and PPCO Subsidiaries. Id.

In connection with the March 2016 PPCO Master Fund, BAM Administrative, as agent, and various

I I including SHIP, the Beechwood Reinsurance entered into a note purchase agreement ("March NPA") that and restated the First Amended SHIP Note. Id. 240. In with the March NPA, PPCO Master Agreement, pursuant to

! Fund entered into the Security which it granted its interests to BAM Administrative, as agent, in substantially all of its assets. Id. 241. However, "no subsidiaries of Master Fund executed the Amended Security Agreement," and Amended Security Agreement expressly provides that it d d not amend or restate the December 2015 Security Agreement." d. 242.

Despite the foregoing, "BAM Administrative as agent, asserts liens against all of the assets of PPCO Master Fund and the MSA PPCO Subsidiaries." Id. 424. the FAC asks for this Court's declaratory judgment that asserted liens

I "do not attach to the assets of the MSA PPCO because "no MSA PPCO Subsidiaries executed the .}unended Security Agreement." Id. 426.

WNIC and BCLIC were the only parties to dismiss this claim. The only support they provide for the is that the

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I declaratory relief claim seeks "the exact same as [the Receiver's] fraudulent conveyance claims." ECF No. 169, at 25 n.23. The Court does not find the declaratory claim to be duplicative of the fraudulent conveyance claims,

1 because the former stems from the argument that the MSA Subsidiaries never executed the Amended Security Agreement, the

I latter concerns whether certain transactions MSA PPCO

I I ' Subsidiaries entered into - pursuant to the December 2015

I Security Agreement, the Ratification Agreement, Jand, if

I executed, the Amended Security Agreement - were

1 fraudulent. I Therefore, the Court denies the motion to the declaratory relief claim. VIII. CNO Financial Group, Inc. and 40186 Inc.

I In its "bottom-line" Order, the Court dism·ssed the aiding and abetting claims against CNO and 40186 Advis for substantially similar reasons that it dismissed the aiding and abetting claims against SHIP and Fuzion.

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the case for dismissing those claims against CNO and 40186 is

I stronger than the case for dismissing those against SHIP,

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In addition, CNO and 40186 Advisors by reference the arguments by BCLIC and WNIC, so the Court's ruling regarding BCLIC and WNIC largely applies to CNO and 40186 Advisors to the extent relevant. ECF No. 174, at 3.

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1 wfth ':lI':lI ~lthough WNIC, or BCLIC, because CNO's and 40[86 role - captured only in conclusory allegations such they "directed Beechwood" to enter into the allegedl fraudulent conveyance transactions - is even further from the

I I allegedly fraudulent transactions at issue. See IFAC 11, 248, 311. 18

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CNO and 40186 Advisors argue that they are subject to personal jurisdiction of this Court, ECF No. 174, at 3-4, but the Court holds that personal jurisdiction existis.

To establish specific personal jurisdiction over defendant, plaintiff must show that (1) jurisdiction is under the state's long-arm statue and (2) exercising jurisdiction comports with the Fourteenth Amendment's Due Process Clause. See, Sonera Holding B.V. v. Cukurova Holding AS., 750 F.3d 224 (2d Cir.

I The Court finds that New York's long-arm statute applies here, because, among other reasons, NYCPLR § (2) allows jurisdiction over any non-domiciliary "who in or through an agent ... commits a tortious act within state," where the term "agent" is rather interpreted broadly. See Topps Co., Inc. v. Gerrit J. Verburg Co., 961 F. Supp. 88,

1 91 (S.D.N.Y. 1997). The FAC sufficiently shows that CNO's - WNIC and BCLIC - "acted in New York for the benefit of, ith the consent of, and under some control by the non-resident rincipal." ECF No. 256, at 60 (referencing Emerald Asset LLC v. Schaffer, 895 F. Supp. 2d 418, 430 (E.D.N.Y. 20 2)).

Indeed, CNO's conduct is often inseparable from its subsidiaries', given their intertwined structurr. See, e.g., FAC

128, 129, 130. The allegations concerning go beyond "bare allegation" that the parent "controlled or otherwise directed or materially participated in the operations" of subsidiary, which was deemed by the Second Circuit to be no enough to invoke personal jurisdiction over a parent enti y. Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 86 (2d Cir. 2018).

Meanwhile, 40186 Advisors worked closely BCLIC and WNIC. See, e.g., FAC 144, 203. Furthermore,

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PB Investment Holdings, Ltd. As a preliminary matter, PBIHL, the successbr-in-interest to BBIHL, argues that the Court lacks personal over it. ECF No. 207, at 5-9. However, the Court that specific personal jurisdiction exists over PBIHL based on

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(1) the payoff I letters accompanying the March 2016 Note

Agreement and (2) the reasons stated in the contexts of the TPC and the SHIP TPC discussed below.

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allegations against 40186 Advisors rely on a term such as "CNO Defendants," 40186 Advisors were of all transactions and conduct that BCLIC and WNIC involved in, so the Court finds that specific jurisdiction over 40\86 Advisors.

The due process prong focuses on the contaqt between defendant and the forum state, inquiring the defendant "purposefully avail[ed] itself of the conducting activities within the forum State, thus the benefits and protections of its laws." Goodyear Dunlop Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). The finds that this prong is met, as the "conduct by CNO and Advisors, in negotiating, structuring and consummating alleg dly fraudulent transactions governed by New York law and provi ing for New York court jurisdiction over disputes" is evidence o purposeful availing of the privilege of conducting activat sin New York. Id. at 63. Indeed, CNO and 40186 Advisors are to have been closely involved in transactions that New York forum and New York law. I 19

"Where, as here, a district court rules on a under Rule 12(b) (2) on the basis of the complaint, the papers, and the supporting memoranda, without conducting anlevidentiary hearing or deferring its ruling until the of evidence at trial, the court must construe all relevant allegations in the light most favorable to the plaintiff, credibility, and draw the most favorable for the existence of jurisdiction."

Jones v. Boto Co., F. Supp. 2d

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~ssue According to the Receiver, pursuant to payoff letters, PBIHL received "millions of dollars in of each of the note purchases through its related entity and agent BAM Administrative Service (having its primary place of business in New York)." ECF No. 256, at 64 (referencing FAC 246-47). Because the forum for disputes arising from and he governing law of the March 2016 Note Purchase Agreement is New York, PBIHL is bound by the New York forum selection clause nder the closely related doctrine, which provides that non-party to a contract may be subject to its forum selection if the non-party is so closely related to either the to the contract or the contract dispute itself that enforcement of the clause against the non-party is foreseeable." v. Calaway, 18-cv-3238 (KPF), 2018 WL 4906256, Oct. 9, 2018). In addition, the exercise of personal over PBIHL comports with the due process because it purposefully availed itself of the privilege of conducting

822, 823 (E.D. Va. 2007) (citing Combs v. Bakke, 886 F.2d 673, 676 (4th Cir. 1989)). "Eventually personal must be established by a preponderance of the evidence, leither at an evidentiary hearing or at trial. But where the is addressed on affidavits, all allegations are co strued in the light most favorable to the plaintiff and doubt are resolved in the plaintiff's favor, notwithstanding a contro1erting presentation by the moving party." A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 79-80 (2d Cir. 1993).

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In re Platinum-Beechwood Litigation

2019 | Cited 0 times | S.D. New York | October 7, 2019

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(~he ~77 ! a~d Jraud I activities in New York through BAM I, its relate'd entity and agent, thus invoking the benefits and of New York law.

Finally, the Court denies the motion to the aiding

I and abetting claims against PBIHL reasons that it denied the motion

for substantiafly the

I to dismiss aiding

same and abetting claims against those FAC Beechwood Defe'ndants involved in the December 2015 and March 2016 transactions.

Legal Analysis TPC I. Common Argument Whether the RICO Claims Are Barred by the

PSLRA

I Various movants argue that the RICO claims them in the WNIC TPC should be dismissed because of the !RICO Amendment.

I ECF No. 188, at 3; ECF No. 154, at 6; ECF No. 194, at 1-2; ECF

I I No. 210, at 8; ECF No. 179, at 8-9; ECF No. 192,

1 at 7; ECF No. I I 232, at 10-11. The Court agrees with these movants for

I substantially the same reasons discussed above the context of the FAC and in Senior Health Insurance Company df Pennsylvania v. Beechwood Re Ltd. et al., 18-cv-6658 (JSR) action"). See In re Platinum-Beechwood Litig., 414, 424-26 (S.D.N.Y. 2019).

I '

"SHIP F. Supp. 3d

In brief, Beechwood's inducement of WNIC BCLIC into the Reinsurance Agreements is a kind of securities - just as

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requirement~ Beechwood's inducement of SHIP into the IMAs wa considered a kind of securities fraud in the SHIP action - b sed on SEC v. Zandford, 535 U.S. 813 (2002). In Zandford, the U.S. Supreme Court held that the respondent engaged in securities fraud "by selling his customer's securities and using the proceeds for his own benefit without the customer's knowledge," ecause the securities sales and respondent's fraudulent were not

1 independent events but rather coincided. Id. at 1815. Here, WNIC

! and BCLIC's funds were alleged to be obtained Beechwood for

I Platinum to inject capital into Platinum's and

I . , , I acquire and such "conduct to keep a securities fraud Ponzi scheme alive" are under the PSLRA. MLSMK Inv. Co v. JP Morgan Chase & Co., F.3d 268, 277 n.11 (2d Cir. 2011); see also Picard v. Kohn, F. Supp. 2d

I 392, 396 (S.D.N.Y. 2012) .

2 ° For this reason, dismisses the RICO claims against all moving defendants.

20

Trying to distinguish the present case and the SHIP action, WNIC and BCLIC argue that their into the Reinsurance Agreements is not a securities tran action, but a purely contractual transaction, whereby they "c ded liabilities to Beechwood and gave Beechwood $42 million in ash as a fee (referred to as a negative ceding commission) t take on those risks, plus approximately $550 million in asset - almost all cash - to satisfy statutory reserve for the risks transferred." ECF No. 256, at 9. WNIC and BCLIC

1 argue that this first transaction should be distinguished from Beechwood and Platinum's subsequent usage of "the reinsurance trust funds to

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Barred

Argument - Whether and BCLIC's by the Doctrine of In Pari Delicto

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Huberfeld, Kim, and PBIHL argue that WNIC nd BCLIC's claims are barred by the in pari delicto doctri e, because WNIC and BCLIC are "alleged to have been knowing [in the FAC] in the same fraudulent conspiracy for they now assert claims against [the cross-claim and third-party

I ECF No. 154, at 9; see also ECF No. 192, at 12; No. 202, at 11.

I At this motion-to-dismiss stage, the Court WNIC and

' BCLIC's allegations in the WNIC TPC to be true assessing whether the claims in the WNIC TPC can the motions to dismiss. But the allegations in the FAC are See,

' Gary/Chi. Int'l Airport Auth. v. Zaleski, F. Supp. 3d 1019, 1022 (N.D. Ind. 2015) (rejecting the view "any defendant who files a third-party complaint necessarily be deemed to admit all the allegations of the complaint"). And the WNIC TPC does not make any admission WNIC and BCLIC

I were accomplices in the FAC in the same fraudulent conspiracy.

engaged in securities fraud." Id. at 10-11. But similar to the fact pattern in Zandford, "[t]his is not a case in which, after a lawful transaction had been consummated, a decided to steal the proceeds and did so .... Rather, fraud coincided with the sales themselves." Zandford, 535 U.S. at 815.

