UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	Case No. 18-71748-67 (AST)
Orion HealthCorp, Inc., et al.,	:	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.	:	

CC CAPITAL CHT HOLDCO LLC'S AND CHT HOLDCO, LLC'S
REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS COUNTERCLAIMS

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CC Capital CHT Holdco LLC ("CC Holdco") and CHT Holdco, LLC ("CHT Holdco"), by and through undersigned counsel, respectfully submit this reply brief in support of their motion to dismiss counterclaims (the "Motion") 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") [Doc. Nos. 548–550].[1]

INTRODUCTION

CC Holdco's and CHT Holdco's Motion established the fatal flaws of the Counterclaims, including that (1) the Counterclaims are barred by the statute of limitations; (2) the Counterclaims are barred by res judicata; (3) the Counterclaims are barred by the Releases executed by Paul Parmar and the Parmar Entities in connection with the Merger; (4) the Parmar Entities lack standing to bring the Counterclaims because they are derivative in nature, and, thus, belong exclusively to the Trustee; and (5) the Counterclaims fall woefully short of the requisite pleading standards and fail to adequately plead each element of a claim for breach of fiduciary duty and fraudulent misrepresentation under Rule 12(b)(6).

In their *Memorandum of Law in Opposition to the Motion of Plaintiffs to Dismiss the Counterclaims of the Parmar Entities* (the "Opposition") [Doc. No. 579], the Parmar Entities completely fail to respond to many of the critical points CC Holdco and CHT Holdco established in their Motion, thereby conceding these positions and waiving any argument in response to them.

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in CC Holdco's and CHT Holdco's Motion [Doc. No. 549].

For example, the Parmar Entities fail to address the substantive arguments regarding the application of statute of limitations to each of the Counterclaims, instead relying exclusively on a relation back argument, which is inapplicable here. The Opposition also fails to address the Motion's arguments that, under the plain language of the Releases, each of the Parmar Entities are a "Releasing Party" and CC Holdco and CHT Holdco are "Released Parties." As to standing, the Opposition similarly fails to address the existence of the settlement filed in and approved by this Court, as well as the Motion's arguments regarding the settlement's resolution of the derivative claims asserted by the Parmar Entities here. Finally, the Opposition ignores the Motion's dispositive arguments with respect to the breach of fiduciary duty claim, including that there is no alleged fiduciary relationship between CC Holdco and each of the Parmar Entities (and a breach thereof) and that the claim is improperly based on a breach of contract and must be dismissed.

In short, the Opposition relies on inapposite, out of circuit and non-precedential law throughout, ignores nearly all of the cases cited by CC Holdco and CHT Holdco in support of their Motion, and argues that the Court should ignore documents which bar their claims because the Parmar Entities did not physically attach them to their Counterclaims, even though those documents are explicitly referenced by and incorporated in the Counterclaims.[2] The Parmar Entities cannot avoid the fatal impact of the agreements between the parties simply by refusing to attach them to their pleading. Tellingly, the Parmar Entities do not provide any counterargument

[2] While the Court is clearly able to properly consider the documents filed in connection with the Motion at this stage, it is not necessary to do so in order to resolve the pending Motion under Rule 12(b)(6). Indeed, the Court need not review any of the documents attached to the Motion to find, as it must, that: the Counterclaims should be dismissed with prejudice because they are barred by the statute of limitations, *see infra* Section I; the Parmar Entities lack standing pursuant to Rule 12(b)(1) to pursue the derivative claims they have unsuccessfully masked as direct claims, *see infra* Section IV; and the Counterclaims should be dismissed in their entirety for failing to state a claim pursuant to Rule 12(b)(6), *see infra* Section V.

as to why any of the documents attached to the Motion are not properly considered by the Court on motion to dismiss. Each of the Motion's exhibits can, and should, be considered here, and the Counterclaims must be dismissed for the following reasons:

First, the Counterclaims are barred by the statute of limitations because they were filed on January 2, 2024, well outside the applicable limitations period and nearly seven years after the purported misrepresentations, omissions, and breaches of duty which all occurred prior to the closing of the Merger, on January 30, 2017. The Parmar Entities' sole argument in response to the Motion's statute of limitations defense is that Rule 15 saves their Counterclaims because they "relate back" to the Crossclaim they previously voluntarily dismissed more than five years ago in this Court. Rule 15, however, does not apply to claims which were voluntarily dismissed, and Rule 15's relation back doctrine is entirely inapplicable here. Even assuming that Rule 15 did apply to the voluntarily dismissed Crossclaim (and it does not as a matter of law), the Parmar Entities have not come close to meeting Rule 15's requirements for relation back in any event. The Counterclaims are barred by the statute of limitations and must be dismissed with prejudice.

