Presentment Date and Time: March 21, 2024 at 4:00 p.m. (Prevailing Eastern Time)

Objection Date and Time: March 14, 2024 at 4:00 p.m. (Prevailing Eastern Time)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	Chapter 11
Orion HealthCorp, Inc., et al.,	Case No. 18-71748-67 (AST) Case No. 18-71789 (AST) Case No. 18-74545 (AST)
Debtors.	(Jointly Administered)
Howard M. Ehrenberg in his capacity as Liquidating Trustee of Orion Healthcorp, Inc., et al., CHT Holdco, LLC, and CC Capital CHT Holdco LLC,	
Plaintiffs,	
v.	
Parmjit Singh Parmar (a/k/a Paul Parmar), Sotirios Zaharis, Ravi Chivukula, Pavan Bakhshi, Naya Constellation Health, LLC, Alpha Cepheus, LLC, Constellation Health Investment, LLC, Constellation Health, LLC, First United Health, LLC, Taira no Kiyomori LLC, Blue Mountain Healthcare, LLC, PBPP Partners LLC, Axis Medical Services, LLC, Vega Advanced Care LLC, Pulsar Advance Care LLC, Lexington Landmark Services LLC, MYMSMD LLC, PPSR Partners, LLC, AAKB Investments Limited, Aquila Alpha LLC, 2 River Terrace Apartment 12J, LLC, Dioskouroi Kastor Polydeuces, LLC, 21B One River Park LLC, Aquila Alshain LLC, Ranga Bhoomi LLC, Harmohan Parmar (a/k/a Harry Parmar), Kiran Sharma, The Red Fronted Macaw Trust, Joel Plasco, and John Does 1 through 100 inclusive,	Adv. Pro. No. 18-08053 (AST)
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF CC CAPITAL CHT HOLDCO LLC'S AND CHT HOLDCO, LLC'S MOTION TO DISMISS COUNTERCLAIMS

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Pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), plaintiffs CC Capital CHT Holdco LLC ("CC Holdco") and CHT Holdco, LLC ("CHT Holdco"), by and through undersigned counsel, respectfully submit this memorandum of law in support of their contemporaneously filed Motion to Dismiss Counterclaims, which seeks dismissal of the counterclaims filed by Defendants Constellation Health LLC, Constellation Health Investment LLC, First United Health, LLC, Naya Constellation Health LLC, Vega Advanced Care LLC, Pulsar Advance Care LLC, Lexington Landmark Services LLC, 2 River Terrace Apartment 12J, LLC, 21B One River Park LLC, Aquila Alshain LLC, Ranga Bhoomi LLC, PPSR Partners, LLC, Taira no Kiyomori LLC, Axis Medical Services, LLC, and The Red Fronted Macaw Trust (the "Parmar Entities") in the *Answer to Second Amended Adversary Proceeding Complaint with Counterclaims* [Doc. No. 525] (the "Answer" or "Counterclaims").[1]

INTRODUCTION

The Parmar Entities' Counterclaims for fraudulent misrepresentation and breach of fiduciary duty against CC Holdco and CHT Holdco are nothing more than the perpetrator of the fraud—once again—trying to shift responsibility for his crimes by attacking his victims and seeking to relitigate previously dismissed and released claims. As set forth in detail in the Second Amended Adversary Proceeding Complaint, over the course of many years, Paul Parmar ("Parmar") and his co-conspirators, by and through various entities controlled directly or indirectly by Parmar, including the Parmar Entities, committed a complex, massive fraud, engaging in various fraudulent securities offerings, fraudulent transactions, financial statement fraud and other

[1] The first 571 paragraphs of the Answer are referred to herein as the "Answer." The next 303 paragraphs of the Answer (which appear on pages 59–121 of the Answer) are referred to herein as the "Counterclaims."

criminal misconduct in connection with the business operations of Constellation Healthcare Technologies, Inc. ("CHT"), Orion HealthCorp, Inc. ("Orion"), and the other affiliated Debtors. Ultimately, Parmar's fraud culminated in the transaction in which CC Holdco, as the majority owner of CHT Holdco, was fraudulently induced to fund $82,502,269.25 of the total $212,502,269.25 in proceeds used to fund CHT Holdco's acquisition of one hundred percent (100%) of the shares of CHT (the "Merger"). At closing, on January 30, 2017, Parmar and various entities he controls fraudulently obtained millions of dollars in Merger proceeds from CC Holdco and CHT Holdco.

As a result of Parmar's fraud, Parmar was arrested, and on May 15, 2018, federal prosecutors filed a criminal complaint in the United States District Court for the District of New Jersey charging Parmar and certain of his co-conspirators with securities fraud for their criminal conduct perpetrated against CC Holdco, CHT Holdco, and others. While the criminal case remains pending and Parmar awaits trial, one of Parmar's co-conspirators, Pavandeep Bakhshi, a Parmar associate and former member of the CHT board of directors, has already pleaded guilty. In addition to the criminal charges, the SEC filed a civil complaint against Parmar and his co-conspirators alleging securities fraud for, among other things, their material misrepresentations in connection with the Merger about CHT's historical and expected future revenues and EBITDA and its purported customer base.

The Parmar Entities' Counterclaims unbelievably attempt to convince this Court that federal prosecutors, the SEC, and the Debtors are all wrong in concluding that the Parmar Entities—via Parmar and his co-conspirators—perpetrated a fraud. Their attempt to relitigate previously dismissed and released claims is improper and must be dismissed for multiple reasons.

First, the Counterclaims are barred by the statute of limitations as the claims arise out of purported misrepresentations and omissions which occurred prior to the closing of the Merger, on January 30, 2017, or shortly thereafter. The Counterclaims, which were not filed until January 2, 2024, are both barred as a matter of law. Thus, the Court should dismiss them with prejudice.

Second, the Counterclaims are barred by res judicata as they are based on allegations relating to the same facts, transactions, and occurrences that have been previously, and unsuccessfully, pled in another jurisdiction. Parmar and the Parmar Entities asserted claims in the United States District Court for the District of New Jersey on March 26, 2019 against CC Holdco, CHT Holdco, and others alleging, among other things, that they engaged in a conspiracy to actively deceive Parmar and entities he controls in order to get a much lower price for CHT, that they obstructed due diligence and financing processes, and that they fraudulently induced them to enter into the Merger. The Honorable Madeline Cox Arleo, United States District Judge for the District of New Jersey, dismissed these claims ***with prejudice***. Thus, the Court should dismiss the Counterclaims with prejudice.

Third, the Counterclaims are precluded by Voting and Support Agreements and Releases of Claims (the "Releases") executed by Parmar and the Parmar Entities in connection with the Merger. The Releases provide that each of the Parmar Entities, on behalf of themselves and their affiliates, "fully, finally and irrevocably releases" CHT Holdco and its affiliates from all claims "of every kind and nature whatsoever . . . occurring at any time at or prior to the Closing with respect to the Company, the shares of Common Stock, or the Merger." In addition to the explicit release of claims, the Parmar Entities agreed not to assert any claim in any forum relating to the Merger. The Parmar Entities cannot avoid the force of the Releases, even by (insufficiently) alleging they were obtained by fraud as these claims have already been rejected by Judge Arleo in

the United States District Court for the District of New Jersey when finding the Releases preclude nearly identical claims.

Fourth, the Parmar Entities lack standing under Rule 12(b)(1) to bring certain of the Counterclaims because they are derivative claims that belong solely and exclusively to the Trustee. The Counterclaims are based on alleged misrepresentations, omissions, and breaches of fiduciary duty owed ***to CHT*** and they cannot be asserted by the Parmar Entities. Significantly, in connection with a settlement reached years ago and approved by this Court on August 21, 2019, the Trustee has already settled and released these claims against CC Holdco and CHT Holdco.

Finally, the Parmar Entities fail to state a fraudulent misrepresentation claim under Rule 12(b)(6) because they fail to plead, with the requisite particularity, each element of the claim. Similarly, the Parmar Entities fail to plead, with the requisite particularity, each element of a breach of fiduciary duty claim, particularly where no fiduciary duty was owed by CC Holdco to the Parmar Entities and where the claim is based on a breach of contract, rather than a breach of fiduciary duty.

Because of the numerous failures to adequately plead the Counterclaims, many of which are incurable, the Court should dismiss the Counterclaims with prejudice and put an end to Parmar's and the Parmar Entities' costly and frivolous litigation against the victims of their fraud.

STATEMENT OF FACTS

I. The Parties

CC Holdco and CHT Holdco are Delaware limited liability companies formed in anticipation of the Merger. Counterclaims, ¶¶ 12–13. As a result of the Merger, CC Holdco owns a majority of the membership interests in CHT Holdco. *Id.* at ¶ 73. Non-party CC Capital Management, LLC ("CC Capital") is a Delaware limited liability company and the sole member of CC Holdco. *Id.* at ¶ 12.

The Parmar Entities include 15 entities, each of which the Counterclaims allege held a direct or indirect ownership interest or were shareholders in CHT. *Id.* at ¶¶ 1, 3. While the Parmar Entities allege that they collectively held an approximately 68% controlling interest in CHT prior to the Merger, they specifically allege only that Constellation Health LLC ("CHLLC"), Constellation Health Investment LLC ("CH Investment"), First United Health, LLC ("FUH"), and Naya Constellation Health LLC ("Naya"), were CHT shareholders prior to the Merger. *Id.* at ¶¶ 4–9. Following the Merger, none of the Parmar Entities allege that they were (or are) CHT shareholders. *Id.* Rather, CHLLC, CH Investment, FUH, and Naya allege that they were shareholders of Alpha Cepheus, LLC ("Alpha Cepheus", which is not defined as a Parmar Entity), and that Alpha Cepheus held a minority interest in CHT Holdco.[2] *Id.*

II. The Merger

In December of 2014, CHT—which was wholly owned by CHLLC—consummated a "go-public" transaction (the "Go-Public Transaction"), after which it was publicly traded on the London Stock Exchange's Alternative Investments Market ("AIM"). Counterclaims, ¶¶ 35–36. As noted above, following the consummation of the Go-Public Transaction, the Parmar Entities allege that they collectively owned 68% of the outstanding shares of CHT. *Id.* at ¶¶ 9, 37. The remaining shares of CHT were owned by public shareholders. *Id.*

In 2016, CHT and CC Capital entered into discussions regarding the Merger—a potential "go-private" transaction whereby CHT would deregister from the AIM, and affiliates of CC Capital would acquire a controlling interest in CHT. *Id.* at ¶¶ 54, 189. On November 24, 2016, CHT, CHT Holdco, CC Capital, Orion, and CHT Merger Sub, Inc. entered into the Agreement and Plan of Merger (the "Merger Agreement"), which memorializes the terms of the Merger. *Id.* at ¶

[2] The Court entered a default judgment against Alpha Cepheus on July 1, 2022. *See* Doc. No. 426.