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1 Therefore, none of the claims in the WNIC TPC shbuld be

I dismissed because of the doctrine of in pari del'cto. III. Common Argument - Whether WNIC and BCLIC's

Indemnity Claims Should Be Dismissed

ontribution and

The WNIC TPC asks that, if WNIC and BCLIC ultimately

I found liable to the Receiver, all cross-claim third-party defendants must indemnify or contribute to WNIC BCLIC. WNIC TPC 919-22. and Huberfeld,

Bodner moved to dismiss this against him, Saks, Ottensoser, PBIHL, Slota, the WNIC TPC

I Beechwood Parties either incorporated Bodner's argument or made similar argument. ECF No. 188, at 13; ECF No. at 7-8; ECF No. 17 9, at 21; ECF No. 194, at 2; ECF No. 202, lat

23; ECF I 232, at 23, ECF No. 210, at 10.

I I Given that the Court already dismissed claims against WNIC and BCLIC in the FAC, the only claims

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No.

against WNIC and BCLIC for the purpose of these contribution and indemnity claims are the fraudulent conveyance, 1unj ust enrichment, and declaratory relief claims.

First, the Court dismisses WNIC and contribution and indemnity claims to the extent they Receiver's fraudulent conveyance claims under Article 10 of the New York Debtor

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of Indemnification and Contribution Among Persons for Fraudulent Conveyances, 23 Seton Hall L. Rev. 1 00, 1605 (1993) (referencing NYDCL § 270).

Second, WNIC and BCLIC's contribution and claims to the extent they are based on the Receiver's enrichment claims against them are dismissed, because the TPC does not make any reference to the December 2015 and 2016 transactions, let alone allege that any of the cross-claim and third-party defendants in the WNIC TPC may be liable to

' the Receiver for liabilities arising out of sue transactions.

Third, for substantially similar reasons, he Court dismisses WNIC and BCLIC's contribution and indemnity claims to the extent they are based on the declaratory claim against WNIC and BCLIC.

Putting these together, the Court grants movants' motions - other than Beechwood Re's motion for the reasons

I · b . d stated below - to dismiss WNIC and BCLIC s an indemnity claims. IV. Common Argument - Whether WNIC and

Enrichment Claims Should Be Dismissed Under New York law, "[a]n unjust claim available where it simply duplicates, or a

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~hese ar~ conventional contract or tort claim." Corsello v. Verizon New York, Inc., 967 N.E.2d 1177, 1185 (N.Y. 2012). Accordingly, "[t]he existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising of the same subject matter." Clark-Fitz atrick, Inc. v. Long Island R. Co., 516 N.E.2d 190, 193 (N.Y. 1987). And although "c urts in this

I Circuit routinely allow plaintiffs to plead claims in the alternative," this is so "when the validity or of the contract is difficult to determine." Nat'l Servs., L.L.C. v. A lied Underwriters Ca tive Risk Co., Inc., 239 F. Supp. 3d 761, 795 (S.D.N.Y. 2017).

Here, there does not appear to be a dispute about the validity or scope of the Reinsurance Agreements.

1 Unlike in the I SHIP action - where $50 million was invested in Energy outside of the IMAs, which was the basis for that some portion of the unjust enrichment claim in the action was

I not dismissed - all of BCLIC and WNIC's funds issue in the WNIC TPC were invested through the Reinsurance with

I I l . Beechwood Re. Also, WNIC and BCLIC make numeroul torts c against various defendants, which also large part of

I WNIC and BCLIC's unjust enrichment claims. For reasons, all unjust enrichment claims in the WNIC TPC dismissed.

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201~ V. Beechwood Trust Nos. 7-14

Excluding the allegations impermissibly Beechwood

I Trust Nos. 7-14 with dozens of other defendants,! the WNIC TPC makes only the following relatively allegation

I against Beechwood Trust Nos. 7-14: "The Platinum co-founders and

1 Levy created each of the Beechwood Trusts as an protection

I I vehicle for use in siphoning off and secreting ill-gotten

I gains from the Co-conspirators racketeering and

I placing them beyond the reach of their WNIC TPC 518. However, this allegation is too broad to Rule 9(b), and so the Court dismisses the aiding and claims against Beechwood Trust Nos. 7-14. VI. David Bodner

The WNIC TPC makes the following against Bodner: (1) he "conducted the business via a secretary who relayed

among others, day-to-day his to other Co-

l conspirators," id. i 482; (2) he was a party July 30, 2015 email where Huberfeld and Bodner expressed concern about the Chief Executive Officer of CNO finding assets were invested in Platinum ("July 30,

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I email"), 1

trust id. i

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(3) he, along with Nordlicht and issued the million Demand Note" which was used to al egedly deceive WNIC and BCLIC into thinking that Beechwood Re as adequately capitalized, id. 548; and (4) "[t]he leaders the

I 21

In their briefs and during the oral argument on August 15, 2019, the parties vigorously debated as to this email chain should be interpreted. In that email on July 29, 2015, an account with the name with the email address "bodnerang@gmail.com" sent an ema'l to David Bodner, stating "I'm really concerned that if E Banach from CNO Financial Group Finds out we invested beechwood [sic] money into platinum with its illiquid investments it didn't exactly fit their investment objective) he trust us and he will take all of the aprox [sic] 50 mil, he has invsted [sic] in beachwood [sic] ... That means beechwood would implode or not be able to function financialy [sic] and have to be dissolved; Even though we did a cancel and We weren't exactly honest with Ed about the original or that beechwood and platinum really are integrated . . I'm concerned, What should we do? [sic] I haven't dalled anybody back yet-I'm just trying to do som [sic] right now. Kind Regards, Platinum Partners .... 1 -cv-10936, ECF No. 285-3, Ex. 33. Then, on July 30, 2015, Davi Bodner responds to the sender of the July 29, 2015 email, only "hwerblowsky@platinumlp.com." Id.

Bodner argues that the sender of July 29, 015 was Bodner's secretary Angela Albanese and that "hwerblowsky@platinumlp.com" is the email address of Platinum's in-house Harvey Werblowsky. ECF No. 311, at 4-5, 6 n.2. In WNIC and BCLIC construe this email as a communication Bodner and Huberfeld confessing to the alleged fraudulent In light of this factual dispute, the Court evidence in favor of WNIC and BCLIC at to stage, because it is not entirely clear who sen the July 29, 2015 email. On the one hand, it may be the seer tary based on the email address itself. On the other hand, email was signed on behalf of Platinum Partners and discussions of matters that one would not necessarily a secretary to participate in.

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argu~ent 18-~v-10936 ema~l inves~ed investmen~ conspiracy[, including Bodner,] met periodicall to steer the Co-conspirators after they agreed upon the terms of the conspiracy in March 2013" at least on the fifteen specific dates, id. 605.

At least the third allegation, and with the fourth allegation, adequately plead the substantial element of the aiding and abetting claims. Even when with Nordlicht and Huberfeld, it cannot seriously be that the third allegation fails as a result to give "fair notice of what the plaintiff's claim is and the ground which it rests." Atuahene v. City of Hartford, 10 F. App'x 33, 34 (2d Cir. 2001). As to the knowledge element of the aiding and abetting claims, the above allegations as a - especially the July 30, 2015 email - are sufficient to give plausible inference that Bodner had knowledge of the prim breach of fiduciary duty. With respect to the J

fraud and 30, 2015 email, as this Court noted during the oral for Trott et

I al. v. Platinum Management (NY) LLC et al., (JSR) (the "Trott action") on March 7, 2019, this "presupposes

I that the recipient knew about that [they] Beechwood's money into Platinum with its illiquid . . the language could fairly be read by any reasonable !fact finder as

I ' conveying to Mr. Bodner what we already knew an a concern that

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inducementjclaim they now have if someone outside finds out." Transcript of Oral Argument dated March 7, 2019 starting at 10:30 a.m., Trott et al. v. Platinum Management (NY) LLC et al., 18-c -10936 (S . D . N . Y . Mar . 7 , 2 0 1 9) , at 1 0 .

For these reasons, the motion to dismiss aiding and

I abetting claims against Bodner is denied.

I VII. Murray Huberfeld

I Because the WNIC and BCLIC's allegations Bodner and those against Huberfeld are substantially and because

I I Huberfeld incorporates by reference Bodner' s arg1uments to

I support his motion to dismiss, see ECF No. similarly denies the motion to dismiss the claims against Huberfeld.

I I 154, 1, the Court

and abetting

' VIII.

Daniel Saks A. Fraudulent Inducement and Aiding and ting Fraudulent

Inducement Claims

I Saks points out that the Reinsurance were signed in February 2014, whereas, according to the WNI TPC, Saks began working at Beechwood in 2014." ECF No. at 3, 14, 17

l (referencing WNIC TPC 504). For this reason, Court grants the motion to dismiss the fraudulent and the claim for aiding and abetting fraudulent induce ,ent against Saks.

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o~ the, B. Breach of Fiduciary Duty Claim Saks argues that WNIC and BCLIC fail to sh w that Saks owed a fiduciary duty do not provide a single fact that shows that a "pe sonal

' relationship of trust and confidence" existed Saks and

I WNIC and BCLIC. ECF No. 179, at 12. However, Court finds

! that a reasonable factfinder could readily that Saks

I I owed fiduciary duty to WNIC and BCLIC. As the Investment Officer of Beechwood Re and BAM I from late

he had I discretionary investment authority over the

that WNIC and l BCLIC entrusted to Beechwood. When WNIC and BCLIC

transferred $600 million to Beechwood Re, it is plausible and BCLIC were reposing "trust or confidence"

infer that WNIC Beechwood Re and its officers including Saks, with whom WNIC and BCLIC were interacting regularly. WNIC TPC 644; see also Indep. Asset

I Mgmt. LLC v Zanger, 538 F. Supp. 2d 704, 709 2008). Where "defendant had discretionary authority to manage [plaintiff's] investment accounts, it owe[s] [p· aintiff] a fiduciary duty of the highest good faith and fa'r dealing."

I Assured Guar. (UK) Ltd., v. J.P. Morgan Inv. Mgmt. Inc., 915

I ' N.Y.S.2d 7, 16 Dep't 2010), aff'd, 962 2011). The WNIC TPC is replete with examples communications with WNIC and BCLIC, asking

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I expertise and prudence. See, e.g., WNIC TPC doubt that, according to the allegations, his

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There is no as a corporate official, combined with this conduct, a personal relationship of trust and confidence." v. Butt,

I 486 F. App'x 153, 156 (2d Cir. 2012) (summary

Furthermore, the breach element is pled

! through the allegations that Saks engaged in a series of non- arm's-length transaction and concealed these from WNIC and BCLIC. For instance, the WNIC TPC Saks' involvement in investing WNIC and BCLIC's "[I]n February 2015, Levy, Saks, Manela and others collaborated on the

I investment of trust assets in China a controlled entity. In May 2015, Levy, Saks and Jordlicht, among others, collaborated in the execution of a to Agera Energy, another Platinum-controlled entity into which the Co conspirators invested trust assets. Starting 2015 and extending into 2016, Levy collaborated with Saks, Manela and Nordlicht, among others, to make further investments of trust assets in ALS, another Platinum-controlled WNIC TPC 634. Similarly, in his communications with and BCLIC, he is alleged to have concealed from WNIC and BCLIC information regarding the Platinum-Beechwood cohnection. Id.

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I the breach of fiduciary duty claim against Saks.]

i I C . Fraud Claim As Saks argues, ECF No. 179, at 14, a based on omission must generally be accompanied by istence of a

I fiduciary relationship requiring disclosure of unknown facts." Connaughton v. Chipotle Mexican Grill, nc., 23 N.Y.S.2d

I , I 216, 220 (1st Dep't 2016). The Court determined above that Saks owed a fiduciary duty to SHIP. Furthermore, of such a fiduciary relationship requiring disclos re is further supported by the special facts doctrine, Saks "possess[ed] superior knowledge, not readily to [SHIP], and knows that [SHIP] is acting on the of mistaken knowledge." Aetna Cas. & Sur. Co. v. Aniero Co., 404 F.3d 566, 582 (2d Cir. 2005).