Second, the Counterclaims are barred by res judicata because they arise out of the same transaction—the CHT Merger—as those that were dismissed with prejudice in the NJ Action. As an initial matter, the Opposition incorrectly relies on cases which do not apply New York law, which is applicable here. Under controlling New York law, that the legal causes of action differ is of no import: any claim which arises from the same facts, transactions, and occurrences as those that were previously dismissed is barred and cannot be relitigated. Moreover, some of the Parmar Entities were direct parties in the NJ Action, and those that were not, are bound by the prior dismissal because they are in privity with Parmar and the other parties as a matter of law, because

it is undisputed that Parmar managed all of the Parmar Entities at all relevant times. The Counterclaims are precluded by res judicata and must be dismissed with prejudice.

Third, the Counterclaims are barred by the Releases, which, as an initial matter, are properly considered by the Court as they are central the Counterclaims and incorporated by reference and relied upon by the Parmar Entities. The Opposition attempts to sidestep the Releases by claiming the Parmar Entities were fraudulently induced to execute them, but Judge Arleo already rejected that argument and there is no material difference in the related allegations. The Opposition also attempts to avoid the Releases by claiming the breach of fiduciary duty claim is based on conduct *after* execution of the release, despite the Counterclaims' allegations to the contrary. The unambiguous language of the Releases encompasses both Counterclaims and plainly releases any claims relating to the negotiation, execution, or delivery of the Merger and related transaction. Accordingly, as a matter of law, the Counterclaims must be dismissed with prejudice.

Fourth, the Parmar Entities lack standing under Rule 12(b)(1) to bring 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 ***all CHT shareholders***. Accordingly, they cannot be asserted by the Parmar Entities for individual recovery. Significantly, in connection with a settlement reached years ago and approved by this Court, the Trustee has already released any claims the Debtor had against CC Holdco and CHT Holdco. While mischaracterizing the allegations of the Counterclaims and citing inapposite law, the Opposition fails to rebut these points, and the derivative claims must be dismissed.

Finally, the Opposition fails entirely to rebut any of the Motion's arguments regarding the breach of fiduciary duty claim. The Counterclaims do not adequately state a claim pursuant to

Rule 12(b)(6) with the requisite specificity, and the Opposition's mere recitation of pleading standards and repetition of the conclusory allegations of the Counterclaims do not save the claims, which must be dismissed.

This Court should dismiss the Counterclaims in their entirety *with prejudice* and put a stop to the Parmar Entities' continued attempts, in multiple jurisdictions, to blame the victims of Parmar's fraud for his criminal conduct.

ARGUMENT

I. The Counterclaims Should Be Dismissed With Prejudice Because They Are Time-Barred.

The Parmar Entities' fraudulent misrepresentation and breach of fiduciary duty claims are barred by the statute of limitations, and, therefore, must be dismissed with prejudice. As the Motion established, the fraudulent misrepresentation claim accrued at or prior to the closing of the CHT Merger on January 30, 2017. Because the Parmar Entities had actual knowledge of the alleged fraud, or knowledge of the facts from which it could reasonably be inferred, on January 30, 2017, whether the two or six-year limitations period applies, the claim has expired. *See* Motion at 13–14. Similarly, because the purported breaches of fiduciary duty occurred prior to the closing of the Merger, the breach of fiduciary duty claim accrued on or before January 30, 2017, and whether the three or six-year limitations period applies, the claim has expired. *Id.* at 15–16. The Opposition fails entirely to rebut the Motion's substantive arguments regarding the statute of limitations as it applies to each of the Counterclaims. *See* Opp. at 6–8. Instead, the Parmar Entities' sole argument is that Rule 15 and the relation back principle somehow saves the Counterclaims, characterizing them as an "amendment" to the Crossclaim filed in this Court on July 10, 2018 [Doc. No. 51]. *See* Opp. at 6–8. As a matter of law, the relation back principle does not apply here.

On July 10, 2018, Parmar and twelve of the Parmar Entities—FUH, CHLLC, Constellation Health Investment 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, and PPSR Partners, LLC—filed their *Answer to the First Amended Adversary Proceeding Complaint* in this Court, while Parmar and ***only*** two of the Parmar Entities, ***FUH and CHLLC***, asserted a Crossclaim against CC Holdco and CHT Holdco [Doc. No. 51]. After motion to dismiss briefing, Parmar, FUH, and CHLLC voluntarily dismissed the Crossclaim without prejudice on January 11, 2019 [Doc. No. 176]. Nearly five years later, on January 2, 2024, the Parmar Entities (including FUH and CHLLC) filed their Counterclaims [Doc. No. 525].