189; Answer ¶¶ 105–06. On the same day, the Parmar Entities contributed all of their shares of CHT common stock to Alpha Cepheus. Counterclaims, ¶¶ 8, 73; Answer, ¶ 112. In turn, Alpha Cepheus contributed all of its shares of CHT common stock to CHT Holdco and held a minority interest in CHT Holdco. Answer, ¶ 112.

To effectuate the Merger, a number of CHT shareholders—including Parmar and CHLLC, FUH, Vega Advanced Care LLC, Pulsar Advance Care LLC, Lexington Landmark Services LLC, PPSR Partners, LLC, and Axis Medical Services, LLC—entered into Releases dated November 24, 2016. Counterclaims, ¶ 198; *see also* Voting and Support Agreements and Releases of Claims, attached to the Declaration of J. Timothy Mast ("Mast Decl.") as Exs. A–H. Pursuant to these Releases, the Parmar Entities committed to vote in favor of the transaction and sell their shares as contemplated by the Merger Agreement and other transaction documents. *See* Mast Decl., Exs. A–H. Significantly, Parmar and the Parmar Entities, on behalf of themselves and their affiliates, also agreed to release and discharge CHT, CHT Holdco, and each of their respective affiliates, directors, among others, from any claims "occurring at any time at or prior to the Closing with respect to the Company . . . or the Merger." *Id.* at §4(d).

The Merger closed on or about January 30, 2017, on which date Alpha Cepheus transferred the controlling interest in CHT Holdco to CC Holdco. Answer, ¶¶ 112, 120–21. The Parmar Entities allege that following the closing of the Merger: (i) CHT Holdco owned 100% of CHT's equity interests; (ii) CC Holdco owned 50.4% of the outstanding shares of CHT Holdco; and (iii) Alpha Cepheus owned 49.6% of the outstanding shares of CHT Holdco. Counterclaims, ¶¶ 73, 81; Answer, ¶ 112.

III. Related Filings In This Court And Other Jurisdictions[3]

A. Parmar Is Arrested And Indicted For His Fraud

On May 15, 2018, the United States of America filed a criminal complaint against Parmar, Sotirios Zaharis ("Zaharis"), and Ravi Chivukula ("Chivukula"), alleging two counts of securities fraud for the defendants' fraudulent actions before and during the Go-Private Transaction. *See U.S. v. Parmjit Parmar et al.*, No. 2:18-cr-00735-MCA, ECF 1 (D.N.J. May 15, 2018), attached to the Mast Decl. as Ex. I. The Securities and Exchange Commission ("SEC") also brought a parallel civil action charging Parmar with securities fraud and recognizing that CC Capital was the victim of Parmar's schemes. *See U.S. Sec. and Exchange Comm. v. Parmjit Parmar*, No. 2:18-cv-09284, ECF 1 (D.N.J. May 16, 2018). Parmar was arrested, but Zaharis and Chivukula had apparently fled the country as they could not be located, up to this date. By December 13, 2018, a grand jury indicted Parmar, Zaharis, Chivukula, and Pavandeep Bakhshi ("Bakhshi") for one count conspiracy to commit securities fraud, one count securities fraud, and one count wire fraud. *See U.S. v. Parmjit Parmar et al.*, No. 2:18-cr-00735-MCA, ECF 32 (D.N.J. Dec. 13, 2018), attached to the Mast Decl. as Ex. J ("Indictment").

The Indictment alleges that from May 2015 through September 2017, Parmar and his co-conspirators organized a complex fraudulent scheme designed to falsely inflate the value of CHT. Indictment, at pp. 4–5. The government alleges that this scheme included (1) falsifying and fabricating bank and accounting records of subsidiaries; (2) generating fake income streams and

[3] CC Holdco's and CHT Holdco's brief refers to the filings in this Court, the criminal and SEC actions against Parmar, and civil filings initiated by Parmar and the Parmar Entities in the United States District Court for the District of New Jersey, all of which can be considered by the Court at the motion to dismiss stage. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) ("courts routinely take judicial notice of documents filed in other courts . . . to establish the fact of such litigation and related filings"); Fed. R. Evid. 201(b)(2).

fabricating CHT customers and its subsidiaries; (3) creating fictitious operating companies that CHT purportedly acquired in sham acquisitions; and (4) making other material misrepresentations and omissions to CC Capital, lenders, and other investors. *Id.* Through this fraudulent scheme, Parmar and his co-conspirators caused the valuation of CHT to exceed $300 million for purposes of financing the Merger, far exceeding its actual value. *Id.* Further, the Indictment alleges that from April 2016 through January 30, 2017, Parmar and his co-conspirators used manipulative and deceptive actions and made untrue statements of material facts, and omitted material facts necessary to make statements made not misleading, in connection with various CHT stock transactions. *Id.* at pp. 10–11.

Parmar filed a motion to dismiss the Indictment, and the court denied his motion in its entirety on July 13, 2022. *See U.S. v. Parmjit Parmar*, No. 2:18-cr-00735-MCA, ECF 125 (D.N.J. July 13, 2022). On March 21, 2023, one of Parmar's primary co-conspirators, Bakhshi, pled guilty. *Id.* at ECF 186, 199. Currently, the criminal case against Parmar has been continued through March 31, 2024. *Id.* at ECF 207.

B. Parmar And Certain Of The Parmar Entities File A Crossclaim Against CC Holdco And CHT Holdco In This Adversary Proceeding

Parmar, FUH, and CHLLC filed a crossclaim against CC Holdco and CHT Holdco on July 10, 2018 in this Court (the "Crossclaim"). *See* Doc. No. 51. The Crossclaim told a nearly identical story as the one told in the current Counterclaims, attempting to allege that CC Holdco and CHT Holdco were "part of an ongoing scheme to unlawfully enrich themselves at the Debtors' creditors, Parmar and the Parmar Entities' expense." *Id.* at ¶ 201. Specifically, it alleged that CC Capital manipulated the valuation process during the Merger by instructing Parmar "to provide a watered down model with no acquisitions, no projected growth, and an increase in anticipated future costs . . . to ensure [the] valuation of CHT was as low as possible." *Id.* at ¶ 240. Parmar, FUH, and

CHLLC alleged that CC Capital orchestrated a coercive "go-shop" period "to ensure no other buyer could outbid CC Capital." *Id.* at ¶ 278. They further claimed that when Parmar wanted to walk away from the deal, CC Capital made false promises to Parmar to induce him to complete the Merger. *Id.* at ¶ 246.

On July 30, 2018, CC Holdco and CHT Holdco filed a motion to dismiss the Crossclaim in its entirety. *See* Doc. No. 68. Shortly thereafter, Parmar, FUH, and CHLLC voluntarily dismissed the Crossclaim without prejudice. *See* Doc. No. 176.

C. Parmar And Certain Of The Parmar Entities Bring Claims Against CC Holdco, CHT Holdco, And Others In The United States District Court For The District Of New Jersey

Two months after filing the Crossclaim with this Court, Parmar and several of the Parmar Entities filed a similar lawsuit in the United States District Court for the District of New Jersey on September 26, 2018 against CC Holdco, CHT Holdco, and others, captioned *Alpha Cepheus, LLC v. Chu*, No. 18-14322 (D.N.J.). In particular, Parmar, FUH, CHLLC, Alpha Cepheus, Naya, and CH Investment brought two securities fraud claims, six racketeering claims, and two claims for violations of the Stored Communications Act against CC Holdco, CHT Holdco, and others (the "NJ Action"). Judge Arleo dismissed the case on December 20, 2019 ***with prejudice***. *See Alpha Cepheus, LLC v. Chu*, No. 18-14322, 2019 WL 7047206 (D.N.J. Dec. 20, 2019), attached to the Mast Decl. as Ex. K.

Spinning a tale similar to the prior Crossclaim and the Parmar Entities' current Counterclaims, Parmar and the Parmar Entities' complaint in New Jersey alleged that CC Holdco, CHT Holdco, and others engaged in a ***conspiracy and a course of conduct that actively deceived Parmar and entities he controls and fraudulently induced them to enter into Merger*** between CC Capital and CHT on January 30, 2017. *See Alpha Cepheus, LLC v. Chu*, No. 18-14322, ECF 65 at ¶ 299 (D.N.J. Mar. 26, 2019), attached to the Mast Decl. as Ex. L ("NJ Compl."). The

complaint alleged that when Parmar purportedly decided to walk away from the Merger, CC Holdco, CHT Holdco, and others manipulated closing documents to induce Parmar and various of his entities into contributing more equity than necessary and falsely promised Parmar that he would remain CEO of CHT. *Id.* at ¶ 93. Further, the New Jersey complaint alleged that CC Capital told Parmar that although Bank of America ("BOA") did not want to finance the Merger, CC Capital convinced BOA to finance on CC Capital's terms. *Id.* at ¶¶ 106–07. The complaint further alleged that CC Capital actively concealed and delayed the impending New York Network Management, LLC ("NYNM") and National ACO, LLC ("NACO") acquisitions from the public shareholders of CHT at the time of the Merger to get a much lower price for CHT. *Id.* at ¶¶ 69, 199, 276(b).