With respect to pleading Saks' omissions,

j especially the ones in WNIC TPC t 644 - Rule 9(b), because they (1) identify what the omissions (2) identify Saks as the person who failed to disclose, (3) the context of the omissions, (4) explain why the were

I fraudulent, and (5) show what Saks obtained the fraud. Odyssey Re (London) Ltd. v. Stirling Cooke ·Holdings Ltd., 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000). As last factor,

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I Saks seems to hold a view that the pleading show that Saks personally obtained some pecuniary benefits the fraudulent scheme to satisfy Rule 9(b) ;

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but the Court 'According

I to the WNIC TPC, what Saks obtained through the was the preventing of WNIC and BCLIC from terminating Reinsurance Agreements. WNIC TPC 11 636, 652, 804. '

In addition, the Court finds that the to mislead is adequately pled, considering the following allegations in the WNIC TPC:

On January 26, 2015, when WNIC and BCLIC questioned the rudency of the investment of trust in JF Aircor and Trilliant, LLC, among other investme ts, Saks asked WNIC's and BCLIC's Eric Johnson to trust in Saks' wisdom in making those investments, but /concealed from Johnson (a) that Murray Huberfeld, who 90-founded Platinum and owned and controlled had dictated that Beechwood Re, BAM and BAM Administ ative invest trust assets in JF Aircorp, and (b) tha the Trilliant investment was a shameless bribe direct d to the principal of SHIP and his family, which was designed to induce SHIP to invest with Beechwood; .

I I 22

Saks claims that the WNIC TPC fails to "what [Saks] obtained through the fraud," because "[t]he to maintain the appearance of corporate profitability, or the success of an investments, will naturally involve benefit corporation, but does not 'entail concrete benefits,'" and increase to individual employment compensation is also ins fficient to satisfy the requirement that a concrete be alleged." ECF No. 179, at 15 (citing Chill v. Gen. Elec. Co.,/ 101 F.3d 263, 268 (2d Cir. 1996); Acito v. IMCERA Grp, F. 3d 47, 54 (2d Cir. 1995)). Also, Saks argues that "[t]he only compensation [Saks] received was employment compensation," hich was "not alleged to have been increased as to him by of the alleged fraud." Id. at 16.

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,, primary '.from l On February 16, 2015, when WNIC and questioned a loan to Kennedy RH Holdings LLC, Saks Kim again asked WNIC and BCLIC to rely on their touting the safety of the loan because it was being to an individual, Bernard Fuchs, who had a net worth in excess of $30 million. Saks and Kim concealed f om WNIC and BCLIC that Fuchs, a defendant in the Action, was a crony of the three Platinum co-founders was hip-deep in the Platinum Ponzi-esque scheme. Id. 644 (emphasis added). The fact that Saks' omissions occurred when WNIC and BCLIC asked questions about the questionable investments adds more weight to that Saks had fraudulent intent in making those

Lastly, the reliance and injury prong is pled

I through the allegation that "WNIC and BCLIC relied on the representations to their detriment, by not

I terminating the Reinsurance Agreements or other actions that could have ameliorated the damages WNIC BCLIC incurred as a result of these misrepresentations." Id. 636, 652, 804.

D. Aiding and Abetting Claims

There is no doubt that the allegations Saks' conduct and omissions discussed above his active

I concealing of the Platinum-Beechwood connection and the allegedly problematic nature of those transactions - adequately plead substantial assistance. See, e.g., WNIC TPC 504, 579,

' 634, 644. In addition, Saks' knowledge of the fraud and

I I breach of fiduciary duty is strongly inferable the alleged

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ahd inf9rmation ana~ysis" Engagement conduct and omissions, aided by the allegation he was both a senior manager of Platinum and Chief Officer of

I Beechwood Re's and BAM I. Id. 504. IX. Hokyong (Stewart) Kim

Because Saks and Kim are similarly according to the WNIC TPC, see, e.g., id. 644, the Court, substantially

I the same reasons that the Court denied Saks' denies the motion to dismiss the breach of fiduciary duty the fraud claim, and the aiding and abetting claims Kim. X. Lincoln International LLC

' I Generally, the allegations against well- particularized and specific, see WNIC TPC yet a few issues merit more attention.

I I First, as to the reliance element of the misrepresentation claims, Lincoln argues that the disclaimer in relevant valuation reports - such as that (1) the were for Beechwood only and should not be relied by any party, (2)

I "Lincoln has not made any independent valuation! or appraisal of the assets," and (3) Lincoln had "relied upon assumed the

I I accuracy and completeness of the financial supplied

I to [Lincoln] and considered in [Lincoln's] of fair

I value, WNIC TPC 716, 716 n.35; Beechwood Letter,

I ECF No. 187-2, Ex. B, at 2 - make WNIC and BCL1C's reliance on

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those reports unjustified. ECF No. 182, at 18-19 The Court disagrees. Under New York law, is well

estab, ished that a general, boilerplate disclaimer of a party's rep esentations cannot defeat a claim for fraud." Dallas Aerospace, Inc. v. CIS

I Air Corp., 352 F.3d 775, 785 (2d Cir. 2003).

According to the WNIC TPC, the nguage has been

I rendered boilerplate-like by Lincoln's alleged qonduct. For instance, the disclaimer that Lincoln has upon and assumed the accuracy and completeness of the information supplied to [Lincoln] and considered in [Lincoln's]

I analysis" is an empty statement, when Lincoln knew

I I that the information it received might not complete or accurate. WNIC TPC 11 720, 722, 728, and Confidentiality Statement, ECF No. 187, Ex.

I I

Disclaimer see also P.T. Bank Cent. Asia v. ABN AMRO Bank N.V., 301 Ad. 373, 378 (N.Y.

I App. Div. 2003) (Disclaimer not preclude laintiff's claim based upon representations that [defendant] mad to plaintiff

I I that [defendant] allegedly knew were false."). addition, the disclaimer language that no parties other than should rely is also meaningless, because Lincoln was allegedly aware of WNIC and BCLIC receiving and relying on Lincol 's valuations. WNIC TPC 752-59. For these reasons, Lincoln's disclaimer

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~ts ~t reads like boilerplate, and thus the disclaimer against justifiable reliance cannot stand.

23 Second, the causation element of the claims is adequately pled through the that WNIC and

' BCLIC did not terminate its relationship with when Lincoln did because of misrepresentations and in Lincoln's reports. See id. ii 768, 782, 832. even in the

I final report - issued after Lincoln had learned more about possible issues with working with Beechwood - does not identify the Platinum-Beechwood tie and other Lincoln allegedly knew as the reasons for their of various valuations. Id. 768, 783.

1 Third, as to the intent element of the misrepresentation claim, the Court finds that t e WNIC TPC has sufficiently "alleg(ed] facts to show that (Lin oln] had both motive and opportunity to commit fraud." Eterni Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y., 375 .3d 168, 187 (2d

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In addition, Lincoln argues that reliance was unjustified because Section 597 of the Reinsurance Agreeme ts gave WNIC and BCLIC opportunity "to verify that the assets w re properly valued." ECF No. 182, at 18. However, as WNIC nd BCLIC correctly point out, precisely because Lincoln allegedly represented that it was independent, reviewed ubstantial data, and never disclosed that these were non-arm's ength transactions, WNIC and BCLIC did not exercise opportunity to object to the valuation reports. ECF No. 256, 11.

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nedligent involvi~g Cir. 2004). The WNIC TPC makes plausible that Lincoln had incentives to (1) "replace [Platinums previous valuation firm] for all of the Platinum funds," (2) "serve as a referral source for opportunities with other fund managers and/ or reinsurance firms," and (3) bolster "credentials

I in the hedge fund and reinsurance communities." TPC Also, the WNIC TPC alleges "facts that strong circumstantial evidence of conscious . .

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by Lincoln in disregarding whether the information it received was true. Morgan Guar. Tr. Co. of N.Y., 375 F.3d at 187; see also,

1 e.g., WNIC TPC 723-25, 727. For these the Court

the motion to dismiss the fraudulent

I Fourth, however, because the special element of the negligent misrepresentation claim is adequately pled, the Court dismisses the negligent misrepresentation claim against Lincoln. WNIC and BCLIC contend that a special

I relationship existed between Lincoln, on the hand, and BCLIC and WNIC, on the other, because Lincoln had and specific knowledge that [WNIC and BCLIC were] receiving relying on its reports." ECF No. 256, at 18-19 WNIC TPC

I 752-58). However, "New York strictly limits

I misrepresentation claims to situations actual privity

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1d. of contract between the parties or a relationshi so close as to approach that of privity." In re Time Warner Inc. Sec. Liti ., 9 F.3d 259, 271 (2d Cir. 1993). In fact, plaintiff/ must show that the benefit to the non-party was the "end and of the transaction." Bayerische Landesbank v. Aladdin dapital Mgmt. LLC, 692 F.3d 42, 60 (2d Cir. 2012). Even Lincoln allegedly knew that WNIC and BCLIC relied upon reports, Lincoln was engaged by the Beechwood pursuant

I to engagement letters, where the end and aim of engagement was to benefit Beechwood, not WNIC and BCLIC pei se.

I Furthermore, the WNIC TPC does not allege that was a direct contact between Lincoln and WNIC and Indeed, the absence of "direct contact" is an important in finding that no special relationship exists. See Anschutz Corp. v. Merrill Lynch & Co., Inc., 690 F.3d 98, 115 (2d Cir. 2012).

In addition, with respect to the aiding and abetting claims

I against Lincoln, the parties dispute what type knowledge is relevant for the purpose of pleading the knowle6ge element: WNIC and BCLIC argue that it is the knowledge of the overvaluation, ECF No. 255, at 20, and Lincoln argues that it the knowledge of the alleged Ponzi scheme, ECF No. 182, 22, dr of Platinum's

I secret control of Beechwood, ECF No. 320, at The language of

I Count Eight and Count Thirteen in the WNIC TPC indicates that

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9 the aiding and abetting claims against Lincoln premised on,

I I inter alia, the knowledge of overvaluation, the of non-arm's length nature of the transactions, the knowledge of Platinum's control over Beechwood investments. WNIC TPC 845, 884. Given that the WNIC that establish the aiding and

TPC sufficiently abetting claims on

facts the knowledge of overvaluation and the knowledge of length nature of the transactions,

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the Court denies motion to dismiss the aiding and abetting claims against

I I Lastly, the Court denies the motion to the claim for civil conspiracy to commit fraud, because all elements of

I the claim - (1) the "agreement" in the form of letters with Beechwood Re and BAM I, along "informal" arrangement with Platinum, (2) an "overt act" the form of Lincoln's issuance of allegedly defective reports with fraudulent valuations, (3) Lincoln's allegedly participation in the furtherance of a plan or and (4)

I the "resulting damage" by WNIC and BCLIC in form of not

I terminating the Reinsurance Agreements or other

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There is no doubt that the WNIC TPC pleads substantial assistance, because Lincoln's alle ed

overvaluation of dozens of investments allowed Beechwood to withdraw millions in surplus while avoiding obligations to top-up the relevant trusts. See WNIC TPC 782.

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204). bJ, ameliorative steps earlier, see generally WNIC 691-783 - are adequately pled. See Pope v. Rice, 04-cv-417 613085, at *13 (S.D.N.Y. Mar. 14, 2005).

(DLC), 2005 WL

XI. David Ottensoser

Other than moving to dismiss the claims RICO, RICO conspiracy, contribution and indemnity, and enrichment -

I all of which the Court has dismissed as above - Ottensoser did not move to dismiss the fraud cl im and the aiding and abetting claims against him, so thes claims remain. ECF No. 194, at 1-2. XII. PB Investment Holdings, Ltd.