As a matter of law, the relation back doctrine does not apply to claims which were voluntarily dismissed. *See In re Direxion Shares ETF Tr.*, 279 F.R.D. 221, 236 (S.D.N.Y. 2012) (holding new claims cannot relate back to voluntarily dismissed claims) (citations omitted). In fact, when a claim is dismissed without prejudice, it is treated as if it had never been filed. *Id.*; *see also Elgendy v. City of New York*, No. 99-cv-05196-JGK, 2000 WL 1119080, at *5 (S.D.N.Y. Aug. 7, 2000).[3] In *Elgendy*, the court held that an amended complaint could not relate back to a voluntarily dismissed complaint. 2000 WL 1119080, at *5. The court found that because "the voluntarily dismissed complaint is treated as if it was never filed, and thus not part of the current

[3] While the Opposition concedes that the NJ Action did not toll the running of the statute of limitations, *see* Opp. at 8; Motion at 14 n.4, the prior filing of the Crossclaim similarly did not toll the statute of limitations, as voluntary dismissed claims cannot, as a matter of law, toll the statute of limitations. *See In re Direxion Shares ETF Tr.*, 279 F.R.D. at 236 (finding "'a voluntarily dismissed claim does not toll the statute of limitations,' nor can claims 'relate back to a claim that no longer exists'") (alteration in original) (citations omitted); *Elgendy*, 2000 WL 1119080, at *5 ("As a general rule, statutes of limitations are not tolled by bringing an action that is later voluntarily dismissed.").

action," a voluntarily dismissed pleading "does not constitute an 'original pleading' for purposes of relation back under Rule 15(c)." *Id.* Accordingly, the court granted the defendant's motion to dismiss those claims as time-barred. *Id.* at *6. Because the Crossclaim in this Court was voluntarily dismissed [Doc. No. 176], the Counterclaims cannot, as a matter of law, relate back.

Even if Rule 15's relation back principles could apply in these circumstances, the Parmar Entities have failed to comply with Rule 15's requirements because they could not have amended the Crossclaim with the Counterclaims "as a matter of course" pursuant to Rule 15(a)(1), and, thus, were required to obtain CC Holdco's and CHT Holdco's written consent or the Court's leave to amend pursuant to Rule 15(a)(2). The Parmar Entities neither sought nor obtained leave of Court or written consent to amend.[4] Further, the Parmar Entities did not even describe the Counterclaims as an amendment to the previously dismissed Crossclaim. Because the Counterclaims do not supersede or amend the previously filed Crossclaim, as required by Rule 15(c)(1), the relation back doctrine is inapplicable here. *See In re GNK Enters., Inc.*, 197 B.R. 444, 449 (Bankr. S.D.N.Y. 1996) ("The relation back doctrine has application only in instances where an original pleading is amended.") (citation omitted); *Korean Air Lines Co. v. Port Auth. of N.Y. & N.J.*, No. 10-cv-02484-JT-MJO, 2012 WL 6967232, at *5 n.3 (E.D.N.Y. Aug. 1, 2012) (explaining that when considering the relation back doctrine under Rule 15(c)(1), "the new pleading dates back ***only to the date of the pleading it supersedes***") (emphasis added), *report and recommendation adopted*, 2013 WL 394704 (E.D.N.Y. Jan. 31, 2013); *Giambrone v. Meritplan Ins. Co.*, No. 13-cv-7377-MKBST, 2017 WL 2303980, at *4 (E.D.N.Y. Feb. 28, 2017) ("in determining relation back pursuant to Rule 15(c), the only relevant pleadings are the party's original pleading and ***that same party's amended***

[4] All of the cases cited in the Opposition are factually and legally inapposite as they involve a motion for leave to amend an answer to assert counterclaims. *See* Opp. at 7–8. Here, there was no pending pleading which could be amended and leave of court was never sought nor obtained.

pleading") (emphasis added) (citation omitted), *report and recommendation adopted*, 2017 WL 2303507 (E.D.N.Y. May 24, 2017).