Dismissing the securities fraud claims with prejudice, the court found that they "are barred by the [Releases], and this deficiency cannot be cured by amendment." *Alpha Cepheus, LLC*, 2019 WL 7047206, at *10. The court considered the Releases on motion to dismiss, finding them integral to the complaint, and found that they expressly released all claims against CC Holdco and CHT Holdco, and, in particular, "clearly and unambiguously release[] the securities fraud claims . . . because they are claims related to representations from the sale of CHT." *Id.* at *5–6. The court also rejected Parmar's arguments that the Releases should be set aside because they were fraudulently induced into them and they were premised on false information, finding such arguments a "misreading of the law." *Id.* at *6. Finally, the court found that the securities fraud claims were inadequately pled as they did not identify any statement made by each defendant or reliance thereof by the plaintiffs. *Id.* at *7–8.

D. The Bankruptcy Plan And Settlement Agreement

On January 6, 2019, the above-captioned Debtors filed that certain *Debtors' Third Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code dated January 6, 2019* [No. 18-71748 (AST), Doc. No. 645] (the "Plan"). On February 26, 2019, this Court

entered an order confirming the Plan [No. 18-71748 (AST), Doc. No. 701] (the "Confirmation Order"). A liquidating trust (the "Liquidating Trust") was created pursuant to Section 6.3 of the Plan. Howard Ehrenberg (the "Trustee") has been appointed as the liquidating trustee of the Liquidating Trust. Pursuant to Section 11.14 of the Plan and Section 11(a) of the Confirmation Order, the Trustee has the exclusive right to pursue ***all*** causes of action on behalf of the Debtors, including CHT. And on August 21, 2019, the Plaintiffs in this adversary proceeding entered an agreement whereby the Trustee released CC Capital, CC Holdco and CHT Holdco from all claims arising from, out of, or in connection with: (a) the Chapter 11 Cases; (b) the above captioned adversary proceeding, (c) and the Merger. *See* Doc. No. 221-1 (the "Settlement Agreement"), ¶ 8.1. This Court approved the Settlement Agreement on October 22, 2019. *See* Doc. No. 232.

IV. The Parmar Entities File Counterclaims Against CC Holdco And CHT Holdco In This Adversary Proceeding

On January 2, 2024, the Parmar Entities filed their Answer and Counterclaims in this Court, asserting a claim for fraudulent misrepresentation against CC Holdco and CHT Holdco and a claim for breach of fiduciary duty against CC Holdco. These claims track, in all relevant ways, the prior Crossclaim filed in this Court and the claims asserted in the NJ Action.

Fraudulent Misrepresentation. The Parmar Entities allege that CC Holdco and CHT Holdco made four "material misrepresentations and omissions" in the course of negotiating and consummating the Merger, including (1) "[f]ailing to disclose material financial information to CC Capital's Due Diligence Team" for the purpose of "acquiring CHT at an unreasonably low value"; (2) "[a]ssuring the Parmar Entities that the fees, expenses and payments made in connection with the negotiations with NACO, and the [$10 million] deposit to NACO, would be reimbursed"; (3) "[b]locking the Parmar Entities from any involvement with the due diligence and financing, going so far as to hire CC Capital's own attorneys to act on CHT's behalf for purposes

of negotiating financing with BOA"; and (4) "[p]romising the [Parmar Entities] 8% ownership in CC Capital and 10% ownership in its new evergreen fund as [an] incentive to close the [Merger]." Counterclaims, ¶¶ 270, 291.

Breach of Fiduciary Duty. The Parmar Entities allege that CC Holdco breached fiduciary obligations owed ***to CHT and its shareholders*** by allegedly (1) "failing to disclose and in fact delaying the NACO and NYNM acquisitions at the time of the [Merger], because they knew that this information would increase the value of CHT and potentially kill the Transaction," *id.* at ¶ 299; and (2) "instructing [its] employees to stop all new sales and acquisitions, because continuing sales and acquisitions would significantly increase the value of CHT," *id.* at ¶ 300. The Parmar Entities also allege that CC Holdco breached its fiduciary duties of good faith by "failing to reimburse the Parmar Entities for all payments and expense incurred to engage NACO, including the $10 million loan extended by the Parmar Entities, as CC Holdco had promised." *Id.* at ¶ 302.

ARGUMENT

I. Motion To Dismiss Standard.

Rule 12(b)(6), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b), governs a motion to dismiss for failure to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal quotations omitted). Conclusory allegations are not sufficient to survive a motion to dismiss. *In re Adelphia Commc'ns Corp*., 359 B.R. 54, 60 (Bankr. S.D.N.Y. 2006) ("[t]he court is not . . . bound to accept as true legal conclusions or theories"). Rather, a claim "is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *In re Fierro*, 616 B.R. 596, 606 (Bankr. E.D.N.Y. 2020) (*quoting Ashcroft*, 556 U.S. at 678). A pleading must have

"specific and detailed factual allegations to support the claim." *In re Adelphia Communications Corp.*, 359 B.R. at 60.

II. The Counterclaims Are Barred By The Statute Of Limitations.

Both the fraudulent misrepresentation and breach of fiduciary duty claims are barred by the statute of limitations, and, therefore, must be dismissed with prejudice.

Fraudulent Misrepresentation. Under New York law, the time within which an action based upon fraud must be commenced "shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." N.Y. C.P.L.R. § 213(8). A cause of action for fraud begins to accrue at the time the fraud is committed. *Matter of Hersh*, 156 N.Y.S.3d 243, 248 (N.Y. 2021). Alternatively, whether a plaintiff should have discovered the fraud is an "objective" test and can be determined through actual or constructive knowledge. *Prestandrea v. Stein*, 692 N.Y.S.2d 689, 691 (N.Y. App. Div. 1999) (citations omitted); *Espie v. Murphy*, 825 N.Y.S.2d 537, 539 (N.Y. App. Div. 2006) ("A plaintiff's ability to discover an alleged fraud depends on whether he or she 'possessed knowledge of facts from which the fraud could reasonably have been inferred.'"); *Watts v. Exxon Corp.*, 188 A.D.2d 74, 76 (N.Y. Sup. Ct. 1993) ("In order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts 'so that, with reasonable diligence, she could have discovered the fraud.'").

Here, the crux of the Parmar Entities' allegations stem from CC Holdco's and CHT Holdco's alleged actions and statements leading up to the closing of the Merger. *See, e.g.*, Counterclaims, ¶ 3 (alleging "damages due to the unscrupulous and fraudulent pattern of activity by the CC Capital Plaintiffs that began in or around September of 2015"); *id.* at ¶ 246 (alleging that in January 2017 they "did not see Chu taking any steps to make his representations and

assurances concrete with any paperwork"); *id.* at ¶ 291 (alleging failure to disclose "material financial information" and "[b]locking" the Parmar Entities' "involvement with due diligence and financing" throughout 2016).

Because all of the alleged fraudulent misrepresentations occurred during due diligence and the negotiation of the Merger to purportedly "induce" the Parmar Entities to close the deal, the cause of action accrued at or prior to the closing of the Merger on January 30, 2017. *Id.* at ¶¶ 3, 246, 291. Thus, the six-year limitations period for these claims expired no later than January 30, 2023. *See Espie*, 825 N.Y.S.2d at 539 (finding alleged fraud arising from closing agreement accrued at the time the agreement was executed). Because the Parmar Entities had actual knowledge of the alleged fraud, or knowledge of the facts from which the alleged fraud could be reasonably inferred, at the closing of the Merger on January 30, 2017, the two-year limitations period running from the discovery of the fraud expired no later than January 30, 2019, and does not save their claims. *See* Counterclaims, ¶ 291; *see also Prestandrea*, 692 N.Y.S.2d at 691; *Espie*, 825 N.Y.S.2d at 539.[4] Thus, the statute of limitations expired on or around January 30, 2023, at the latest, and the fraudulent misrepresentation claim is time-barred and must be dismissed, with prejudice.

[4] Unquestionably, the Parmar Entities had full knowledge of their purported fraud claims when the Crossclaim was filed in this adversary proceeding on July 10, 2018, and when the NJ Action was filed on September 26, 2018, where they allege overlapping theories and a nearly identical fraudulent scheme as that alleged in the operative Counterclaims here. *See supra* pp. 8–10; *see also infra* pp. 16–23. Even under the most generous discovery rule, the claims would have expired in 2020 and the Counterclaims are time-barred. Notably, neither the filing of the Crossclaim in this Court nor the filing of the NJ Action tolls the statute of limitations. *See Gutierrez v. Vergari*, 499 F.Supp. 1040, 1049 (S.D.N.Y. 1980) ("the statute of limitations is not tolled by bringing an action that is later voluntarily dismissed"); *Harmon v. Patrolman's Benevolent Ass'n*, 199 F. App'x. 46, 48 (2d Cir. 2006) ("[t]he dismissal with prejudice of a lawsuit does not toll the statute of limitations"); *EB Brands Holdings, Inc. v. McGladrey, LLP*, 62 N.Y.S.3d 134, 135 (N.Y. App. Div. 2017).

Breach of Fiduciary Duty. Under New York law, the limitations period for a breach of fiduciary duty claim is three years where, as here, the plaintiff seeks monetary relief. *See* N.Y. C.P.L.R. § 214(4); *see also Cusimano v. Schnurr*, 137 A.D.3d 527, 529 (N.Y. App. Div. 2016). The claim accrues at the time the breach of the duty occurs, "even though the injured party may not know of the existence of the wrong or injury." *Jadidian v. Goldstein*, 210 A.D.3d 969, 179 N.Y.S.3d 140, 141 (N.Y. App. Div. 2022) (citations omitted); *see also Cator v. Bauman*, 39 A.D.3d 1263, 1264 (N.Y. App. Div. 2007) (finding statute of limitations on investor's breach of fiduciary duty claim against broker accrued at the time of the broker's acts or omissions, and not the later date in which investor realized his investment losses); *Scott v. Fields*, 85 A.D.3d 756, 759 (N.Y. App. Div. 2011) (finding three-year limitations period began during the closing, when the breach of fiduciary duty occurred).

Because the Parmar Entities only seek monetary relief for their breach of fiduciary duty claim, *see* Counterclaims, ¶ 303, the three-year limitations period applies. In support of their breach of fiduciary duty claim, the Parmar Entities allege that, prior to the closing of the Merger, CC Holdco: (1) failed to disclose and delayed the NACO and NYNM acquisitions "***at the time of the [Merger]*** because they knew" it would decrease the value of CHT, Counterclaims, ¶ 299 (emphasis added); (2) "instruct[ed] [its] employees to stop all new sales and acquisitions" to ensure a decrease in value of CHT, *id.* at ¶ 300; and (3) promised to "reimburse the Parmar Entities for all payments and expense incurred to engage NACO, including the $10 million loan," *id.* at ¶ 302. This claim began accruing at the time of the purported statements or omissions—in other words, before or at the time of the Merger, which closed on January 30, 2017. *Cator*, 39 A.D.3d 1263.