I I I As a threshold matter, PBIHL argues that Court does not

I have personal jurisdiction over it. In addition

1 to the reasons discussed above in the context of the FAC and in context of the SHIP TPC, the Court finds that specific

the personal jurisdiction over PBIHL is established through alter ego theory. "Under New York law, if a court has personal jurisdiction over a defendant, it may also exercise personal/jurisdiction over an alter ego defendant." Micro Fines Recycling LLC v. Ferrex Eng'g, Ltd., 17-cv-1315 (LEK/DEP), 2019

1762889, at *5 (N.D.N.Y. Apr. 22, 2019); see also S. New Tel. Co. v. Glob. NAPs Inc., 624 F.3d 123, 138 (2d Cir. Personal jurisdiction over an alter ego defendant can exercised where

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! the "allegedly controlled entity was a controlling party; it is not necessary

shell allegedly to show that the shell was used to commit a fraud." Int'l Equity nvs. v. Opportunity Equity Partners, Ltd., 475 F. Supp. d 456, 459 (S.D.N.Y. 2007); see also Marine Midland Bank F.2d 899, 904 (2d Cir. 1981)). The factors to

I N.-4\. v. Miller,

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jurisdictional alter-ego analysis include there was a failure to observe corporate formalities, undercapitalization, intermingling of personal

of corporate funds, shared office space and phone numbers, any overlap in

I I ownership and directors and whether the was used to perpetrate a wrongful act against the Cardell Fin. Corp v. Suchodolski Assocs., 09-cv-6148 (VM) 2012 U.S.

I Dist. LEXIS 188295, at *94-95 (S.D.N.Y. July 2012).

Based on these factors, the Court finds th, t the WNIC TPC adequately alleges that PBIHL is an alter ego the relevant

I Platinum and Beechwood entities over which the has personal jurisdiction. For instance, the WNIC alleges overlap in management and ownership: "Platinum and controlled Beechwood . . Platinum and were integrated, with their senior managers back and forth between Platinum and Beechwood," WNIC TPC 58 Taylor and Feuer were "[President and Chief Executive Off'cer,

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I I respectively,] of Beechwood Re as well as the of most Beechwood entities, and Taylor was also of Beechwood Bermuda, including the predecessor-in-lnterest of PBIHL," id. 483, 485, 623. The WNIC TPC intermingling of corporate funds: Taylor made false as to how

' I I the "entirety of Beechwood's capital" is to WNIC and BCLIC, id. 623; Platinum and Beechwood intermingled funds with PBIHL, when Platinum funded Bermuda (including PBIHL) with million of the capacity under the $100 million Demand Note from Re . to satisfy Bermuda insurance regulators," id.

I Having determined that it has personal over

I PBIHL, the Court denies the motion to dismiss fraudulent

I conveyance claims against PBIHL, because the WNIC TPC plausibly and with particularity alleges facts each element of the fraudulent conveyance claims under the WNIC and

I BCLIC allege that the "Demand Note Transfer occurred on or about May 16, 2014" and that the transfer was in the of $75 million. Id. 619. The WNIC TPC alleges that defendants,

' including PBIHL, were recipients of the Demand ote transfer, id. 618, but this grouping appears as WNIC and

I BCLIC would need to conduct discovery to see the funds were apportioned among PBIHL and the two other Bermuda

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I defendants. The transfer was designed for the of, and succeeded in, rendering Beechwood Re insolvent placing Beechwood Re's "capital" beyond the reach of WNIC and BCLIC, and there was no

consideration for Beechwood Re's of the

I $75 million at issue. Id. 620. These alleged satisfy the

I elements of the§ 275 claim (actual conveyance with the intent or belief of going insolvent), the§ 273 (constructive conveyance by becoming insolvent, the absence of fair consideration), and the§ 274 claim

I conveyance by becoming undercapitalized, in theJabsence of fair consideration) .

With respect to the§ 276 claim (actual made with intent to defraud), it is the transferor's intent to defraud rather than the transferee's intent, s PBIHL argues that matters, and the transferor Beechwood Re's intent is adequately pled as well. See In re Sharp Int'l.! Corp., 403 F.3d 43, 56 (2d Cir. 2005) (holding that a creditor show "intent

I to defraud on the part of the transferor to on a Section 276 claim") (emphasis added) .

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In addition, PBIHL argues that the WNIC TPC to plead that WNIC and BCLIC each is a "creditor" with to sue under New York's statute, ECF No. 202, at 21, the WNIC TPC is clear that WNIC and BCLIC are creditors of Re under the Reinsurance Agreements to avoid the Demand1Note transfer, see WNIC TPC §§ 890-92.

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l I Lastly, the allegations regarding the Demand Note transfer

I discussed above and Taylor's January 14, 2015 state the

I fraud claim and the aiding and abetting claims. an email dated January 14, 2015, Taylor, on behalf of Beechwood

I I entities including the predecessor-in-interest PBIHL, wrote

I I that he and Feuer "consider the entirety of Beeqhwood's capital

I I as available to support any liabilities within companies. . It has always been our intent utilize all of [our] capital availability to support the of our

I i businesses, first and foremost being the [WNIC BCLIC] block." WNIC TPC 623. This statement by TayloJ is attributable

I to PBIHL, as Taylor was alleged to be the Presi ent of PBIHL's predecessor-in-interest and that such email was "on behalf of all Beechwood companies." Id. (emphasis added). And there is no allegation suggesting that Taylor was acting the scope

I of his responsibility as President in making statement.

I I Once this statement is attributable to PBIHL, with the

I I Demand Note transfer, scienter is adequately Lastly, for substantially similar reasons as discussed - i.e., based

I on the Demand Note transfer discussed above Taylor's January 14, 2015 email - the Court denies the motion dismiss the aiding and abetting claims against PBIHL. XIII. Wi11 Slota

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In re Platinum-Beechwood Litigation

2019 | Cited 0 times | S.D. New York | October 7, 2019

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j The fraud claim and the aiding and against Slota are premised on the following three allega

1 ions: (1) his search for a valuation firm, (2) Slota' s of brokerage agreements with Nomura and his efforts to look additional prime brokers, and (3) the following email that sent to Hodgdon in November 2013, in response to sending an email to Slota's Platinum email address a Beechwood matter:

I I Please DO NOT email me at [Slota's address] regarding Beechwood business. We've up separate email addresses for all staff involve, in Beechwood. Mine is [Slota's Beechwood email addr ss].

1 I believe I've point. This is reminding you.

repeatedly made myselfjclear on this the third time I will been

I WNIC TPC 1i 494-95, 638.

With respect to the first allegation, is alleged be "the point person responsible for finding hiring a valuation firm that would make Beechwood's in Platinum and Platinum-related entities appear to

'

to

the outside world." Id. 1 495. Other than conclusor,y statements such

I I as "Slota and the Co-conspirators enticed to participate

I in this fraud," there is no specific imputing

I fraudulent intent on Slota's part. Id. Other Slota signing the NDAs with Lincoln, id. 696, and passing the first

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suppor/ Negative Assurance Letter issued by Lincoln on March 7, 2014, id. 759, which in and of wrongful actions, there is no particularized Slota pressured Lincoln to produce overvalue was aware of the alleged overvaluations.

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that or that he ! I With respect to the second allegation, it alleged that "the efforts to establish additional prime arrangements were led by Slota, Levy and Taylor initially" and

I that Levy and Slota "signed a series of eight agreements with Nomura, all dated January 31, 2014." Id. 640. Not only do these allegations successfully plead the assistance element of the aiding and abetting against

I they, together with the fact Slota was the Officer, provide a reasonable of Slota, but also Chief Operating

I Slota's knowledge of the primary fraud and breabh of fiduciary duty - that Beechwood was promising incompatibll interests in the trust assets to two different parties.

However, while the aiding and abetting are

I sufficiently pled, the fraud claim cannot be on this allegation, because there is no allegation as what Slota represented to WNIC and BCLIC regarding the indompatible

l interests. Also, the allegations do not the contention that Slota had an affirmative duty to disclose

1 the truth

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Nov~~ber relianc~ regarding incompatible security interests to WNI and BCLIC, so the fraud claim cannot be based on this omission either.

As to the third allegation, in light of the surrounding circumstances, a reasonable factfinder may from the November 2013 email that Slota had the requisite! knowledge of the primary fraud and breach of fiduciary duty, given

I his role as "the enforcer within the integrated IPlatinum- Beechwood conspiracy for maintaining the that Beechwood had no connection with Platinum." Id. 494. The aiding and abetting claims should move forward this reason.

However, the third allegation does not a fraud claim.

I Aside from the email he sent to Hodgdon, at a 8, 2014 meeting, Slota is alleged to have misrepresente, himself as the Chief Operating Officer of Beechwood. Id. 577 However,

I compared to Kim and Saks who were allegedly in contact with WNIC and BCLIC, see id. 644, the

above allegation is the

I only pled interaction that Slota had with WNIC and BCLIC. Also, Kim and Saks repeatedly made misrepresentations/ to WNIC and

I I BCLIC to be proximate cause of their harm, id.,! but Slota' s email itself and his representation at the 8 meeting do not sufficiently plead the justifiable and resulting

i I injury element of a fraud claim. I

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I I For these reasons, the motion to dismiss fraud claim against Slota is granted,

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but the motion to iss the aiding and abetting claims against Slota is denied.

I XIV. TPC Beechwood Parties

I The WNIC TPC Beechwood Parties consist of: the Feuer Family Trust, Taylor, the Taylor-Lau Family Beechwood

' Holdings, BAM I, BAM Administrative, BBL, BBIL, Re,

' I Narain, and Beechwood Capital. Not all of these and entities moved to dismiss the claims against ECF No. 210.

A. Fraudulent Inducement Claim Against Narain

I Narain notes that he did not arrive at Beedhwood until January 2016, WNIC TPC 508, which was after Reinsurance Agreements had been executed. ECF No. 210, at For this reason, the fraudulent inducement claim against/Narain is dismissed.

B. Fraud Claim Against Dhruv Narain

The WNIC TPC makes the following particuiarized allegation against Narain:

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The fraudulent inducement claim against Slota is also dismissed because, as Slota correctly points there is "no action by Slota described in the [WNIC] TPC could have caused [WNIC and BCLIC] to enter into the Agreements or refrain from terminating them." ECF No. 232, at 19. Simply put, "[t]here is no explanation of how the alleged communications by Slota . . induced [WNIC an BCLIC] to enter into the Reinsurance Agreements." ECF No. 313, at 7.

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coul(lter andjexhibits, On June 23, 2016, WNIC and BCLIC questdoned the investment of trust assets

Quest and Atlantic Coast Life Insurance, wondering if there was any aspect to the transactions that were ot at arm's length. Narain and Kim rushed to assu e WNIC and BCLIC to rely on their expertise that the were prudent and asked WNIC and BCLIC to to the transactions. Of course, Narain knew hand that the Quest Livery transaction was not at arm's-length, as it was a sweetheart deal for one Huberfeld's cronies. Narain did not disclose that Nor did Narain or Kim reveal that the Atlantic Coast Life Insurance deal was another bribe aimed at inducing the

I insurer directed to invest its funds Beechwood. The bribe succeeded in accomplishing that. WNIC TPC 644. Narain argues that the above in{estment actually occurred on February 9, 2016, and so there was nexus between alleged representation . and [WNIC and ECF No. 210, at 15. To support this claim,

conduct." l Narain attaches as

I exhibit to his motion papers the email between Eric Johnson of WNIC and BCLIC and Kim (but not on June 23,

I

an

2016, which discuss the "sale of Quest Livery from WNIC Sub," not investment into Quest Livery. ECF No. at 1 (emphasis

I added). Narain argues that "this document is incorporated into the [WNIC TPC] by reference provides the basis for WNIC and BCLIC's fraud 312, at 9.