Even assuming the Counterclaims were an amended pleading properly pled through leave of court or consent, relation back under Rule 15(c) would still not apply here. Here, only two of the fifteen Parmar Entities initially brought the Crossclaim. *See* Doc. No. 51. The Counterclaims, on the other hand, attempt to add the remaining ***thirteen*** Parmar Entities as Counterclaim-Plaintiffs—even though they were not parties to the previously dismissed Crossclaim, *see* Motion at 8–9. *Compare* Doc. No. 51, *with* Counterclaims. Where new parties are sought to be added, the relation back doctrine requires the new parties show the defendant-parties "knew or should have known that the action would have been brought against [them], but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C)(ii). If the reason for originally not naming the new plaintiff-party is anything other than a mistake of identity, then the relation back doctrine is unavailable. *See In re Bennett Funding Grp., Inc. Sec. Litig.*, 194 F.R.D. 98, 100 (S.D.N.Y. 2000) ("[W]ell-established case law and the clear dictates of Rule 15(c) require that plaintiffs invoking the relation back doctrine demonstrate that their failure to add new plaintiffs was the product of some mistake, ***rather than a deliberate decision***.") (emphasis added); *Julian v. Metro. Life Ins. Co.*, No. 17-cv-00957-AJN-BCM, 2021 WL 4237047, at *9–10 (S.D.N.Y. Sept. 1, 2021) (finding omission of newly-added plaintiff in original complaint ***not*** a mistake when there was no "legal error nor [was] it a case in which an employee with identical claims was mistakenly named as a plaintiff in the original [c]omplaint") (citation omitted), *report and recommendation adopted sub nom. Julian v. MetLife, Inc.*, 2021 WL 4710775 (S.D.N.Y. Oct. 7, 2021).

Here, the Parmar Entities have not alleged, as they must, that they made a mistake in their original pleading (the Crossclaim) in failing to include the thirteen entities they now seek to add

in the Counterclaims, and there is no evidence in support of a mistake. *See Julian*, 2021 WL 4237047, at *10. In fact, it is clear it was a deliberate choice for the thirteen Parmar Entities to not join in the Crossclaim when they joined the Answer in the same pleading, as their interests were undisputedly represented, and they were aware of the identity of parties. *See In re Bennett Funding Grp., Inc. Sec. Litig.*, 194 F.R.D. at 100. CC Holdco and CHT Holdco certainly also would be prejudiced by the Parmar Entities' undue delay and by having to defend new claims that are barred by the statute of limitations and that have already been litigated and decided, *see infra* Section II. *See Paulay v. John T Mather Mem'l Hosp.*, No. 14-cv-5613-SJFAYS, 2016 WL 1445384, at *6 (E.D.N.Y. Mar. 14, 2016) (finding defendant would be prejudiced if it had to defend against time-barred complaint), *report and recommendation adopted sub nom. Paulay v. Mather*, 2016 WL 1449648 (E.D.N.Y. Apr. 12, 2016).

Even though the cases they cite in their Opposition discuss these procedural requirements, the Parmar Entities omit any discussion of them or the proper use of the relation back doctrine. This is just one (of many) instances of the Parmar Entities' providing piecemeal (and irrelevant) legal analysis in an effort to save their claims. The Parmar Entities' attempt to apply a wholly inapplicable relation back doctrine to circumvent the statute of limitations fails on all accounts. *See In re Allbrand Appliance & Television Co., Inc.*, 875 F.2d 1021, 1025 (2d Cir. 1989) ("Clearly the relation back rule was not designed to provide a means either to circumvent or to expand the limitations."). As a result, the Counterclaims do not relate back to the Crossclaim as a matter of law.[5]

[5] And, because the Parmar Entities fail to otherwise rebut the dispositive arguments in the Motion regarding the application of the statute of limitations to each of the Counterclaims, they have waived any argument beyond their erroneous relation back argument. *Cole v. Blackwell Fuller Music Publ'g, LLC*, No. 16-cv-7014-VSB, 2018 WL 4680989, at *7 (S.D.N.Y. Sept. 28, 2018) ("Plaintiff's silence in his opposition concedes Defendants' arguments concerning the Amended

The Counterclaims must be dismissed in their entirety with prejudice because the statute of limitations bars both claims.

II. The Counterclaims Should Be Dismissed With Prejudice Because They Are Precluded By Res Judicata.

The Parmar Entities' fraudulent misrepresentation and breach of fiduciary duty claims are barred by claim and issue preclusion, and, therefore, must be dismissed with prejudice. The Motion established that claim preclusion bars the Counterclaims because the NJ Action, which involved the same parties or parties in privity, dismissed with prejudice claims arising from the same operative facts and transactions. *See* Motion at 16–21. Similarly, issue preclusion bars the Counterclaims from being relitigated here because the NJ Action dismissed with prejudice claims which arose out of the same facts, transactions, and occurrences that are the foundation of the Parmar Entities' claims here. *Id.* at 21–23.