Thus, the statute of limitations expired no later than January 30, 2020, and the breach of fiduciary duty claim is time-barred and must be dismissed, with prejudice.[5]

III. The Counterclaims Are Barred By Res Judicata.

Even assuming they are not time barred (they are), the Parmar Entities' fraudulent misrepresentation and breach of fiduciary duty claims are barred by res judicata, and, therefore, must be dismissed with prejudice.

A. Claim Preclusion

The Parmar Entities' Counterclaims are barred by claim preclusion because Judge Arleo dismissed with prejudice claims arising from the same operative facts and transactions in the NJ Action. Under New York law, claim preclusion bars parties or their privies from relitigating claims that were or could have been raised in a prior action against the same parties, provided they are within the scope of a prior final judgment on the merits, based upon the same harm, and arising out of the same or related facts. *See Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 N.Y.3d 64, 73 (N.Y. 2018) ("a party must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions"). "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *In re Hunter*, 4 N.Y.3d 260, 269 (N.Y. 2005) (citations omitted).

[5] Alternatively, if the breach of fiduciary duty claim necessarily depends on fraud, as may be the case here, *see* Counterclaims, ¶¶ 299–300, the limitations period is the greater of six years from the date the cause of action accrued or two years from the discovery of the fraud. *See Gerschel v. Christensen*, 143 A.D.3d 555, 557 (N.Y. App. Div. 2016); *see also supra* p. 13 (citing N.Y. C.P.L.R. § 213(8)). As discussed above, in this case, even applying a six-year limitations period, it expired no later than January 30, 2023, and, thus, any claims based in fraud are nevertheless time-barred. *See supra* pp. 13–16.

Here, Judge Arleo's dismissal with prejudice of the claims asserted by Parmar and the Parmar Entities in the NJ Action is a final judgment on the merits. *See Yonkers Contracting Co. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 381 (N.Y. 1999) (finding an "order[] dismissing the complaint with prejudice" is a "final judgment upon the merits") (citations omitted). This Court must give preclusive effect to the judgment of the United States District Court for the District of New Jersey under the Full Faith and Credit Clause of the U.S. Constitution, Art. IV, Sec. I, which "requires that the public acts, records, and judicial proceedings of each state be given full faith and credit in every other state." *Balboa Capital Corp. v. Plaza Auto Care, Inc.*, 178 A.D.3d 646, 647 (N.Y. App. Div. 2019).

Next, the identity of the parties is the same in the NJ Action as compared to the Counterclaims in this Court. *Hoffer v. Bank of Am., N.A.*, 25 N.Y.S.3d 279, 281 (N.Y. App. Div. 2016) ("res judicata gives 'binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein'") (citations omitted). CC Holdco and CHT Holdco were defendants in the NJ Action and are Counterclaim-defendants here. The plaintiffs in the NJ Action were Parmar, FUH, CHLLC, Naya, CH Investment, and Alpha Cepheus (the "Party Claimants"). While certain Parmar Entities were not direct parties to the NJ Action, including Vega Advanced Care LLC, Pulsar Advance Care LLC, Lexington Landmark Services LLC, 2 River Terrace Apartment 12J, LLC, 21B One River Park LLC, Aquila Alshain LLC, Ranga Bhoomi LLC, PPSR Partners, LLC, Taira no Kiyomori LLC, Axis Medical Services, LLC, and The Red Fronted Macaw Trust (the "Non-Party Claimants"), the Non-Party Claimants are all in privity with the Party Claimants and are bound by the NJ Action's final judgment.

Privity can be determined by "whether the circumstances of the actual relationship, the mutuality of interests, and the manner in which the nonparty's interests were represented in the earlier litigation established a functional representation such that the nonparty may be thought to have had a vicarious day in court." *Rojas v. Romanoff*, 186 A.D.3d 103, 111–12 (N.Y. App. Div. 2020). For example, controlling status over a corporation constitutes privity with it as a matter of law. *See Karali v. Araujo*, 11 N.Y.S.3d 823, 826 (N.Y. Sup. Ct. 2015); *see also Melwani v. Jain*, No. 02-CV-1224, 2004 WL 1900356, at *2 (S.D.N.Y. Aug. 24, 2004) (companies were in privity despite being separate entities, because they had overlapping shareholders, officers, and directors); *Dean v. Town of Hempstead*, 527 F. Supp. 3d 347, 420 (E.D.N.Y. 2021) (different companies sharing corporate officers is sufficient to create a privity relationship). The Non-Party Claimants are in privity with Party Claimants because Parmar managed the Parmar Entities until at least January 2020, and at all times relevant to the NJ Action. Counterclaims, ¶ 10; *see also* NJ Compl. ¶ 352.[6] Parmar's managerial responsibility and control over all of the Parmar Entities creates privity as a matter of law. *See, e.g.*, *Karali*, 11 N.Y.S.3d at 826; *Dean*, 527 F. Supp. 3d at 420; *Specialty Restaurants Corp. v. Barry*, 653 N.Y.S.2d 972, 973 (N.Y. App. Div. 1997) (finding privity where party was president, shareholder, and director in corporation). Like the entities in *Melwani*, the Parmar Entities overlap in officers and directors, which also is sufficient to establish privity as a matter of law. 2004 WL 1900356, at *2. The entities even refer to themselves as the

[6] And Parmar has previously admitted that all of the Parmar Entities (as defined in the operative Counterclaims) are "entities owned or controlled by Parmar," *except* Taira no Kiyomori LLC and The Red Fronted Macaw Trust. *See* Doc. No. 51, ¶¶ 21, 26, 29 & p. 1; Doc. No. 65. The Red Fronted Macaw Trust is simply a trust of which Parmar's sister is a trustee thereof and which, upon information and belief, Parmar controls. *See* Doc. No. 51, ¶ 38; Doc. No. 303, ¶ 41. And Taira no Kiyomori owned Blue Mountain Healthcare, LLC, which Parmar has admitted he owned and controlled. *See* Doc. No. 65; Doc. No. 303, ¶ 41. (The Court entered a default judgment against Blue Mountain Healthcare, LLC on July 1, 2022. *See* Doc. No. 427.) All of the Parmar Entities are inextricably linked.

"Parmar Entities," in numerous filings, which further demonstrates the common control Parmar exerted over them. Additionally, the Non-Party Claimants had their interests sufficiently represented in the NJ Action, such that they had their "vicarious day in court." *Rojas*, 186 A.D.3d at 112. The Party Claimants initiated the NJ Action against CC Holdco, CHT Holdco, and others in an effort to purportedly protect Parmar's personal interests and the financial interests of his corporate entities he manages and controls in connection with the Merger. *See generally* NJ Compl. The Parmar Entities all have aligned financial interests that are rooted in the allegations against CC Holdco, CHT Holdco, and other CC Capital parties related to the Merger with CHT, particularly when the Parmar Entities together held a controlling interest in CHT prior to the Merger. *See* Counterclaims, ¶ 9.

Finally, the claims arise from the same transaction or series of transactions—*i.e.*, in connection with the CHT Merger. *See Paramount*, 31 N.Y.3d at 78 ("[W]hether or not the first judgment will have preclusive effect depends in part on whether the same transaction or series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first."). It is of no import that the claims in the NJ Action were brought as securities fraud claims, whereas here, the Counterclaims assert fraudulent misrepresentation and breach of fiduciary duty—claims are precluded even if they are based on different legal theories or seek different remedies, and claim preclusion bars not only claims that were litigated but claims that could have been raised in the prior litigation. *See Syncora Guarantee Inc. v. J.P. Morgan Sec. LLC*, 970 N.Y.S.2d 526, 533 (N.Y. App. Div. 2013) (finding that it is not necessary that the "precise legal theories presented in the first action also be presented in the second action" because "[t]he critical element is that both suits arise out of the same subject matter or series of alleged wrongs") (citations omitted).

The Parmar Entities' fraudulent misrepresentation and breach of fiduciary duty claims are precluded because they arise from the same series of transactions as the fraud claims that were dismissed *with prejudice* in the NJ Action. Indeed, the transaction at issue—the Merger—is the same in both cases and the allegations of CC Holdco's and CHT Holdco's purported wrongdoings are nearly identical. *Compare* NJ Compl., ¶¶ 69, 93, 106–07, 199, 276(b) (alleging that CC Holdco and CHT Holdco manipulated Parmar and various of his entities into contributing more equity than necessary and made false promises with respect to the Merger; concealed and delayed the impending NYNM and NACO acquisitions from the public shareholders of CHT to get a much lower price for CHT; and convinced BOA to finance the Merger on their terms, cutting Parmar and his entities out of the process), *with* Counterclaims, ¶¶ 270, 291, 299–300, 302 (alleging that CC Holdco and CHT Holdco failed to disclose material financial information in due diligence; failed to pay the Parmar Entities expenses and deposit made in connection with NACO, including $10 million loan; failed to disclose and delayed NACO and NYNM acquisitions to decrease the value of CHT; and blocked the Parmar Entities from any involvement with due diligence and financing, including with BOA). In both proceedings, the Parmar Entities alleged CC Holdco and CHT Holdco engaged in a course of conduct that actively deceived Parmar and the entities he controls, and fraudulently induced them to enter into the Merger on January 30, 2017. *Id.* These are nearly identical allegations repackaged as different legal claims.