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ECF No.

I 27 Generally, "when a defendant attempts to a plaintiff's Complaint with its own factual allegations such allegations and exhibits are inappropriate for consideration by

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:sum However, although it is possible that this ocument was the only basis upon which WNIC and BCLIC drafted the above allegations in WNIC TPC 1 644, it is also that WNIC and BCLIC relied on additional documents to draft paragraph, as

I I evidenced by the fact that (1) the emails in the;exhibit do not involve Narain, while WNIC TPC 644 identifies as a speaker, and (2) the emails in the exhibit discuss Quest

I Livery, whereas WNIC TPC 644 also discusses in Atlantic Coast Life Insurance. The Court with certainty as to whether the above allegations a ,ainst Narain

I relied exclusively on the emails in the exhibit./ The ref ore, the Court leaves this question, as well as the veracity of the last paragraph in WNIC TPC stage in the litigation.

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as to the 1 to a later

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the Court at the motion to dismiss stage." v. Cty. of Suffolk, 995 F. Supp. 2d 215, 220 (E.D.N.Y. According to the Second Circuit, "the harm to the plaintiff a court considers material extraneous to a complaint is the lack notice that the material may be considered." Ch mbers v. Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) Accordingly, "[w] here plaintiff has actual notice of all the1 information in the movant's papers and has relied upon these documents in framing the complaint the necessity of a Rule 12 (b) (6) motion into one under Rule 56 is dissipated." Cortec Industries, Inc. et al. v. Holdin, L.P., 949 F.2d 42, 48 (2d Cir. 1991). Therefor, the Court considers this exhibit at this motion to dismiss stage.

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Because the elements for the fraud claim Narain are

I adequately pled (1) for substantially similar as the ones discussed in the context of the fraud against Saks and Kim and (2) based on his February 2016 where he

I . stated, "we all agree Platinum related stuff is 1egreg1ous," the

I Court denies the motion to dismiss the fraud against Narain. See WNIC TPC 472, 548, 564, 643.

C. Breach of Fiduciary Duty Claim Against Ohr v

Narain argues that the WNIC TPC rests

I

Narain on "Narain's corporate position" and does not allege facts giving rise to the inference that

Narain "had a fiduciary relation$hip with Narain personally.• ECF No. 210, at 18. This is not First, according to the WNIC TPC, he was not just a officer but a Chief Investment Officer who "had authority" to manage WNIC and BCLIC's investment accounts, owing fiduciary duty of the highest good faith and dealing.• Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Inc., 915 N.Y.S.2d 7, 16 (1st Dep't 2010), aff'd, 962 765 (N.Y. 2011). Second, when his investor had a question about one of the investments in June 23, 2016, he alleged to have "rushed to assure [WNIC and BCLIC] to rely on expertise," which a reasonable fact finder could infer as sking for the

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i I investor's trust and confidence in his investment discretion and decision. WNIC TPC 1 644.

Therefore, for substantially similar as the ones discussed in the context of the fraud claim Narain and the breach of fiduciary duty claims against and the Court denies the motion to dismiss the of duty claim against Narain.

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Kim above, fiduciary

D. Motion to Dismiss or Compel WNIC and BCLIC to Arbitrate

Their Breach of Contract Claim and and Indemnity Claims Against Beechwood Re

i Beechwood Re moved to dismiss, or compel on, the breach of contract claim and the and indemnity claim against it. ECF No. 209. In its motion to compel arbitration under Section 4 of the Federal Arbi ration Act, Beechwood Re argues that the WNIC TPC "raise[s]I disputes arising under the broad scope of the arbitration contained in

I the Reinsurance Agreements." ECF No. 210, at On June 11,

! I 28

Beechwood Re argues that the current against Beechwood Re in the WNIC TPC are virtually identical to the allegations against Feuer and Taylor in a case in front of the Court, where the Court granted a motion to compel arbitration. See Bankers Conseco Life Ins. Co. v. Feuer, 16-cv- 7646 (ER), 2018 WL 1353279, at *1 (S.D.N.Y. 15, 2018). Furthermore, Beechwood Re argues that WNIC and on the one hand, and Beechwood Re, on the other, entered valid agreements with broad arbitration provisions the parties to arbitrate "all disputes or differen es between the Parties arising under or relating to" the Rein urance

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Nd. 2019, WNIC and BCLIC made a motion to quash motion by Beechwood Re, arguing that Beechwood Re cannot such motion until posting additional security pursuant to applicable New York and Indiana security statutes. ECF No. In a Memorandum Order dated July 10, 2019, this Court denied motion by WNIC and BCLIC, on grounds that the arbitration should first decide whether WNIC and BCLIC were precluded bringing their motion, given that the arbitration panel had awarded them some interim security which subsequently been confirmed by this Court. ECF No. 333, at 12-13. the Court has

I not and will not rule on Beechwood Re's instant1motion until the

I arbitration panel decides whether WNIC and are precluded from bringing their motion to enforce the New York and Indiana security statutes in quashing Re's motion to dismiss or to compel arbitration.

Legal Analysis - SHIP TPC I. Common Argument - Whether SHIP' s Unjust Claims

Should Be Dismissed

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Agreements. ECF No. 211-2, Ind. Re. Ins. § ECF No. 211- 3, NY Re. Ins. § 10.l(a). Beechwood Re further that, in fact, WNIC and BCLIC are arbitrating the claims and issues with Beechwood Re in an ongoing arbitra ion before the American Arbitration Association, Bankers Cons co Life Ins. Co. et al. v. Beechwood Re Ltd. et al., AAA Case 01-16-0004-

1 2510, and so this Court lacks jurisdiction ove this matter for now. ECF No. 210, at 3, 21.

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jwere ~CF 11-~2; Ottensqser Beechw1od Various movants argue that SHIP's unjust against them are subsumed by SHIP's breach of

claims c ntract claims against the Beechwood counterparties to the IMA in the SHIP action and by other tort claims against them in the present action. ECF No. 279, at 13; ECF No. 262-2, at 6 7; ECF No. 284,

I at 17; ECF No. 351, at 9-10; ECF No. 357, at The Court

I agrees. I

I The core of SHIP's unjust enrichment is that these defendants enriched themselves using the from unearned performance fees and other monies earned from tlansactions that favored Platinum or Beechwood over SHIP, most o which are governed by, or pursuant to, the terms of the I As. Because "[t]he existence of a valid and enforceable ten contract governing a particular subject matter precludes recovery in quasi contract for events arising of the same subject matter," these claims are precluded. Inc. v. Long Island R. Co., 516 N.E.2d 190, 193 (N.Y. 1987) .

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I 29

Alternatively, various moving cross-claim third-party defendants correctly point out that the SHIP TP,C generally fails to allege with Rule 9(b) specificity that they enriched at SHIP's expense. ECF No. 279, at 13; 18-cv-6658, ECF No. 452, at 10; ECF No.262-2, at 6-7; ECF No. 287, at 21; No. 284, at 17; ECF No. 346, at 12-14; ECF No. 347, at ECF No. 351, at 9; ECF No. 357, at 13. For instance, notes that he "was not an owner of any of the various Entities, just as he was not an owner of Platinum Management (NY) LLC, and the

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j A small portion of the unjust enrichment that appears not to be governed by any valid and enfoiceable written

I contract concerns SHIP's $50 million investment the June 2016 Agera transaction outside of the IMAs. SHIP TPC 232. However, the unjust enrichment claims based on the June Agera

I transaction are not pled adequately with respectjto who were unjustly enriched, except in the case of Cassidy "Cassidy was slotted to receive, and did receive, interests AGH Parent worth in excess of $13 million through Starfish Capital, an entity dominated and controlled by Cassidy, for no apparent consideration." Id. 1 308. In the SHIP action, the second of motions to dismiss, this Court has held that unjust enrichment claim can proceed only against Feuer Taylor for their "significant ownership positions in" but dismissed

I the claim based on the $50 million investment Agera as to all

I 1 other defendants therein for failing to specifylwho was enriched. See In re Platinum-Beechwood Litig., F. Supp. 3d

i 414, 427 (S.D.N.Y. 2019). For the same reason, Court in its

I I "bottom-line" Order dismissed the unjust enrichment claims

I against all moving defendants other than in this action

SHIP TPC does not allege otherwise." ECF No. at 1. Michael Nordlicht argues that him holding a 95.01% interest in Agera Holdings does not prove that he received anything of value belonging to SHIP. ECF No. 283, at 3, 17.

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thJ c9urt indepe1dent and also hereby dismisses the unjust enrichment against Steinberg. II. Common Argument - Whether SHIP's Civil

Should Be Dismissed The civil conspiracy claims, just like the aiding

Claims

and abetting claims, seek to hold the co-conspiraton defendants secondarily liable for the primary torts by Beechwood and Platinum/Beechwood insiders. In the SHIP the civil conspiracy claims are largely duplicative of aiding and

I abetting claims. See SHIP TPC 445-53. if the aiding and abetting claims are not dismissed for a given defendant, the civil conspiracy claim against defendant should be dismissed. See Loreley Fin. (Jersey) 3 Ltd. v. Wells Fargo Sec., LLC, 12-cv-3723 (RJS), 2016 5719749, at *8 (S.D.N.Y. Sept. 29, 2016) cases in which aiding

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. 1· 1 'h . 1· N an a etting c over ap t c ew York courts have allowed the aiding and claims to proceed, but have dismissed as duplicative the conspiracy claims.") .

Even for those defendants against whom aiding and abetting claims are otherwise dismissed, the still dismisses the conspiracy claims for two

reasons.

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moving l plead the element

I First, the SHIP TPC does not adequately

I SHIP TPC could of existence of an agreement. As Saks notes, I have provided, for instance, "times, facts, and regarding how the conspiracy began or, to the Saks was brought into the conspiracy later, the agreement' by which Saks

' allegedly jointed the conspiracy." ECF No. 272, 11. For

I Michael Nordlicht, it is not clearly pled as to whether there

I I was an "agreement" that Michael Nordlicht to further the goals of conspiracy. And the Court would not find a conspiracy agreement based solely on defendants' common See Schwartz v. Soc'y of N.Y. Hosp., 605 N.Y.S.2d 73 (1st Dep't

I I 1993); Brownstone Inv. Grp. v. Levey, 486 F. Supp. 2d 654, 661 (E. D. Ky. 2 0 0 7) .

Second, for certain individuals, civil claims are dismissed for similar reasons that aiding a

1 d abetting I I claims were dismissed. For example, for the reasons the substantial assistance or knowledge element is adequately

I pled against a particular defendant, the "intentional

I participation in furtherance of a element]would also often fail. Pope v. Rice, 04-cv-4171 (DLC), 2005 WL at *13

I (S . D. N . Y. Mar. 14, 2 0 0 5) .

For these reasons, the Court in its Order

I I I . dismissed the civil conspiracy claims against 11

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I defendants 30

and hereby dismisses the civil claim against Steinberg. III. I et al.

The group "BAM I et al." includes: BAM I, AM I I, BAM Administrative, Beechwood Re, Beechwood Holdings, BBL, BBIL, the Feuer Family Trust, the Taylor-Lau Family BAM GP II, BAM

i GP II, MSD Administrative, N Management, Beechw0od Global

I Distribution Trust, Feuer Family 2016 Acq Taylor-Lau Family 2016 Acq Trust, and Beechwood Capital. move to dismiss all claims against them, and they incortorate by

I reference the arguments in the memoranda supporting the motions to dismiss filed by Bodner, Beechwood Trust 7-14, Monsey

I Equities, LLC, and BRILLC LLC Series C. ECF No.