Initially, the Court can properly consider Judge Arleo's Opinion and Order and the Amended Complaint filed in the NJ Action, *see* Doc. No. 550, Exs. K & L, at the motion to dismiss stage as public filings and court documents of which the Parmar Entities unquestionably had notice; in fact, these were pleadings filed by Parmar and the Parmar Entities, and they clearly had notice of Judge Arleo's Order dismissing their case against CC Holdco and CHT Holdco. *See, e.g.*, *Graham v. Select Portfolio Servicing, Inc.*, 156 F. Supp. 3d 491, 502 n.1 (S.D.N.Y. 2016) ("In deciding a motion to dismiss under Rule 12(b)(6), a court can take judicial notice of court documents."). And, of course, when considering the defense of res judicata, the Court "can take judicial notice of all of the documents which are part of the record before it, as well as the

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Complaint's failure to state a claim, and Plaintiff's claims are thus dismissed for that additional reason."). Indeed, by relying exclusively on a doctrine which allows a plaintiff to overcome statute of limitations constraints, the Parmar Entities have tacitly admitted that the statute of limitations does bar their Counterclaims. This alone requires dismissal of the Counterclaims with prejudice.

documents contained in the record before the [other c]ourt, without having to convert the motion to one for summary judgment." *In re 9281 Shore Rd. Owners Corp.*, 214 B.R. 676, 684 (Bankr. E.D.N.Y. 1997); s*ee also Jacobs v. L. Offs. of Leonard N. Flamm,* No. 04-cv-7607, 2005 WL 1844642, at *3 (S.D.N.Y. July 29, 2005) ("In cases where some of those factual allegations have been decided otherwise in previous litigation, however, a court may take judicial notice of those proceedings and find that plaintiffs are estopped from re-alleging those facts.").[6]

The Parmar Entities concede that Judge Arleo's Order has preclusive effect as to the issues "actually litigated" in the NJ Action but argue that the issues asserted in the Counterclaims are "qualitatively distinct." Opp. at 13–14. This argument fails as a matter of law and as a matter of fact based on the record. As a matter of law, res judicata is not limited only to claims that are "actually litigated" in the prior action—under New York's transactional approach, any claim is barred and cannot be relitigated if it arises from the same operative facts, transactions, and occurrences that are the foundation of claims previously brought. *See* Motion at 19; *see also Syncora Guarantee Inc. v. J.P. Morgan Sec. LLC*, 970 N.Y.S.2d 526, 533 (1st Dep't 2013) (even if different claims and different legal theories are presented in the second action, they are barred because "[t]he critical element is that both suits arise out of the same subject matter or series of

[6] While the Court need only consider the NJ Action pleadings to determine that res judicata bars the Parmar Entities' claims here, unquestionably the Court can also properly consider the Criminal Complaint and Indictment, *see* Doc. No. 550, Exs. I & J, at the motion to dismiss stage as public filings and court documents of which the Parmar Entities had notice. *See, e.g.*, *Ives Lab'ys, Inc. v. Darby Drug Co.*, 638 F.2d 538, 544 n.8 (2d Cir. 1981) (considering indictments even though they did not "directly involve[e] the parties," because, among others, they "are part of the public record of a court"), *rev'd on other grounds sub nom. Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844 (1982); *Boykins v. Lopez*, No. 21-cv-2831-KMK, 2022 WL 2307684, at *4 (S.D.N.Y. June 27, 2022) ("courts within the Second Circuit routinely take judicial notice of criminal complaints, indictments, and other charging instruments").

alleged wrongs") (citations omitted).[7] Thus, it is of no import that the legal causes of action here (fraudulent misrepresentation and breach of fiduciary duty) are different, and have different elements of proof, from those that were dismissed with prejudice in the NJ Action (securities fraud and RICO). *Id.*; *see also O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357–58 (1981) ("that the theories involve materially different elements of proof will not justify presenting the claim by two different actions" when the claim "aris[es] out of the same or related facts such as would constitute a single 'factual grouping'") (citation omitted). It matters only that the underlying allegations supporting such claims arise out of the same operative facts, transactions, and occurrences. Here, they do.

Judge Arleo dismissed with prejudice both counts of securities fraud and the RICO claim, and she dismissed without prejudice only the claims for violations of the Stored Communications Act.[8] *See Alpha Cepheus, LLC v. Chu*, No. 18-cv-14322, 2019 WL 7047206, at *10 (D.N.J. Dec. 20, 2019). That some claims in the NJ Action were dismissed with prejudice and others without

[7] The Parmar Entities ignore the many cases cited in CC Holdco's and CHT Holdco's Motion on this crucial issue and, instead, cite only two cases that do not even apply New York law. The Opposition's reliance on *Chabad of Prospect, Inc. v. Louisville Metro Bd. Of Zoning Adjustment*, 623 F. Supp. 3d 791, 799 (W.D. Ky. 2022) is entirely irrelevant as it is an out of circuit court applying Kentucky law, which does not follow the same transactional approach to res judicata as New York. Equally as unpersuasive and irrelevant, the Opposition cites *Czepas v. Schenk*, 362 N.J. Super. 216, 227–28 (App. Div. 2003), in which a New Jersey state court applies New Jersey law and does not engage in any meaningful res judicata analysis, relying only on the previous complaint's dismissal without prejudice to end the analysis.