In *Platon v. Linden-Marshall Contracting Inc.*, 109 N.Y.S.3d 41, 42 (N.Y. App. Div. 2019), the plaintiff brought a breach of contract action in small claims court arising from allegedly unsatisfactory renovation work performed by the defendant, which the court dismissed. After the dismissal, the plaintiff filed negligence, fraudulent inducement, and General Business Law claims against the defendant for the renovation work in the Supreme Court, New York County. *Id.* The

defendant, again, moved to dismiss, but the court denied it. *Id.* On appeal, the Supreme Court Appellate Division reversed the denial of defendant's motion to dismiss, finding that "plaintiff's negligence, fraudulent inducement, and General Business Law claims are barred by the doctrine of res judicata, as they arose out of the same transaction or occurrence as plaintiff's prior breach of contract claim." *Id*. at 42–43. Like the plaintiff in *Platon*, the Parmar Entities assert claims arising out of the same transaction, based on the same facts, and seek to recover for the same alleged injuries as in the NJ Action, which were dismissed with prejudice.

Because the NJ Action is a final judgment on the merits, the parties in the NJ Action and the Counterclaims here are the same or in privity with one another, and the claims arise from the same transaction and essential facts, and thus would involve much of the same evidence, the Counterclaims are barred by claim preclusion and should be dismissed with prejudice.

B. Issue Preclusion

Parmar's claims are also barred by issue preclusion, which bars the relitigation of issues determined in a prior proceeding where "the issue in the second action was raised, necessarily decided, and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." *Feng Li v. Peng*, 161 A.D.3d 823, 826 (N.Y. App. Div. 2018).[7]

Judge Arleo "necessarily decided," by dismissing *with prejudice*, the claims in the NJ Action, which arose out of the same facts, transactions, and occurrences, and which are the foundation of the Parmar Entities' Counterclaims for fraudulent misrepresentation and breach of fiduciary duty here. *See Alpha Cepheus, LLC*, 2019 WL 7047206, at *10; *see supra* pp. 16–21.

[7] The doctrine of privity, *see supra* pp. 17–19, applies to issue preclusion as well, and, thus, precludes the Parmar Entities' Counterclaims in their entirety. *See Buechel v. Bain*, 97 N.Y.2d 295, 304 (N.Y. 2001).

Some of the very same allegations made here in the Counterclaims were made by Parmar and various of the Parmar Entities in the NJ Action and were material to their claims, including, but not limited to, the alleged issues related to due diligence and financing in connection with the Merger, the alleged wrongdoings regarding the purported delay of the NACO and NYNM acquisitions, and the alleged promises made to Parmar and the Parmar Entities in connection with the Merger. *See supra* pp. 9–10, 16–21. Likewise, in the NJ Action, as in the Counterclaims, the Parmar Entities alleged that the Releases executed in connection with the Merger were "entered into by fraud" and thus, "unenforceable." *Compare* NJ Compl., ¶¶ 148–49, 153, 155, *with* Counterclaims, ¶¶ 198–206. These issues were material to the NJ Action as they formed the basis of the claims brought there and the basis for the court's dismissal with prejudice. *See Alpha Cepheus, LLC*, 2019 WL 7047206, at *10 (finding these "claims are barred by the [Releases], and this deficiency cannot be cured by amendment"). In fact, Judge Arleo considered the Releases on motion to dismiss, finding them integral to the complaint, and found that they "clearly and unambiguously" released all claims against CC Holdco and CHT Holdco where they are "***related to representations from the sale of CHT***." *Id.* at *5–6 (emphasis added). The court also rejected Parmar's arguments that the Releases should be set aside because they were allegedly fraudulently induced and they were premised on false information, finding such arguments a "misreading of the law." *Id.* at *6.

Finally, Judge Arleo specifically found that these allegations were inadequately pled as they did not identify a single statement made by ***each*** defendant or why any such representation would be misleading. *Id.* at *7. For example, while plaintiffs alleged that Parmar and CC Capital agreed that he would "remain as CEO of CHT and continue to oversee CHT's growth," they never alleged that any defendant specifically represented that Parmar would remain as CEO, or for how

long. *Id.* Additionally, Judge Arleo found plaintiffs could not plead any reliance on Parmar's position post-Merger because he executed an employment agreement in connection with the Merger that provided he could be terminated immediately without cause. *Id.* With respect to allegations regarding due diligence, Judge Arleo found that these purported representations were similarly not alleged to have been misleading and not sufficiently specific to be material. *Id.* With respect to allegations regarding alleged manipulation of closing documents to induce plaintiffs to contribute more equity to the transaction, Judge Arleo found these allegations insufficient, as they "do not allege what percentage of Plaintiffs' equity would have been 'necessary' to complete the [Merger], or otherwise specify what they lost in the transaction" and they do not identify any statement that is alleged to be misleading. *Id.* at *8.

The Parmar Entities had a full and fair opportunity to litigate these issues—and indeed did litigate these issues—in the NJ Action and do not get a second bite at the apple in this Court now. *Mattes v. Rubinberg*, 632 N.Y.S.2d 793, 796 (N.Y. App. Div. 1995) (finding issue preclusion barred fraud claim where same facts were used to assert securities fraud claim in a federal action because both claims were based on the issue of whether defendants justifiably relied on similar or identical misrepresentations or omissions). The Counterclaims are barred by issue preclusion and should be dismissed with prejudice.

IV. The Counterclaims Are Precluded By The Releases Executed By The Parmar Entities.

In connection with the Merger, the Parmar Entities executed Releases which bar both Counterclaims asserted against CC Holdco and CHT Holdco.[8] The Releases, which are governed

[8] The documents underlying the Merger and related transactions are central to the claims asserted in the Counterclaims, and they are incorporated by reference and heavily relied upon by the Parmar Entities. In fact, the Parmar Entities ***explicitly*** allege that Releases were executed by certain shareholders of CHT—including the Parmar Entities themselves—in connection with the Merger and that they were purportedly fraudulently obtained. *See* Counterclaims, ¶¶ 198–206. The Court

by Delaware law, *see* Mast Decl., Exs. A–H § 11(a), provide that Parmar and each of the Parmar Entities, on behalf of themselves and their affiliates, "fully, finally and irrevocably releases" CHT Holdco and its affiliates from all claims "of every kind and nature whatsoever . . . occurring at any time at or prior to the Closing with respect to the Company, the shares of Common Stock, or the Merger," *id.* at § 4(d)(i). In addition to the explicit release of claims, the Parmar Entities specifically agreed not to assert any claim in any forum "relating to the negotiation, execution or delivery of this Agreement or the Merger Agreement or the consummation of any of the Contemplated Transactions." *Id.* at § 4(d)(v). The Parmar Entities' Counterclaims are barred by the Releases and must be dismissed with prejudice.

First, the issue of whether the Releases bar claims nearly identical to the Counterclaims has already been decided by Judge Arleo in the NJ Action, and, thus, is precluded under res judicata principles. *See supra* pp. 16–23; *see also Alpha Cepheus, LLC*, 2019 WL 7047206, at *5–6. In the NJ Action, whereby Judge Arleo dismissed the Parmar Entities' claims ***with prejudice***, the court considered these Releases on motion to dismiss and found that they expressly released ***all*** claims against CC Holdco and CHT Holdco, and, in particular, "clearly and unambiguously

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can consider the Releases because they were incorporated by explicit reference in the Counterclaims. *See Bank of New York Mellon Tr. Co. v. Morgan Stanley Mortg. Cap., Inc.*, No. 11-CIV-0505-CM-FM, 2011 WL 2610661, at *3 (S.D.N.Y. June 27, 2011) ("In deciding a motion to dismiss, this Court may consider the full text of documents . . . that the plaintiff either possessed or knew about and relied upon in bringing the suit. . . . 'Plaintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision on the motion.'") (citations omitted); *see also Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (explaining the court can "consider[] documents outside of the pleadings" "when the document is integral to a plaintiff's claim and incorporated into the complaint"). The court need not accept as true allegations that are "contradicted by facts that can be judicially noticed or by any other allegations or exhibits attached to or incorporated in the pleading." Wright & Miller, *Federal Practice and Procedure*, § 1363, at 464–65 (2d ed. 1990).

released the securities fraud claims . . . because they are claims related to representations from the sale of CHT." *Id.* at *5–6. Nearly identical to the Counterclaims, the securities fraud claims in the NJ Action alleged that CC Holdco and CHT Holdco induced Parmar and various of his entities into contributing more equity than necessary into the Merger, made false promises to Parmar about his involvement and roles post-Merger, obstructed the due diligence process and financing negotiations with BOA, and concealed and delayed the impending NYNM and NACO acquisitions from the public shareholders of CHT at the time of the Merger to get a much lower price for CHT than was fair and proper. *See* NJ Compl., ¶¶ 69, 93, 106–07, 199, 276(b). Here, too, the Releases cover the Parmar Entities' Counterclaims because they similarly arise out of purported pre-Merger representations, promises, and omissions, and, thus, are unambiguously claims "with respect to the Company" and with respect to "the Merger." *Deuley v. DynCorp Intern., Inc.*, 8 A.3d 1156, 1163 (Del. 2010) ("Delaware courts recognize the validity of general releases.") (citation omitted).

Second, the issue of whether CC Holdco and CHT Holdco are considered "Released Parties" under the Releases also has already been decided in the NJ Action, and, thus, is precluded under res judicata principles. *See supra* pp. 16–23; *see also Alpha Cepheus, LLC*, 2019 WL 7047206, at *5. Considering these Releases on motion to dismiss, the court in the NJ Action found that "[b]ecause Plaintiffs allege that [CHT Holdco] and [CC Holdco] are under the common control of CC Capital, they are affiliates of CHT and CHT Holdco, and are Released Parties under the [Release]." *Alpha Cepheus, LLC*, 2019 WL 7047206, at *5 n.8. Here, too, the Parmar Entities allege that CC Holdco, whose sole member is CC Capital, owns a majority interest in CHT Holdco. *See* Counterclaims, ¶¶ 12, 73. CHT Holdco is expressly released *by name* in the Release, and, as an affiliate of CHT and CHT Holdco, CC Holdco is similarly released, making them both Released Parties and subject to protection under the Release.