1 281, 1 n.2. A. Aiding and Claims In its "bottom-line" Order, the Court gran

1 ed the motion to dismiss the aiding and abetting claims against Administrative, Beechwood Holdings, BBL, MSD Beechwood Capital, N Management, BAM GP I, BAM II, the Feuer Family Trust, and the Taylor-Lau Family Trust, denied the

I motion to dismiss the aiding and abetting against other

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This excludes Ottensoser, who did not move tb .civil conspiracy claim against him. ECF No.

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/SHIP PEDEVfO, I BAM I et al. defendants, based on the following allegations, among others.

With respect to BAM II:

BAM II, in conjunction with BAM I, sered as an investment advisor for the other Beech ood Entities, and enacted Investment Management with both BBIL and Beechwood Re. In their as investment managers, BAM signed on behalf of SHIP) and was the signatory for most, if not all, of theldeals Beechwood caused SHIP to enter. For deals in SHIP was transacting with a Beechwood Entity ditectly, BAM II served as the investment advisor to Beechwood Entity and BAM I served as investment advisor to SHIP.

I I BAM's 31

subsequent requests for of Performance Fees totaling $7,850,000 were based on fraudulent valuations of investments. On each of those five occasions betweer July 2015 and July 2016, BAM used the falsely asset valuations set forth in the valuation)reports that BAM sent to SHIP which valuations essentially unchanged over that entire period, for minor fluctuations as the basis for its Performance Fee calculations, intending and knowing SHIP would rely on those false valuations to its detriment in approving the Performance Fees.

1 Id. 17, 351. BAM II was heavily involved in of these allegedly problematic transactions. It is hard argue that, based on these allegations, BAM II did not assist or did not have the requisite knowledge.

With respect to BAM Administrative (a/k/a/1 BAMAS): 31

BAM I and BAM II are grouped together in the TPC as "BAM." BAM's involvement in the Montsant, and Agera transactions is described in detail in the SHIP

1 TPC. See generally SHIP TPC 249-320.

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I I BAMAS served as agent for the Trusts and as agent and signatory on behalf of Beec wood Re and BBIL in connection with certain transactio s described more fully below. For example, BAMAS was a signatory to a May 22, 2015 participation agreement a July 14, 2010 Desert Hawk Gold Corp. note as a ent for Beechwood Re, BBIL, SHIP, BCLIC, WNIC,and ULICO, counter to DMRJ Group I, LLC - a of PPVA.

Saks also signed the Montsant NPA on ehalf of BAMAS, which served as SHIP's agent for the {ransaction ...

Michael Nordlicht, and Kevin were

I knowing and willing participants in conspiracy to commit fraud and breach of fiduciary by virtue of their involvement in the June 2016 Transactions.

' SHIP TPC 20, 251, 449. The motion to dismiss/the aiding and abetting claims against BAM Administrative is because (1) the first and last excerpted allegations to plead such claims, because the SHIP TPC does not discuss Desert Hawk transaction elsewhere and does not mention BAM in the context of the June 2016 AGH Transactions all, (2) the second allegation is too vague and broad to knowledge or

I establish substantial assistance, and (3) the allegation is conclusory.

With respect to MSD Administrative:

According to an organizational chart attached to a March 17, 2014 email from Feuer to Samuel Adler, MSD Administrative was an company for mercurial tasks. For its limited with these "mercurial tasks," MSD was paid

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l Admin~strative. BBL:/

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I I significant service fees by the Entities.

I These service fees were used to funnel out of the Beechwood Entities in order to shield assets from creditors. Id. 21. As BAM I et al. correctly point out, "mercurial

1 tasks" description fails to state the aiding andlabetting claims

I I without any explanation as to what these tasks and why these "mercurial tasks" tied to the primary frau! or breach of

I fiduciary duty at issue. ECF No. 285, at 10. Fur hermore, the allegations regarding service fees are too vague and conclusory to meet the Rule 9(b) standard. Therefore, the Curt dismisses the aiding and abetting claims against MSD

With respect to Beechwood Holdings and

The Beechwood Holdings Subsidiaries paid significant management fees and were provided

significant assets for no The BBL Subsidiaries were paid significant management fees and were provided significant for no consideration. I

' Id. 91, 93. These allegations fail to plead aiding and

! abetting claims, because they are targeted at subsidiaries

I of Beechwood Holdings and BBL and there is no as to why

I the Court should pierce the corporate veil to hold the relevant

I parent entities liable for their subsidiaries'

With respect to Beechwood Capital:

Beechwood Capital served as a "trade for other of the Beechwood Entities in or er to access

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1 pe rrcipient thej gro~p TPC: vendors and banks and prime brokers. communications with targets of the scheme, including Feuer and Taylor characterized Beechwood Capital a New York private investment fund that was a new entrant into the life and health market, without revealing that Beechwood in fact was a mere instrumentality to be employed in of the Platinum-Beechwood Scheme.

I On or about March 28, 2013, Steinberg Huberfeld a list of wire transfers, of which was a transfer by Platinum of approximately 50,000.00 to Beechwood Capital. This transfer appea s to represent Platinum's initial investment in, and unding of, Beechwood. 66.

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These allegations fail to state t e aiding and

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I ' abetting claims. In the first excerpted paragraph, Feuer and

! Taylor, not Beechwood Capital itself, made the misrepresentation. As to the second excerpted paragraph, as this

I Court has previously found, the initial funding Beechwood does not in and of itself show any fraudulent or

I knowledge of the primary fraud or breach of duty. See

I In re Platinum-Beechwood Litig., 18-cv-6658 2019 WL 1570808, at *12 (S.D.N.Y. Apr. 11, 2019).

With respect to N Management:

N Management, controlled by NordlichtJ signed the

I 32 In addition, Beechwood Capital is alleged to part of the Feuer Group, which in turn is alleged to be a of the March 20, 2013 email outlining the terms of Platinum Beechwood Scheme, and by February 2013, the was "already in discussion with potential targets." SHIP !! 64-65. These allegations are too broad and rely on impermiss 1

'ble group pleading.

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Beech1ood. demand notes upon which Beechwood Re to be

I capitalized with $100 million and claimed to be capitalized with $75 million. N Managdment also caused

I BRILLC to issue a secured promissory to BBIL so that BBIL could purchase a surplus from SHIP in the amount of $50 million .... In under the control of Feuer, N Management all of the initial collateral upon which the million demand notes were based, and replaced that with certain interests in the Surplus AGH Parent LLC, Beechwood Holdings, and BBL.

1 Id. 33. The two transactions were executed of initial capitalization of Beechwood entities, and they not by themselves support anything remotely close to knowledge of the primary fraud or breach of fid ciary duty. The SHIP TPC does not contain any detail regarding he 2017 transaction, let alone any support as to why N

1 anagement's role I in this transaction satisfies the substantial or knowledge element. For these reasons, the and abetting claims against N Management are dismissed.

With respect to the Feuer Family Trust and1 the Taylor-Lau

I Family Trust:

The Feuer Family Trust was Feuer's ownership interest BBL.

I I I I created hold Mark in Holdings

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and

The Taylor-Lau Family Trust was creat

1 ed to Taylor's ownership interest in

hold Scott

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trusts"): f~r Feuer, Bodnet. Acquisition Trvsts

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T,C Id. 27, 28. These allegations regarding any wrongdoing or knowledge of the primary fiduciary duty.

do not show I

or breach of I I I With respect to the Beechwood Global Trust, the Feuer Family 2016 ACQ Trust, and the Family 2016 ACQ Trust (collectively, the "2016 Acquisition

[They] were trusts created and used the purpose of furthering the fraudulent schemes of Taylor, Levy, Nordlicht, Huberfeld, and On August 5, 2016, each of the 2016 was used to execute the transfer of equity in Beerhwood Holdings and BBL from the Nordlicht Group to and Taylor in exchange for debt in the form of secured promissory notes amounting to approximately .... [As part of the August 5, 2016 Transactions,] the Beechwood Trusts purported to their nearly 70% interest in Beechwood Holdings to the Taylor-Lau Family 2016 ACQ Trust and the Feuer F mily 2016 ACQ Trust in exchange for a promissory in the principal amount of $36,550,000. The Series Entities, with the BRILLC Series acting on their behalf, also purported to their approximately 70% aggregate interest in BBL to the Taylor-Lau Family 2016 ACQ Trust and Feuer Family 2016 ACQ Trust in exchange for a note in the principal amount of $51,439,756.10.

' I Id. 34, 433.

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These allegations plead the

I assistance and knowledge elements of the aidini and abetting claims. These three trusts were instrumental in carrying out the August 5, 2016 Transactions, which further Nordlicht,

33 The SHIP TPC contains additional specific allegations against each of the 2016 Acquisition Trusts regarding tjheir role in the August 5, 2016 Transactions. See, e.g., SHIP 389, 431-34.

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~hove. ! Huberfeld, and Bodner's economic interest in Holdings and BBL by changing the companies' ownership while maintaining the intended economic beneficiaries. id. Furthermore, the detailed descriptions of their give "rise to an inference of [their] knowledge" of primary fraud

I by misrepresentation and breach of fiduciary by harming SHIP. Krys v. Pigott, 749 F.3d 117, 129 (2d Cir.

Lastly, there are no particularized satisfying the Rule 9(b) standard against BAM GP I and BAM II, and so the Court grants the motion to dismiss the against BAM GP I and BAM GP II.

B. Claim for Declaratory Judgment for Contractual

Indemnification / BAM I et al. moved to dismiss the claim declaratory judgment for contractual indemnification, but did not

I provide any reason. Therefore, the motion is IV. Beechwood Trust Nos. 7-14, Monsay Equities LLC, Beechwood

Re Investments, LLC Series C, Lawrence Par

1 ners LLC, Whitestar LLC, Whitestar LLC II, and Whitestar LLC III Other than the allegations regarding structures of these entities, the SHIP TPC makes more or the same allegations against these entities as it does the Beechwood Global Distribution Trust, the Feuer Family ACQ Trust, and the Taylor-Lau Family 2016 ACQ Trust discussed See id.

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of jentities - by

Series Entities," and "BRILLC Series Members" - is not fatal to satisfying the pleading standards in this circumstance, because the SHIP TPC alerts that identical claims are asserted against each, whi hare combined for efficiency's sake; it would amount to an un easonable burden for SHIP to, at the pre-discovery stage, distin uish among these

I I entities, for instance, as to what percentage of the 70%

I aggregate interest in BBL each of the BRILLC Members transferred. For substantially the same discussed in

l the context of the Beechwood Global Trust, the Feuer Family 2016 ACQ Trust, and the Taylor-Lau! Family 2016 ACQ Trust, the motion to dismiss the aiding and claims

I against Beechwood Trust Nos. 7-14, Monsey Equities, LLC,

I Beechwood Re Investments, LLC Series C, Partners LLC, Whitestar LLC, Whitestar LLC II, and Whitestar III is therefore denied. 34

' 34

Some of these moving defendants contend thatjnothing about the August 5, 2016 Transactions is "alleged to caused any damage to SHIP," ECF No. 337, at 3, but the Court does not find this argument persuasive. The SHIP TPC states the continued concealment made SHIP "not to terminate the IMds sooner or to take other actions that might mitigate the damages that SHIP suffered while the IMAs remained in effect." TPC 437-38, 443-44.

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I alfeged V. David Bodner

I As a threshold matter, Bodner argues that the SHIP TPC fails to adequately allege facts establishing fraud as part of the claim for aiding and abetting fraud. No. 27 9, at 5-8. Contrary to Bodner's view, the SHIP TPC allegations that Taylor, Feuer, Levy, and others/committed fraud, for instance, by making affirmative misrepresentation to

I I SHIP or that they breached their fiduciary duty SHIP. See,

' e.g., id. 11 67, 71, 128, 132, 142, 268, 411, 446.