[8] The Opposition erroneously claims that because some claims were dismissed without prejudice in the NJ Action, claim preclusion does not apply. *See* Opp. at 16. Not so. Under New York's transactional approach, the fact that the Stored Communications Act claims were dismissed without prejudice has no impact on whether claim preclusion applies. The Counterclaims clearly arise from the same operative facts, transactions, and occurrences as the securities and racketeering claims that Judge Arleo dismissed with prejudice. Moreover, even assuming that the Parmar Entities could have asserted a Counterclaim under the Stored Communications Act, they did not attempt to do so, and any such claim would be time-barred in any event. 18 U.S.C. § 1030(g).

prejudice makes no difference under New York's transactional approach to res judicata. *See, e.g.*, *Hellman v. Hoenig*, 989 F. Supp. 532, 538 (S.D.N.Y. 1998) ("Under New York law, the court issuing the first judgment need not have ruled on every issue that might have been raised. Pursuant to the 'transactional approach' adopted by the Court of Appeals, res judicata also operates to preclude the litigation of matters that *should* or *could have* been or were raised in a prior proceeding arising from the same, 'factual grouping,' 'transaction,' or 'series of transactions.'") (emphasis in original) (citations omitted). There is no doubt that the Counterclaims and the claims dismissed with prejudice in the NJ Action arose from the same "factual grouping" or "transaction"—CC Holdco's and CHT Holdco's purported conduct leading up to and during the CHT Merger. *See* Motion at 19–21. Whether or not every allegation is the same or every issue was decided by Judge Arleo, "[t]he policy against relitigation of adjudicated disputes is strong enough generally to bar a second action even where further investigation of the law or facts indicates that the controversy has been erroneously decided, whether due to oversight by the parties or error by the courts." *Reilly v. Reid*, 45 N.Y.2d 24, 28 (1978).

Here, there is no question that the issues asserted in the Counterclaims are substantially similar to the issues raised in the NJ Action—both actions relate to and arise from the CHT Merger. For example, the allegations underlying the securities claims in the NJ Action (which were dismissed with prejudice) were that CC Holdco and CHT Holdco purportedly intentionally deceived and made misrepresentations regarding due diligence, financial issues, manipulation of closing documents, and false promises with respect to the Merger as a scheme to induce Parmar and various of his entities into contributing more equity than necessary and decrease the value of CHT. *See* Motion at 20. In the Counterclaims, the Parmar Entities similarly claim that CC Holdco and CHT Holdco failed to disclose material financial information and "block[ed] the Parmar

Entities from any involvement with due diligence and financing," to decrease the value of CHT. *See, e.g.*, Counterclaims, ¶¶ 270, 291, 299–300, 302. There is no doubt that the underlying allegations in both cases arise out of the same operative facts, transactions, and occurrences.

Moreover, contrary to the Opposition's misguided claim that the "issue of whether the [Parmar Entities] were induced into signing the merger documents by the nondisclosure of Plaintiffs scheme to steal all of their equity was never pled, never actually litigated and is therefore not precluded," Opp. at 16, these allegations were, in fact, pled in the NJ Action. *See Alpha Cepheus*, LLC, 2019 WL 7047206, at *5 (explaining that defendants were alleged to have "fraudulently manipulated certain closing documents, and funds flow requirements to '***induce Plaintiffs into contributing a much larger percentage of their equity than necessary***'") (emphasis added) (citing NJ Compl., ¶ 313). In fact, the fraudulent inducement allegations were asserted in detail in the NJ Complaint. *See* NJ Compl., ¶¶ 146–56.[9]

Finally, with respect to establishing the identity or privity of parties for claim and issue preclusion, the Parmar Entities admit CC Holdco and CHT Holdco were defendants in the NJ

[9] Not only was this issue actually pled and litigated, but even if it wasn't, it certainly could have been raised in the NJ Action, which is sufficient to be barred under res judicata. *See* Motion at 16. For example, in *Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 193 (1981), the court explained that the current case was part of the same transaction as the previous suit, because the claims "originate[d]" from the same agreement, span the same period of time, and the "chief participants in the relevant events [were] the same," even though the current action alleged more facts than the previous action. Here, similarly, the Counterclaims originate from the same go-private transaction, the facts span the same period of time leading up to the transaction and shortly thereafter, and the chief participants are the same. *Compare* Counterclaims, ¶ 2 (alleging CC Holdco and CHT Holdco "orchestrated and executed a complex fraudulent scheme to artificially devalue and steal valuable assets belonging to the Parmar Entities" through execution of go-private transaction), *and id.* at ¶¶ 85–89, 91, 110–32, 139–67, 208–27 (alleging CC Holdco and CHT Holdco manipulated due diligence process to keep CHT's value low), *with Alpha Cepheus, LLC*, 2019 WL 7047206, at *5 (alleging CC Holdco, CHT Holdco, and others mispresented due diligence prior to the go-private transaction and fraudulently manipulated certain closing documents and funds flow requirements to "induce Plaintiffs into contributing a much larger percentage of their equity than necessary").