Third, likewise, all of the Parmar Entities are "Releasing Parties" under the Releases. In the first instance, Parmar and FUH, CHLLC, Vega Advanced Care LLC, Pulsar Advance Care LLC, Lexington Landmark Services LLC, PPSR Partners, LLC, and Axis Medical Services, LLC executed Releases, and, thus, they are "Releasing Parties" who undoubtedly released all their claims, including the Counterclaims. *See* Mast Decl., Exs. A–H. Moreover, the remaining Parmar Entities—CH Investment, Naya, 2 River Terrace Apartment 12J, LLC, 21B One River Park LLC, Aquila Alshain LLC, Ranga Bhoomi LLC, Taira no Kiyomori LLC, and The Red Fronted Macaw Trust—are also "Releasing Parties" as they are "affiliates" of Parmar and the other Parmar Entities because Parmar managed and controlled the Parmar Entities. Counterclaims, ¶ 10; *see also* Mast Decl., Exs. A–H § 4(d)(i) (defining "Releasing Parties" as "Stockholder on behalf of itself, and its affiliates, ..."); Black's Law Dictionary (10th ed. 2014) (defining "affiliate" to include a subsidiary, parent, or sibling corporation). *See also Alpha Cepheus, LLC*, 2019 WL 7047206, at *5 (applying the same reasoning with respect to affiliates of the Released Parties and finding that the claims against them were barred). The entities even refer to themselves as the "Parmar Entities," in numerous filings, which further demonstrates the common control Parmar exerted over them. Clearly, all of the Parmar Entities are "Releasing Parties" under the agreements and have thus released their claims.

Fourth, the Parmar Entities attempt to avoid the impact of the Releases by arguing that they are "unenforceable" because they were "procured by fraud," but this issue has already been decided against them in the NJ Action, and, thus, this issue is precluded under res judicata principles. *See supra* p. 22; *see also Alpha Cepheus, LLC*, 2019 WL 7047206, at *6. In the NJ Action, Parmar and the Parmar Entities alleged—as they have, again, in the Counterclaims—that the Releases should be set aside because they were fraudulently induced. *Compare* NJ Compl., ¶¶

148–49, 153, 155 (alleging the Releases, executed by Parmar and his entities, are "unenforceable" as they were "entered into by fraud"), *with* Counterclaims, ¶¶ 198–206 (same).

Judge Arleo explicitly rejected that argument, holding that the Releases "clearly and unambiguously appl[y] to the [claims]" because the Parmar Entities "have not pled any legal ground sufficient to set it aside," particularly when they have "expressly pled that Parmar had actual knowledge of all omissions allegedly present in the [Release]." *Alpha Cepheus, LLC*, 2019 WL 7047206, at *6 (citing *E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 461–62 (Del. 1999) (requiring party seeking to set aside release under fraudulent inducement theory to be able to state claim for fraud)). The Releases unambiguously provide "a full and complete defense" to "any action at law" against CHT Holdco and CC Holdco, and pursuant to the Releases, the Parmar Entities represented and warranted that, among other things, they had full and complete access to information related to the transaction and had not relied on any "statement, representation or warranty, oral or written, express or implied" made by CHT Holdco or CC Holdco. Mast Decl., Exs. A–H § 5(e). The Parmar Entities cannot avoid the Releases.

Accordingly, the Releases plainly bar the Counterclaims asserted against both CHT Holdco and CC Holdco and should be dismissed with prejudice.

V. The Parmar Entities Lack Standing Because Certain Of The Counterclaims Are Derivative And Belong Exclusively To The Trustee.

The Parmar Entities' Counterclaims are based largely on allegations of alleged fraudulent misrepresentations or omissions and alleged breaches of fiduciary duty ***owed to CHT***. These allegations form the basis of derivative claims which belong to and can only be asserted by or on behalf of CHT. As such, any claims arising from those allegations belong to the Trustee. The Parmar Entities lack standing to pursue those claims and they should therefore be dismissed pursuant to Rule 12(b)(1).

"When a plaintiff lacks standing to bring a suit, the court does not have subject matter jurisdiction to hear their claim, and this is grounds for dismissal of a case." *In re 305 E. 61st St. Grp. LLC*, 644 B.R. 75, 83 (Bankr. S.D.N.Y. 2022); *see also* Fed. R. Civ. P. 12(b)(1). "A representative of the bankruptcy estate, including a bankruptcy trustee, stands in the shoes of the debtor and therefore has exclusive standing to assert causes of action belonging to the estate." *In re 305 E. 61st St. Grp. LLC*, 644 B.R. at 83. As a result, a trustee has the exclusive standing to assert derivative claims on behalf of a corporate debtor; in contrast, a debtor's creditors and shareholders have standing to pursue only direct claims. *See id.* (dismissing derivative claims brought by member of Chapter 11 debtor); *BRS Assocs., L.P. v. Dansker*, 246 B.R. 755, 771–72 (S.D.N.Y. 2000) (dismissing derivative breach of fiduciary duty claims for lack of standing); *In re The 1031 Tax Grp., LLC*, 397 B.R. 670, 680–82 (Bankr. S.D.N.Y. 2008) (holding that certain derivative claims were property of the estate and subject to the automatic stay).

Under Delaware law,[9] the determination of whether a claim is direct or derivative depends "solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of the recovery or other remedy (the corporation or the stockholders, individually)." *Fares v. Lankau*, 953 F. Supp. 2d 524, 530 (D. Del. 2013) (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc*., 845 A.2d 1031 (Del. 2004)). A shareholder's direct claim "must be independent of any alleged injury to the corporation." *Halpert v. Zhang*, No. 12-1339-SLR-SRF, 2015 WL 1530819, *2 (D. Del. Apr. 1, 2015).

[9] Courts look to the law of the state of incorporation to determine whether claims are direct or derivative. *See Carfagno ex rel. Centerline Holding Co. v. Schnitzer*, 591 F. Supp. 2d 630, 634 n.25 (S.D.N.Y. 2008). Here, CHT is incorporated under the laws of the state of Delaware, as are CC Holdco and CHT Holdco, and, thus, Delaware law governs this analysis. Answer, ¶ 19.

Claims for breach of fiduciary duty, self-dealing, and fraud have been regarded as derivative claims where shareholders suffered no individualized injury. *In re JMO Wind Down, Inc.*, No. 16-10682 (BLS), 2018 WL 1792185, at *6–8 (Bankr. D. Del. Apr. 13, 2018). Generally, claims based on the deterioration of a stock's value are derivative. *Kramer v. W. Pac. Indus., Inc*., 546 A.2d 348, 354 (Del. 1988) ("[W]here a plaintiff shareholder claims that the value of his stock will deteriorate . . . his cause of action is derivative in nature."). Likewise, allegations of self-dealing are generally derivative claims. *Thornton v. Bernard Techs., Inc*., No. 962-VCN, 2009 WL 426179, at *3 (Del. Ch. Feb. 20, 2009) ("[Delaware] case law finds allegations of waste and self-dealing transactions generally to be derivative instead of direct. When a director engages in self-dealing or commits waste, he takes from the corporate treasury and any recovery would flow directly back into the corporate treasury.").

Here, nearly all of the allegations offered in support of the Counterclaims form the basis of derivative, rather than direct, claims. First, the Parmar Entities allege that CC Holdco breached its fiduciary duties by failing to disclose and delayed the NACO and NYNM acquisitions at the time of the Merger, in order to devalue CHT's shares. Counterclaims, ¶ 299. Second, the Parmar Entities allege that CC Holdco breached its fiduciary duties by "instructing CC Holdco employees to stop all new sales and acquisitions" in an effort to devalue CHT's shares. *Id.* at ¶ 300. Third, the Parmar Entities allege that CC Holdco and CHT Holdco failed to disclose material financial information "for the specific purpose of acquiring CHT at an unreasonably low value." *Id.* at ¶ 291. Finally, the Parmar Entities allege that CC Holdco and CHT Holdco blocked the Parmar Entities from involvement with due diligence and financing in connection with negotiating financing with Bank of America. *Id.*

Even if these allegations were true, the devaluation of CHT's stock is a harm suffered primarily by CHT and would not cause shareholders to suffer a harm independent from the harm to CHT. *See, e.g.*, *Kramer*, 546 A.2d at 354 ("claims that the value of [] stock will deteriorate . . . [are] derivative in nature"). Indeed, the Parmar Entities explicitly allege that CC Holdco purportedly breached fiduciary duties owed ***to CHT***. Counterclaims, ¶ 299 ("CC Holdco, its chairman, board members and directors breached their fiduciary duties ***to CHT and its shareholders*** . . . ."); *id.* at ¶ 300 (same). Further, the Parmar Entities even seek damages on behalf of CHT shareholders. *Id.* at ¶ 303 ("As a direct result of the misconduct of CC Holdco, its chairman, board members and directors, ***the CHT shareholders and the Parmar Entities have been damaged*** in an amount to be determined at trial."). Thus, the Counterclaims are derivative claims and cannot be brought as direct claims here.[10] This is particularly true where the Trustee has the exclusive standing under the Plan and Confirmation Order to pursue all claims arising from these allegations and has released all claims arising from these allegations as to CC Holdco, CHT Holdco, and others in this proceeding pursuant to the Settlement Agreement approved by this Court. *See* Plan, at § 11.14 and Confirmation Order, at § 11(a) (providing that the Trustee has the

[10] Moreover, even if the Trustee did not own and control these claims, and he clearly does, the Parmar Entities still would not have standing to pursue these derivative claims. While the Parmar Entities allege that they held a controlling interest in CHT prior to the Merger, following the Merger, none of the Parmar Entities allege that they are current CHT shareholders. *See* Counterclaims, ¶ 9. Rather, FUH, CHLLC, CH Investment, and Naya allege that they are shareholders of Alpha Cepheus, and that Alpha Cepheus held a minority interest in CHT Holdco. *Id.* Under controlling Delaware law, only a ***current*** shareholder has standing to pursue derivative claims. *See Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 935 (Del. Ch. 2008) (derivative plaintiffs must show that they "owned stock at the time of the wrong complained of" and "maintain[ed] their shareholder status throughout the litigation"). And while none of the Parmar Entities is a current shareholder of CHT, even if they were, a shareholder does not have standing to pursue derivative claims until it first makes a demand that the corporation pursue those claims in the first instance, or sufficiently plead demand futility. *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). The Parmar Entities have done neither.

exclusive right to pursue ***all*** causes of action on behalf of the Debtors, including CHT); *see also* Settlement Agreement, at ¶ 8.1 (providing that the Trustee released Plaintiffs from all claims arising from, out of, or in connection with the above captioned adversary proceeding and the Merger); Doc. No. 232 (Order approving Settlement Agreement).[11]

Accordingly, the Counterclaims should be dismissed pursuant to Rule 12(b)(1), to the extent that they are based on the above referenced allegations, *see* Counterclaims, ¶¶ 291, 299–300.