I Furthermore, this Court has held previously SHIP has

I adequately pled actionable fraud and fiduciary claims against those individuals in the SHIP action on similar

-- I allegations. See In re Platinum-Beechwood Litig. !, 377 F. Supp. 3d 414, 419-20 (S.D.N.Y. 2019); In re Platinum-Beechwood Litig., 345 F. Supp. 3d 515, 523-27 (S.D.N.Y. 2019).

As discussed above in the context of the the July 29,

I 2015 email sufficiently establishes Bodner's See SHIP TPC 1 114. With respect to the substantial element,

I various statements and emails sent on behalf - such as alleged overvaluation of the Platinum portfo}ios, see id. 11

I 321-66 - can be attributable to Bodner given insider status

I as one of the founders of Platinum and as an mastermind of the alleged scheme. Further supporting this,j he did have

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I input into Platinum's and PPVA's investment valJations or assessments of associated risks. See id. For all of these reasons, the motion to dismiss the aiding and abetting claims against Bodner is denied. VI. Elliott Feit

The SHIP TPC makes the following allegations against Feit:

Feit was responsible for calculating performance fees to which any of the Beechwood Advisors were allegedly entitled, for submitting thf performance fee requests to SHIP, and for responding requests from SHIP for information about those requests. As discussed below, all of the fee requests submitted by Feit or others were in that each request was based on inflated of the investment assets within the SHIP that the Beechwood Advisors managed .... Because of Feit's position as an officer within Beechwood and his day-to-day involvement in the operatipns and finances at the Beechwood Advisors, he that the investment valuations reported to and others were materially inflated. Feit was on the Finance Committee and made monthly presentations to board on the financial performance of the Advisors including the assets under the IMAs. also worked with the valuation firms to get of Beechwood's inflated valuations. [SHIP TPC 35] For example, on April 2, 2015, Elliot

1 Feit, Finance Director of Beechwood, acting for at the direction of Beechwood and through the mails and wires of

I interstate commerce, requested from Lorentz to withdraw $3,500,000 as a Fee from the BAM IMA account. In support this request, Feit represented in writing to that the assets contained in the BAM IMA account at time possessed a market value of 'and a principal plus interest owed to SHIPjof

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' s~bstantial toJether CommitJee $110,780,801.37.' In light of the 'excess' of $4,362,671.02, Feit requested of a withdrawal of $3,500,00 in Performance Fees, and submitted a 'Withdrawal Notice' for that amount by Saks for countersignature by Lorentz. Feit supported this request by attaching the Wilming on Trust statements for this account for the p riod ending on March 31, 2015, to illustrate the purported investment activity and interest accrued on the [Id. 347] This plan to transfer bad investments from CNO's account to SHIP's is revealed in a se ies of emails between several of the Co-Conspirator on July 23, 2015. Stewart Kim forwards Elliot Fei a conversation with Eric Johnson and Timothy Bischof of CNO, requesting 'a table specifying the lo ns/amounts potentially to be transferred into [WNIC] Trust' and asks him to provide the materialsj Feit forwards the exchange to Moti Edelstein and asks for a 'listing of the belie privates' to which Edelstein asks if he 'want[s] the list of loans from BCLIC Primary to SHIP-BAM showing their values[.]' Feit agrees that is how he understoodjthe request. Edelstein proceeds to send Feit a that Feit in turn forwards to Kim. The list includes loans to:

I .. Each and every one of these is related to Platinum. Each and every one of these loans was purchased at or around par, despite knowledge that they were not worth purported value. [Id. 377] ' See also id. 354, 360. These allegations - to Feit's characterization as "nothing more than carry his ministerial and administrative duties as a finance director! at Beechwood," ECF No. 346, at 1, 5, 9 - sufficiently plead assistance. In addition, these allegations, with his alleged role as a member of the Finance of Platinum

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lead'to a reasonable inference of his knowledge of the primary fraud and breach of fiduciary duty. See also JP Morgan Chase Bank Winnick, 406 F. Supp. 2d 247, 252 (S.D.N.Y. 2005) (holding that /defendant's knowledge can be pled generally under Rule "provided a factual basis is pled which gives rise to a str ng inference of fraudulent intent"). VII. Bernard Fuchs

l I The SHIP TPC makes the following particulatized allegations regarding Fuchs:

Fuchs did not have an official title, nevertheless had day-to-day involvement in the and operations of Platinum Management .... He also was aware of and participated planning, marketing, and execution of various of those transactions, such as assisting in the planning of the Agera Transactions .... During latej 2015 and the first quarter of 2016, Fuchs engaged numerous discussions with investors seeking intormation concerning the status of PPVA, their investments, and

I requests for redemption, often exchanging emails with Nordlicht, Bodner, Huberfeld, Levy, Landesman concerning the best response to investor inquiries or forwarding on such .... Fuchs 35

Feit refutes the factual allegations that he had a dual role in Platinum and Beechwood and that he was "BAM CFO," submitting an affidavit attesting that he was by MSD Administrative and never employed by any Platinum-related entity. ECF No. 346, at 4 (referencing Feit Affidavit, ECF No. 345, Ex. 3-8). The Court does not this affidavit at this motion to dismiss stage, because the is submitted to dispute a factual allegation made in the SHIP TPC. See Global Network Comrnc'ns, Inc. v. Cit of N w York, 458 F.3d 150, 156 (2d Cir. 2006).

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I I However, the knowledge element is not pled. In contrast to Bodner, Huberfeld, or Nordlicht, does not occupy as central of a role as an insider of thelBeechwood Platinum scheme. The China Horizon deal and the ennedy Sobli Consultants deal are alleged to be non-arm's length deals, but these deals, in and of themselves, do not add to the

i inference that Fuchs had the knowledge that Beechwood

I entities and individuals were committing fraud or breaching their fiduciary duty to SHIP. Lastly, SHIP TPC describes the Agera transaction in detail but mentions Fuchs other than that he "assist[ed] in the planning of the

I Agera Transaction," which lacks 46. For

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'!s these reasons, the motion to dismiss the aiding claims against Fuchs is granted.3 6 VIII. Murray Huberfeld

abetting

Huberfeld incorporates by reference Bodner's and other moving defendants' applicable arguments. 18-cv- ,658, ECF No.

I 452, at 1. Contrary to Huberfeld's claim that only affirmative act that SHIP connects to Huberfeld in the SHIP TPC is the March 20, 2013 email discussed below, at 8, the SHIP TPC makes the following particularized against Huberfeld: (1) he participated in initial of Beechwood Re, SHIP TPC 23, 66, (2) he maintained office, phone line, and computer at Beechwood's offices and provided a full-time secretary, id. 23, 111-12; (3) on 9, 2015, Huberfeld "gave the go ahead to David Steinberg!- using a

I Platinum email address - to sell $10 million of PEDEVCO from CNO's WNIC 2013 LTC Primary trust to a bank," id. 113; and (4) he sent the March 20, 2013 e ail setting

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In addition to the knowledge and substantial assistance elements, Fuchs also focuses on the proximate element. ECF No. 262-2, at 5. However, the concept of p oximate cause is already "embedded into the substantial assista ce element," and it is established "where a plaintiff's injury as a direct or reasonably foreseeable result of the defendant conduct." Silvercreek Management, Inc. v. Citigroup, Inc.J et al., 346 F. Supp. 3d 473, 488 (S.D.N.Y. 2018).

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~eechwood forth a detailed "outline of terms" between and Beechwood, id. 64. I

Without even relying on the group pleading - which is permitted here given Huberfeld's insider see id.

I 327-28 - these allegations sufficiently plead the substantial assistance element of the aiding and abetting For substantially similar reasons as discussed in the case of

I Feit, the above alleged facts - along with insider status and the July 29, 2015 email discussed - "give rise

I I to an inference of knowledge" of the underlying,fraud and breach

I I of fiduciary duty. Krys v. Pigott, 749 F.3d 129 (2d Cir. 2014). In fact, whether SHIP sufficiently element is not disputed by Huberfeld. But in

the knowledge case, the knowledge element is adequately pled for the same reasons that it is adequately pled for the and abetting claims against Bodner, as discussed above). See1 ECF No. 322, at 35; 18-cv-6658, ECF No. 452. IX. Hokyong (Stewart) Kim

The SHIP TPC makes the following allegations

I against Kim:

I I Kim was a senior manager of Platinum ;Management. Starting in November 2013, Kim himself and other Platinum Management to WNIC and BCLIC as the Chief Risk Officer for Re and BAM. . At the time, Beechwood Re and BAM did not

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I I have a Chief Risk Officer, despite materials claiming otherwise. [SHIP TPC 1 44]

I This plan to transfer bad investments from CNO's

I account to SHIP's is revealed in a series of emails between several of the Co-Conspiratorsl 1

on July 23, 2015. Stewart Kim forwards Elliot Feit a conversation with Eric Johnson and Timothy Bischof CNO, requesting "a table specifying the potentially to be transferred into the [WNIC] Trust" and asks him to provide the materials. Feit forwards the exchange to Moti Edelstein and asks for a "listing of the belie privates" to which asks if he "want [s] the list of loans transferred/ from BCLIC Primary to SHIP-BAM showing their values[.]" Feit agrees that is how he understood request. Edelstein proceeds to send Feit a that Feit in turn forwards to Kim. The list loans to [various entities ... where each] one of these investments is related to Platinum. and every one of these loans was purchased at or par, despite Beechwood's knowledge that they were ot worth their purported value. [Id. 1 377]

I These allegations sufficiently plead the substarltial assistance

I element. Furthermore, given Kim's role as the Risk Officer of Beechwood Re and BAM I, the above conduct his

l affirmative misrepresentation as the Chief Risk'Officer of Beechwood Re and BAM I and his deep involvement the transactions

' transferring bad investments from WNIC and account to SHIP's give rise to an inference of Kim's knowledge of the

I underlying fraud by misrepresentation and breacr of fiduciary duty by harming SHIP. X. Michael Nordlicht and Kevin Cassidy

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1 The SHIP TPC makes the following against Michael Nordlicht: I

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allegations

Michael Nordlicht participated in meetings with SHIP to discuss the Agera Transactions. He directly in the closing of those transactions to detriment of SHIP. [Id. 48]

I I On June 17, 2014, Michael Nordlicht acquired 100% of the equity in Agera Energy. At the time of sale, Michael Nordlicht was a recent law school graduate who previously had worked as an analyst at Platinum for his uncle, Mark Nordlicht. It is unclear if anything, he paid for his interest in Ager a [Id. 2 7 2] The next day, on June 18, 2014, Michael sold a 4.99% interest in Agera Energy to Beechwpod Re.

It is unclear what, if anything, Beechwood Re for that interest. [Id. 273] Steinberg and Ottensoser working with thers, including Michael Nordlicht, Narain, and Kevin - were responsible for preparation of the by which various portions of the [June 2016 AGH Tlransactions] were consummated. [Id. 304] Although the above allegations may plead the assistance element, for similar reasons as the discussed

I above for dismissing the aiding and abetting against

I Fuchs, the knowledge element here is not adequately pled. In contrast to Bodner, Huberfeld, or Nordlicht, Nordlicht does not occupy as central of a role as an of the Beechwood-Platinum scheme. Although the Agera transactions are alleged to be non-arm's length deals, these de ls in and of themselves do not add to the inference that Mi hael Nordlicht

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I l duty.

I In addition to the last excerpted allegation above, Cassidy faces the following particularized allegations:!

When Cassidy was released from prison Nordlicht, Bodner, and Huberfeld installed him as managing director of Agera Energy. Cassidy was intimately involved in all aspects of the Agera Transactionsjand participated in meetings with SHIP related to the transactions ..