Action and that there is "overlap" in four of the Parmar Entities as parties to the NJ Action and in this litigation—namely, FUH, CHLLC, Naya, and CH Investment. *See* Opp. at 16. Thus, FUH, CHLLC, Naya, and CH Investment are undisputedly bound by the NJ Action as direct parties, and, at the very least, the Counterclaims must be dismissed as to them. The Opposition argues that the remaining eleven Parmar Entities—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—are not in privity with Parmar or the four Parmar Entities who were direct parties in the NJ Action because the Counterclaims do not allege Parmar held an ownership interest in any of the entities nor allege any description of the duties and powers he had to act on their behalf. *Id.* at 16–17. But Parmar has previously admitted ***to this Court*** that nearly all the Parmar Entities are "entities owned or controlled by [him]." *See* Motion at 18, n.6 (citing Doc. No. 51, ¶¶ 21, 26, 29 & p.1; Doc No. 65). Regardless, such allegations are not necessary to establish privity under New York law, which requires only an overlap in officers, directors, or managers. *See* Motion at 18–19; *see also Hellman*, 989 F. Supp. at 537 (finding privity by virtue of officer's role as CEO, Chairman of the Board, and majority shareholder in entity). Here, the Counterclaims' explicit allegation that Parmar managed all Parmar Entities and the Opposition's admission of the same, *see* Counterclaims, ¶ 10; Opp. at 16–17, is more than sufficient to establish privity.[10]

[10] The Opposition fails to address the various other ways privity is established, *see* Motion at 18–19, and thus concedes those arguments, *see Cole*, 2018 WL 4680989, at *7.

Because the NJ Action dismissed with prejudice claims arising out of the same transaction and essential facts as those pled here, with parties which are the same or in privity with one another, the Counterclaims are barred by res judicata and should be dismissed with prejudice.

III. The Counterclaims Should Be Dismissed With Prejudice Because They Are Precluded By The Releases Executed By The Parmar Entities.

The Parmar Entities urge this Court to ignore the plain language of Releases signed by them as a bargained for exchange in connection with the Merger. In this effort, they argue in the first instance that the Court should not consider the Releases because they did not attach them to their pleadings. Opp. at 3–4. Second, although they mischaracterize their own allegations and Judge Arleo's Order in the process, they argue that the Counterclaims are not barred because they plead a claim for fraud in the inducement here but did not in the NJ Action. *Id.* at 12–14. And, finally, they argue that the Releases do not bar some unidentified subset of the breach of fiduciary duty claim, which is purportedly based on conduct which occurred after the execution of the Releases. *Id.* at 13. None of these arguments have any merit.

A. The Court Can Consider The Releases On Motion To Dismiss.

As an initial matter, the Court can, and should, properly consider the Releases on motion to dismiss, *see* Doc. No. 550, Exs. A–H, because they are central to and incorporated by reference in the Counterclaims and relied upon by the Parmar Entities. *See* Counterclaims, ¶¶ 198–206 (explicitly alleging "Voting and Support Agreement[s] and Release[s] of Claims" were executed in connection with the Merger by CHT shareholders); *see also Holmes v. Air Line Pilots Ass'n, Int'l*, 745 F. Supp. 2d 176, 193 (E.D.N.Y. 2010) ("courts may consider 'the full text of documents that are quoted in the complaint or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit'") (citation omitted). Unquestionably, the Parmar Entities executed the Releases, possessed them, knew about them, and relied upon them. *See* Doc. No. 550, Exs.

A–H. Indeed, the Counterclaims allege that to facilitate the CHT Merger, "'Voting and Support Agreement[s] and Release[s] of Claims'[] were prepared and presented to all shareholders of CHT to sign" and that the CHT Merger could not be consummated unless 89% of the shareholders executed the agreements. Counterclaims, ¶ 198.[11]

Even assuming that the Counterclaims had not referenced the Releases, the law is clear that the Parmar Entities cannot "evade a properly argued motion to dismiss simply because [they] ha[ve] chosen not to attach the [Releases] to the [Counterclaims] or to incorporate [them] by reference." *I. Meyer Pincus & Assocs. P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991); *Bank of New York Mellon Tr. Co. v. Morgan Stanley Mortg. Cap., Inc.*, No. 11-cv-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). In fact, if the Releases contradict the allegations of the Counterclaims, the Releases "control and th[e] [c]ourt need not accept as true the allegations" in the Counterclaims. *Holmes*, 745 F. Supp. 2d at 194 (citation omitted).