VI. The Parmar Entities Fail To State A Claim Under Rule 12(b)(6).

A. Fraudulent Misrepresentation

The Parmar Entities fail to state a claim for fraudulent misrepresentation. Rule 9(b) requires a pleading of fraud to "state with particularity the circumstances constituting fraud." The heightened pleading requirements for fraud exist, among other reasons, to "provid[e] a defendant fair notice of plaintiff's claim, to enable preparation of defense" and to "protect[] a defendant from harm to his reputation or goodwill." *See DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987).

"Under New York law, '[t]he elements of a cause of action for fraud require a [1] material misrepresentation of a fact, [2] knowledge of its falsity, [3] an intent to induce reliance, [4] justifiable reliance by the plaintiff and [5] damages.'" *IKB Int'l S.A. in Liquidation v. Bank of Am.*

[11] Indeed, the Trustee has already asserted claims against certain of the Debtors' former directors and officers for breach of fiduciary duty. *See* Adv. Pro. No. 20-08046. The Trustee settled those claims pursuant to a settlement agreement filed on October 18, 2021, by and among the Trustee, the directors and officers, and others, which required the Debtors' first tier D&O insurance carrier to fund a settlement payment to the Trustee in the amount of $18,500,000. *Id.* at Doc. No. 82. The Court approved the settlement on December 16, 2021. *Id.* at Doc. No. 84. The Trustee has filed another adversary proceeding against the Debtors' secondary D&O insurance carrier, which is currently pending in this Court. *See* Adv. Pro. No. 21-08161.

Corp., 584 F. App'x 26, 27 (2d Cir. 2014) (quoting *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y. 3d 553, 559 (2009)). The particularity requirement, combined with the elements of fraud, "requires that the plaintiff (1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Id.* (citations and internal quotations omitted). Where there is more than one defendant, as here, charged with the same fraudulent misconduct, the claim must include specific and separate allegations as to ***each*** defendant. *See Goldin v. Tag Virgin Islands, Inc.*, No. 651021/2013, 2014 WL 2094125, at *10 (N.Y. Sup. Ct. May 20, 2014). And, a plaintiff must show "proximate causation, such that the injury 'is the natural and probable consequence of the defrauder's misrepresentation or . . . the defrauder ought reasonably to have foreseen that the injury was a probable consequence of his fraud.'" *Hunt v. Enzo Biochem, Inc.*, 471 F. Supp. 2d 390, 399–400 (S.D.N.Y. 2006) (citation omitted). A pleading which inadequately alleges any one of these elements, fails to state a viable fraud claim and must be dismissed.

For example, in *Trinity Bui v. Industrial Enterprises of Am.*, 594 F. Supp. 2d 364 (S.D.N.Y. 2009), the district court dismissed a fraud claim for failure to state a claim under Rules 12(b)(6) and 9(b) where the plaintiffs failed to specify any particular statement as the material misrepresentation of fact serving as the basis of their fraud claim, in addition to failing to allege knowledge, scienter, or reliance. The Court found that the amended complaint was replete with general allegations of fraud rather than specific statements with the required particularity, lacked any allegations of defendants' motive or opportunity to commit fraud, and did not support a finding of conscious misbehavior or recklessness. *Id.* at 372. Similarly, in *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441 (S.D.N.Y. 2010), the district court granted a motion to dismiss

a fraud claim where plaintiffs failed to adequately plead reliance. The court noted that reliance is properly considered at the motion to dismiss stage, taking "the entire context" of the transaction at issue into consideration, including information available to a plaintiff and the plaintiff's level of sophistication. *Id.* at 448–50. The court found the plaintiffs had access to information that would have unmasked the alleged fraud and, therefore, plaintiffs could not establish justifiable reliance or state a claim for fraud. *Id.*

Here, the Parmar Entities have utterly failed to establish the requisite elements of such a claim. They have failed to specify a single statement as a material misrepresentation or omission sufficient to give rise to a fraudulent misrepresentation claim, including, the identity of the speaker, where and when it was made, and how it was fraudulent. *See IKB Int'l S.A. in Liquidation*, 584 F. App'x at 27. The Parmar Entities make no attempt to distinguish between CC Holdco and CHT Holdco—instead, relying on improper group pleading premised on allegations made as to the "CC Capital Plaintiffs," *see* Counterclaims, ¶¶ 291–96—and do not, as they must, point to a single representation made by either CC Holdco or CHT Holdco upon which ***each*** Parmar Entity relied in making decisions regarding the Merger transaction. *See Goldin*, 2014 WL 2094125, at *10 (dismissing "allegations made collectively as to the 'TAG Defendants'" as improper "group pleading" which "do[] not suffice to state a fraud claim"); *CIFG Assur, North Am., Inc. v. Bank of Am., N.A.*, No. 654028/12, 2013 WL 5380385, at *3 (N.Y. Sup. Ct. 2013) ("A [fraudulent inducement] claim involving multiple defendants must make specific and separate allegations for each defendant."); *Suero v. NFL*, No. 22-CV-31 (AKH) (BCM), 2022 WL 17985657, at *12 (S.D.N.Y. Dec. 16, 2022) ("a plaintiff must show that her reliance was 'actual' that is, that ***she*** actually saw, read, or heard—and then acted on the basis of—the allegedly fraudulent statements") (emphasis added) (citations omitted); *In re Fyre Festival Litig.*, 399 F. Supp. 3d 203, 215, 217

(S.D.N.Y. 2019) (finding allegations failed to provide defendants notice "of when and how an ***individual*** plaintiff relied upon the statement" and "[b]road assertions of reliance on multiple misstatements covering at least a four-month period of time are insufficient") (emphasis added).

Indeed, no statement could even plausibly be alleged where there have been no allegations that any of the Parmar Entities were involved in due diligence and negotiations in any way leading up to the Merger. The Counterclaims fail to even mention by name 11 of the entities after defining and grouping them into the "Parmar Entities" at the start of the Counterclaims. *See* Counterclaims, ¶ 1 (defining Vega Advanced Care LLC, Pulsar Advance Care LLC, Lexington Landmark Services LLC, 2 River Terrace Apartment 12J, LLC, 21B One River Park LLC, Aquila Alshain LLC, Ranga Bhoomi LLC, PPSR Partners, LLC, Taira no Kiyomori LLC, Axis Medical Services, LLC, and The Red Fronted Macaw Trust as the "Parmar Entities" and never mentioning them again). Moreover, certain of the Parmar Entities, including, for example, 2 River Terrace Apartment 12J, LLC and 21B One River Park LLC were shell entities formed to hold Parmar's properties and were not formed until ***after*** the diligence was completed or ***after*** the Merger closed, and, therefore, as a matter of law, could not have relied on any alleged statements or omissions that pre-dated their existence. *See, e.g.*, Doc. No. 51, ¶¶ 34, 36; Doc. No. 303, ¶ 57. Likewise, The Red Fronted Macaw Trust is simply a trust of which Parmar's sister is a trustee thereof and there are no allegations that any statements of any kind were made to it, much less that it relied on them. *Id.* at ¶ 38. These allegations—or rather, lack thereof—are insufficient to form the basis of fraud with particularity as required by law. There also is no allegation that CC Holdco or CHT Holdco intended to defraud the Parmar Entities or any particularized allegations of conscious misbehavior by CC Holdco or CHT Holdco. Instead, like plaintiffs in *Trinity Bui*, the Counterclaims are replete with general statements and conclusory assertions.

Parmar ran and controlled CHT—indeed, the Parmar Entities contend that Parmar managed them until January 2020 and that they, in turn, held a controlling interest in CHT prior to the Merger, Counterclaims, ¶ 9–10—and he clearly knew all of the facts regarding CHT and the underlying fraud that he masterminded. *Gladstone Bus. Loan, LLC v. Randa Corp.*, No. 09-CIV-4225 (LMM), 2009 WL 2524608, at *4 (S.D.N.Y. Aug. 17, 2009) ("If the plaintiff 'has the means of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.'") (citation omitted). Beyond Parmar's direct knowledge, the Parmar Entities also represented and warranted, in the Releases, that they had "full and complete access" to all documentation related to the transaction and had not relied on any statement made by CHT Holdco or CC Holdco. Mast Decl., Exs. A–H § 5(e); *supra* pp. 23–27. Accordingly, the Parmar Entities do not—and cannot—allege with particularity any justifiable reliance.

In any event, the allegation that CC Holdco and CHT Holdco failed to disclose information to CC Capital's own due diligence team, *see* Counterclaims, ¶ 291(a)–(b), (d), is nonsensical and is not, in fact, a representation made ***to*** the Parmar Entities themselves. Similarly, the Parmar Entities' claim that CC Holdco and CHT Holdco "[b]lock[ed]" the Parmar Entities from involvement with due diligence and financing for purposes of negotiating with BOA, *id.* at ¶ 291(d), does not allege any fraudulent statement (or omission) made ***to*** the Parmar Entities themselves. Thus, these claims cannot serve the basis of a fraudulent misrepresentation. The other two allegations the Parmar Entities base their fraudulent misrepresentation claim on include that CC Holdco and CHT Holdco purportedly "***assur[ed]***" the Parmar Entities that they would be reimbursed for their expenses in the NACO transaction and "***promis[ed]***" the Parmar Entities, and

Parmar himself, ownership interests in CC Capital and a new evergreen fund. *Id.* at ¶ 291(c)–(e). Not only are these conclusory allegations which are not pleaded with sufficient particularity, but also they are promissory statements about future facts which are not typically actionable as fraud. *Tesoro Petroleum Corp. v. Holborn Oil Co.*, 108 A.D.2d 607, 607 (N.Y. App. Div. 1985) ("A failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract. A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract"). To the extent that the Parmar Entities' fraudulent misrepresentation claim is based on these purported "representations," they do not adequately state a claim.