1 In 2016, when the Beechwood Advisors soliciting SHIP to participate as an unwitting victim June 2016 Agera Transactions where SHIP's fresh of $50 million or more was needed to advance the Cassidy met with Wegner and Lorentz of SHIP when visited New York before the deal, and Cassidy joined! in the effort to solicit SHIP on the false premise that the proposed deal was a legitimate transaction when in SHIP was duped, as he fully understood. [Id. 4 9] Cassidy and others from Agera Energy pro ided information to SHIP regarding corporation operations: and assisted

I Beechwood and Platinum in soliciting SHIP's investment outside the IMAs. [Id. 288] These allegations sufficiently plead facts substantial assistance. Furthermore, his role a director of Agera and the above alleged conduct especialll his soliciting

I of SHIP's funds, which are more closely tied the primary fraud and breach of fiduciary duty against SHIP compared to Michael Nordlicht's Cassidy's knowledge fiduciary duty.

alleged roles give rise an inference of

I of the underlying fraud breach of

I XI. David Ottensoser

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~Beechwood ~peaking, P~IHL. err c5urt's Ottensoser moved to dismiss only the claim against him, which was dismissed as discus ed above. ECF No. 277, at 1. XII. Investment Holdings Ltd.

The SHIP TPC makes the following particular·zed allegation regarding BBIHL, PBIHL's predecessor-in-interest:38

Specifically, on April 1, 2016, to an Assignment of Note and Liens (the Repo Agreement"), PGS assigned the Note to BBIL

I ULICO 2014 ... , [BBIHL] ... , BBIL (together, the "First Repo Assignees") in exchan3e for $15 million in cash, of which $2.5 (representing 16.7%) was funded from SHIP's BBIL IM funds. [SHIP TPC 281] In its "bottom-line" Order, the Court granted t emotion to dismiss the aiding and abetting claims against BIHL, because

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PBIHL incorporates by reference the personal durisdiction argument it made in its memoranda in support motions to dismiss the claims against PBIHL in the FAC and the WNIC TPC. ECF No. 347, at 13. For the reasons discussed in the

I context of the FAC and the WNIC TPC, the Court has specific personal jurisdiction over PBIHL in the of the SHIP TPC as well. In addition, PBIHL's predecessor-in-interest was a party to the First Repo Agreement, dated 2016, where SHIP claims that this was negotiated and in New York. ECF No. 361, at 28. 38

As PBIHL correctly points out, PBIHL was in the SHIP TPC's definition of "Platinum Entities," Entities," or "Co-Conspirators," so, strictly none of Counts 1, 2, and 7 were ever alleged against ECF No. 361, at 1 (referencing SHIP TPC 1 nn. 1-3). The analysis here assumes this error did not exist, althoug this error alone is fatal to SHIP's claims against PBIHL.

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6urt this allegation alone fails to plead knowledge the primary

I I . fraud and breach of fiduciary duty. It would be speculative to infer BBIHL's knowledge of the primary fraud or of

I I fiduciary duty from this minor role alone as of a complicated series of Agera transactions. This role is in stark contrast to, for instance, BAM I's involvement

I in the Montsant, PEDEVCO, and Agera transactions

1 . Indeed, SHIP's aiding and abetting claims against PBIHL "appear to be an attempt to create liability by association." No. 347, at 9.

I XIII.

I Daniel Saks I The SHIP TPC makes the following particula1ized allegations, among others, against Saks: (1) received and was involved in commenting on the third-party reports sent to BAM I, which included inflated of the Beechwood transactions with PPVA, SHIP TPC 339; (2) Saks signed a Note Purchase Agreement on SHIP's to acquire a note from Montsant Partners, LLC, a wholly portfolio company of Platinum Partners Value Arbitrage LP, id. 249-51;

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(3) despite the prices of oil and gas rapidly

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Saks disputes the allegation that the loan to Montsant using SHIP's money, pursuant to the Note Agreement that Saks signed, was effectively because it was guaranteed by Nordlicht and Kalter. ECF No. 272, at 3-4. However, at this motion to dismiss stage, the takes the

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I declining and PEDEVCO's financial condition worsJning, in April

I 2015, BAM I purchased, on SHIP's behalf, the notes, which were then assigned to SHIP pursuant to a Saks executed on SHIP' s behalf, id. 2 61; (4) Saks ,"was involved in

I negotiating amendments to the Golden Gate Oil

I I documents," id. 37; and (5) Saks signed a withdrawal notice document in the amount of $3,500,000 in performahce fee from

I I SHIP' s account, id. 347. These allegations suf!ficiently plead substantial assistance. Silvercreek Mgmt., Citigroup,

I Inc., 346 F. Supp. 3d 473, 487 (S.D.N.Y. 2018) r[S]ubstantial assistance can take many forms, such as transactions or helping a firm to present an enhanced financ'al picture to others."). For similar reasons as discussed abo e in the context of Feit, Huberfeld, and Kim, Saks' role as the hief Investment

I I I allegations that this loan was effectively undelcollateralized more so given that the post-closing collateraliiation requirement was not subsequently satisfied atltheir face value. SHIP TPC 253-55. Furthermore, these obligations had not been performed by Nordlicht and Kalter as of the date of filing of the SHIP TPC. Id. 256. ,

I Saks argues that he resigned from BAM I on 31, 2015, and so he cannot be held liable for the 2016 transactions that restructured the PEDEVCO debt to subordinate priority for repayment under Beechwood's rights for repayment· ECF No. 272, at 2, 4 (referencing SHIP TPC 258-67). But allegedly executed an Assignment Agreement dated April 2015 through which SHIP acquired a secured note issued by in April 2015, which was allegedly problematic. SHIP 261.

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splely at/ Officer of Beechwood Re and BAM I and his and extensive

' involvement in the allegedly problematic described here 41

give rise to a strong inference of Saks' of the primary fraud and breach of fiduciary duty. XIV. Will Slota

i The SHIP TPC makes the following against Slota:

[Slota] was a senior manager of Platinum!Management who, starting in November 2013, misrepresented himself to WNIC and BCLIC as the Chief Operating Beechwood Re and BAM .... Slota and the Co-Conspirators lived this lie for several years, starting in 2013, when Slota's paychecks were coming from Management.

Slota served as the enforcer integrated Platinum-Beechwood conspiracy for the deception that the Beechwood Entities no connection with Platinum, ensuring that the Co-Cons irators who were misrepresenting themselves as certain of the Beechwood Entities' officers and managers did NOT their "@platinumlp" domain (or otherwise evidence of their Platinum affiliation) when with those outside of the conspiracy. . Slota also the point person responsible for finding and a valuation firm that would make the Beechwood Advisors' investments in Platinum Funds and Platinum-related appear legitimate to the outside world. [SHIP I 45] [I]n a series of emails from March 11, among Nordlicht, Slota, Kim, and Levy, after Slota for making eight fraudulent agreements with a prime broker in order to open the CNO trust Nordlicht made this plan clear: "let's all please focus on our respective jobs. Stew [Kim] needs to lo k at risk, u In this respect, Saks is incorrect in that SHIP's aiding and abetting claim against him depends on Saks' position as Chief Investment Officer to supervise SHIP's investments in 2015 and his prior employment Platinum which allegedly allowed him to be aware of "all aspeots of the Platinum-Beechwood scheme." ECF No. 272, at 7 (!emphasis).

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i [Slota] need to do blocking and tackling [prime brokerage] account openings. [Id. 116] Beechwood always intended to defer to valuations. For example, in a series of emails from March 19, 2014, Will Slota, Naftali Manela, Feit, and David Levy discuss putting together valuation policy. [Id. 335] For substantially similar reasons as discussed in the context of Feit, Huberfeld, Kim, and Saks, these] allegations state aiding and abetting claims against Slota. particular,

I his role as the Chief Operating Officer of Beechwood Re and BAM

I I and the above allegations - especially that was in

l charge of opening allegedly fraudulent prime account -

I rise to an inference of Slota's knowledge df the primary fraud and breach of fiduciary duty.

David Steinberg 42

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Steinberg argues that all the claims against are barred by Rule 14 of the Federal Rules of Civil allegedly because "Rule 14(a) does not allow a third-parti complaint to be founded on a defendant's independent cause of action against a third-party defendant, even though arising out the same occurrence underlying plaintiff's claim, becaus¢ a third-party complaint must be founded on a third party's actual or potential liability to the defendant of all or part of th¢ plaintiff's claim against the defendant." ECF No. 388, at As SHIP correctly points out, the SHIP TPC did not rely on Rule 14 to join Steinberg; instead, SHIP made valid crossclaims against other co-defendants pursuant to Rule 13(g) and joined Steinberg to those crossclaims pursuant to Rule} 18 and 20. See Fed. R. Civ. P. 18 (a) ("A party asserting a counterclaim, crossclaim, or third-party claim may join, as or alternative claims, as many claims as it has inst an opposing

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against

[Steinberg was] a portfolio manager, investment advisor, and co-chief risk advisor for:PPVA, and was at all relevant times a member of the yaluation committee that had overall responsibility for valuing PPVA's assets. Steinberg was involved in nearly all aspects of the Scheme. He began working as a co-investment adyisor to BAM in 2014, for which he was paid performance fees. Steinberg participated in the Management valuation committee and help set the inflated PPVA valuations, which caused the inflated valuations represented by the Beechwood Advisors. [SHIP TPC § 4 7] Huberfeld also maintained active contrpl over Beechwood investments. On March 9, he gave the "[g] o ahead" to David Steinberg - a Platinum email address - to sell $10 million worth of Pedevco from CNO's WNIC 2013 LTC Primary to a third- party bank. [Id. § 113] [In the context of the Montsant transaction,] Nordlicht and David Steinberg, both P atinum executives, executed the Note Purchas Agreement on behalf of Montsant. [Id. § 240b; see lso § 251]

1 David Steinberg, a senior vice and portfolio manager for Platinum, joined the board of PEDEVCO by July 2015. [Id. § 257] I Further, on May 23, 2014, Ari Hirt, Management portfolio manager for Golden Gate told

Levy, Saks, Steinberg a potential party."); Fed. R. Civ. P. 20 (a) (2) ("Persons . . may be joined in one action as defendants if: (A) any right relief is asserted against them jointly, severally, or the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or and (B) any question of law or fact common to all will arise in the action.") . 1

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~he Augu~t third party lender had brought up Elk's SEC filing, writing "the issue is that it discloses the value of the option and herefore pegs [Golden Gate's] value at $60M. This is ultimately a marketing issue that could be dealt but something we should all be aware of. [Id. § 333] For substantially similar reasons as discussed a ove for other moving defendants, these allegations adequately lead substantial assistance, especially his signing o relevant

I transactional documents. Silvercreek Mgmt., v. Citigroup, Inc., 346 F. Supp. 3d 473, 487 (S.D.N.Y. 2018) assistance can take many forms, such as transactions or helping a firm to present an enhanced picture to others."). Indeed, the above allegations as a especially

' combined with the allegation that he was a manager,

I investment advisor, and co-chief risk advisor PPVA, a board member of PEDEVCO, and a member of the committee "give rise to an inference of [Steinberg's] kno ledge" of the

I ' overvaluation of Golden Gate Oil and the length nature

I of the PEDEVCO and Agera transactions, as well the primary

I breach of fiduciary duty associated with those alleged frauds.

I Krys v. Pigott, 749 F.3d 117, 129 (2d Cir.

Conclusion In sum, this Opinion and Order set forth

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reasons for the Court's "bottom-line" Order issued on 18, 2019, which

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October!:_, is hereby reaffirmed. In addition, it grants Ste'nberg's motion to dismiss the unjust enrichment claim and the c'vil conspiracy claim in the SHIP TPC against him, while denying Steinberg's motion in all other respects.

The Clerk is directed to close the entry the docket

I number 387 on the Cyganowski docket, 18-cv-12018.

SO ORDERED. Dated:

New York, NY

2019

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