Finally, each of the Parmar Entities fails to sufficiently allege individualized causation. "To establish causation, plaintiff must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)." *Shainwald v. Pros. for Non-Profits, Inc.*, 62 Misc.3d 1221(A) at *6 (N.Y. Sup. Ct. 2019). Here, the Parmar Entities plead only conclusory and generalized statements regarding their purported injuries and the cause thereof. *See* Counterclaims, ¶ 296 ("As a result of the CC Capital Plaintiffs' material misrepresentations and omissions, the Parmar Entities have suffered injuries, including but not limited to monetary damages in an amount to be determined at trial."). This is not sufficient under the heightened particularity pleading standard. *See Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017) ("allegations consisting of bare legal conclusions . . . are not entitled to any [] consideration"); *P & HR Solutions, LLC v. Ram Capital Funding, LLC*, 195 A.D.3d 473, 474 (N.Y. App. Div. 2021) (causation must be adequately pled with particularity in order to survive a motion to dismiss); *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421–22 (N.Y. 1996) (finding failure to plead causation because plaintiffs did not allege how

defendants' failure to disclose information proximately caused the alleged damages and did not allege the damages were "because of defendants' fraud rather than an independent business decision").

Because the Parmar Entities have not adequately pled a single element of fraudulent misrepresentation with the requisite particularity, the claim must be dismissed.

B. Breach Of Fiduciary Duty

Likewise, the Parmar Entities' claim for breach of fiduciary duty fails to state a claim for two important reasons. First, they have failed to sufficiently allege the existence of a fiduciary relationship between CC Holdco and each of the Parmar Entities. Second, the claim that CC Holdco failed to reimburse certain expenses related to the prospective NACO transaction is also insufficient to state a claim for breach of fiduciary duty because it is based on a breach of contract.

1. The Parmar Entities' Breach Of Fiduciary Duty Claim Fails Because They Have Not Established A Fiduciary Duty Owed By CC Holdco To Them.

Under Delaware law,[12] a claim for breach of fiduciary duty must establish: (1) the existence of a fiduciary duty; and (2) a breach by the fiduciary of that duty. *Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010), *aff'd sub nom. ASDI, Inc. v. Beard Rsch., Inc*., 11 A.3d 749 (Del. 2010). A fiduciary relationship exists "where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another." *In re BMT-NW Acquisition, LLC*, 582 B.R. 846, 862 (Bankr. D. Del. 2018). "The relationship must be a 'dependency or a condition of superiority of one of the parties over the other' characterized by

[12] Under New York choice of law principles, internal corporate affairs (including breach of fiduciary duty claims) are governed by the law of the state of incorporation. *In re BP p.l.c. Derivative Litig*., 507 F. Supp. 2d 302, 308–10 (S.D.N.Y. 2007). Here, CHT is incorporated under the laws of the state of Delaware, as are CC Holdco and CHT Holdco, and, thus, Delaware law governs this analysis. Answer, ¶ 19.

confidence and trust given by one party to another, and domination and influence exercised by one party over another." *Id.* For example, courts have recognized a fiduciary relationship between controlling shareholders and minority shareholders, as well as corporate directors and shareholders. *See eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 26 (Del. Ch. 2010); *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. Supr. 2000).

Because the Parmar Entities allege that CC Holdco breached its fiduciary duty based on fraud and misrepresentations—*e.g.*, that CC Holdco failed to disclose certain information and would reimburse certain expenses but failed to do so, *see* Counterclaims, ¶ 299, 302—their claims sound in fraud, and the Parmar Entities must meet the heightened pleading standard for its fiduciary duty claim under Rule 9(b). *Pac. Elec. Wire & Cable Co. v. Set Top Int'l, Inc.*, No. 03-CIV-9623 (JFK), 2005 WL 578916, at *15 (S.D.N.Y. Mar. 11, 2005) (finding where breach of fiduciary duty claim is based on defendants' "material misrepresentations to Plaintiffs," it "sound[s] in fraud and must meet the heightened pleading standard of Rule 9(b)"); *Ferrari Club of Am., Inc. v. Bourdage*, No. 12-CV-06530 EAW, 2017 WL 6419061, at *2 (W.D.N.Y. Apr. 25, 2017) (finding Rule 9(b) "'applies to all claims that sound in fraud, as determined by the wording and imputations of the complaint, regardless of the label used in the pleading,' including breach of fiduciary duty").[13]

The Parmar Entities' claim for breach of fiduciary duty fails in the first instance because they have not established that any fiduciary relationship or duty existed as between CC Holdco and ***any*** of the 15 Parmar Entities ***prior to the Merger***, which is when the Parmar Entities allege

[13] While the breach of fiduciary duty claim is governed by the law of the state of incorporated, *see supra* note 12, the pleading standard of the Second Circuit applies. *See, e.g.*, *Marino v. Grupo Mundial Tenedora, S.A.*, 810 F. Supp. 2d 601, 605–06 (S.D.N.Y. 2011) (applying Rule 9(b) pleading standard for breach of fiduciary duty claim governed by Delaware law); *In re Extended Stay, Inc.*, No. 09-13764-JLG, 2020 WL 10762310, at *101–04 (Bankr. S.D.N.Y. Aug. 8, 2020) (same).

that CC Holdco breached fiduciary obligations, *see* Counterclaims, ¶ 302. *See In re Nine Sys. Corp. S'holders Litig.*, No. 3940-VCN, 2013 WL 771897, at *7 (Del. Ch. Feb. 28, 2013) (finding plaintiff must allege that the fiduciary relationship existed ***at the time of the breach***). The Parmar Entities do not—and cannot—allege that CC Holdco was a controlling shareholder of CHT prior to the Merger or that CC Holdco, or a representative thereof, was on the CHT board prior to the Merger. While the Parmar Entities generally allege that they held a controlling interest in CHT prior to the Merger, following the Merger, none of the Parmar Entities allege that they are CHT shareholders. Counterclaims, ¶ 9. Rather, FUH, CHLLC, CH Investment, and Naya allege only that they are shareholders of Alpha Cepheus (and that Alpha Cepheus held a minority interest in CHT Holdco). *Id.* at ¶¶ 4–8. The Counterclaims do not allege any fiduciary relationship as between CC Holdco, who had no control or interest in CHT prior to the Merger, and all 15 of the Parmar Entities generally, who are not alleged to have any interest in CHT or CHT Holdco following the Merger. Indeed, the Parmar Entities do not allege any relationship, fiduciary or otherwise, between CC Holdco and the Parmar Entities before or after the Merger closed. Thus, no fiduciary relationship has been sufficiently pled, and, as a matter of law, there is no basis for a claim that any fiduciary duty was breached. *See, e.g.*, *Mentis v. Del. Am. Life Ins. Co.*, No. 98C-12-023 WTQ, 1999 WL 744430, at *3–4 (Del. Super. July 28, 1999) (dismissing breach of fiduciary duty claim where no fiduciary relationship exists).

And, there is no coherent allegation that each of the Parmar Entities suffered damages as a result of CC Holdco's alleged misconduct. *See* Counterclaims, ¶ 303 ("As a direct result of the misconduct of CC Holdco, its chairman, board members and directors, the CHT shareholders and the Parmar Entities have been damaged in an amount to be determined at trial."). Such conclusory allegations are not sufficient to state a claim with particularity. *See Loudon v. Archer–Daniels–*

Midland Co., 700 A.2d 135, 145–46 (Del. 1997) ("conclusory allegation[s] fail[] to state a cognizable claim" because, although allegations need not be pleaded with particularity, "some factual basis must be provided from which the Court can infer" the elements of a breach of fiduciary duty claim). Thus, the breach of fiduciary duty claim should be dismissed.

2. Certain Of The Breach Of Fiduciary Duty Claims Also Fail Because They Are Breach Of Contract Claims.

The Parmar Entities' breach of fiduciary duty claim further fails because it is not properly pled as a breach of a fiduciary duty claim, but rather, is based on a promise and alleged breach thereof. *See* Counterclaims, ¶ 302 (alleging that CC Holdco breached its fiduciary obligations by "failing to reimburse the Parmar Entities for all payments and expenses incurred to engage NACO, including the $10 million loan extended by the Parmar Entities").

A party whose claim is based entirely on a breach of the terms of a contract "generally must sue in contract, and not in tort." *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 889 (Del. Ch. 2009) (dismissing tort claim based on nothing more than breach of contract); *Data Mgmt. Internationale, Inc. v. Saraga*, No. 05C-05-108, 2007 WL 2142848, at *3 (Del. Super. Ct. July 25, 2007) ("In preventing gratuitous 'bootstrapping' of contract claims into tort claims, courts recognize that a breach of contract will not generally constitute a tort."); *Tristate Courier & Carriage, Inc. v. Berryman*, No. 20574-NC, 2004 WL 835886, at *11 (Del. Ch. Apr. 15, 2004) (holding that plaintiff's claim for fraud failed as a matter of law where plaintiff alleged nothing more than breach of contract). "Even an intentional, knowing, wanton, or malicious action by the defendant will not support a tort claim if the plaintiff cannot assert wrongful conduct beyond the breach of contract itself." *Data Mgmt. Internationale, Inc.*, 2007 WL 2142848, at *3.

Here, the Parmar Entities allege that CC Holdco breached certain promises, including, for example, to reimburse them for certain NACO related expenses and to reimburse them for a

purported $10 million loan, as consideration for the consummation of the Merger. Counterclaims, ¶¶ 63–64, 291, 302. These claims are a quintessential breach of contract claim, involving an alleged bargained for promise and an alleged breach thereof.[14] Accordingly, the breach of fiduciary duty claim should be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, CC Holdco and CHT Holdco respectfully submit that the Court should dismiss the Counterclaims brought by the Parmar Entities with prejudice.

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[14] And even if the claim was pursued as a breach of contract claim, it, too, would fail. "To prove a breach of contract claim, a plaintiff must show: 'the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff.'" *In re Mobilactive Media, LLC*, No. 5725-VCP, 2013 WL 297950, at *15 (Del. Ch. Jan. 25, 2013) (citations omitted). The Parmar Entities do not—and cannot—allege that there was any obligation under the Merger Agreement for CC Holdco to reimburse the Parmar Entities for NACO expenses nor that CC Holdco, or a representative or agent thereof, and any single Parmar Entity entered into another agreement for such expenses.