And the Parmar Entities' allegation that they were fraudulently induced to enter the Releases does not impact this Court's ability to consider the agreements on a motion to dismiss. *See New v. M&T Bank Corp.*, No. 21-cv-1186-LJV, 2024 WL 22734, at *1 n.1, *3–5 (W.D.N.Y. Jan. 2, 2024) (considering agreement on motion to dismiss because it was integral to complaint

[11] In an effort to mask the significance of the Releases, the Parmar Entities define and refer to the "Voting and Support Agreement and ***Release of Claims***" as the "Proxy Agreement" throughout the Counterclaims. *See id.* at ¶¶ 198–206 (emphasis added).

even though plaintiff alleged he was fraudulently induced into signing it); *Pucilowski v. Spotify USA, Inc.*, No. 21-cv-1653-ER, 2022 WL 836797, at *3 (S.D.N.Y. Mar. 21, 2022) (same), *aff'd*, No. 22-869, 2022 WL 16842926 (2d Cir. Nov. 10, 2022). For example, in *Pucilowski*, in ruling on a motion to dismiss, the court considered an agreement, which was not attached to the complaint, where the plaintiff alleged that she was fraudulently induced into signing it. 2022 WL 836797, at *3. The court explained that plaintiff "concede[d] in her complaint that she received and signed the agreement and she does not dispute its authenticity, accuracy, or relevance." *Id.* Accordingly, the court held that the agreement was "central" to the plaintiff's allegation that she was fraudulently induced into signing the agreement and, thus, the agreement, "even if not incorporated by reference, [was] sufficiently integral to the complaint." *Id.* Here, similarly, the Parmar Entities admit that they signed the Releases, and the Counterclaims are devoid of any facts disputing the authenticity, accuracy, or relevance of the Releases. *See, e.g.*, Counterclaims, ¶¶ 198–206. Therefore, the Releases are "central" and integral to the Counterclaims and can be considered in ruling on the Motion. *See Pucilowski*, 2022 WL 836797, at *3.

Thus, the Court may consider the full text of the Releases and need not accept as true any contradictory allegations.[12]

B. The Parmar Entities Alleged They Were Fraudulently Induced To Enter The Releases In The NJ Action, And Judge Arleo's Ruling Precludes Their Claims.

The Opposition argues that the Counterclaims are not barred by the Releases because while the Parmar Entities allege fraud in the inducement here, they claim they did not allege they were fraudulently induced to enter the Releases in the NJ Action. Opp. at 12–14. This argument lacks merit. In fact, in the NJ Action, the Parmar Entities did assert detailed allegations that they were

[12] The Court may also consider the NJ Action pleadings in determining the preclusive effect of Judge Arleo's Order with respect to the Releases. *See supra* pp. 10–11.

fraudulently induced to enter the Releases, and those claims are substantively identical to the allegations in the Counterclaims here. *Compare* NJ Compl., ¶¶ 146–48 (alleging Releases "were fraudulent in several respects" and omitted material information, including that the Special Committee approved the transaction but failed to disclose that a valuation showed the purchase price "was well below what could be considered fair" and NYNM transaction was "stalled on direction of CC Capital"), *with* Counterclaims, ¶¶ 57, 199–200 (alleging NYNM transaction was delayed and Releases "were fraudulent in several respects" and omitted material information, including "valuations and conditions under which the Special Committee agreed to approve the Transaction"); *compare* NJ Compl., ¶ 151 (alleging CC Capital induced shareholders into signing Releases by giving promissory notes and telling shareholders "that if they did not agree to the [R]elease, the funds to fight any litigation and claims will . . . be deducted from these promissory notes"), *with* Counterclaims, ¶ 202 ("In an effort to further induce CHT's shareholders to agree, they were given promissory notes and were told that if they did not agree to the [R]elease, the funds to fight any litigation and claims will come from their money and would be deducted from these promissory notes."); *compare* NJ Compl., ¶¶ 153–56 (alleging fraudulent misrepresentations were made to shareholders on phone calls "in an effort to fraudulently induce them into signing"), *with* Counterclaims, ¶¶ 204–07 (same).

Despite the Parmar Entities' allegations in the NJ Action that they were fraudulently induced to enter the Releases, Judge Arleo ultimately concluded that the Parmar Entities had released ***any*** "claims related to the representations from the sale of CHT." *Alpha Cepheus, LLC*, 2019 WL 7047206, at *6; *see also* Motion at 24–25; Doc. No. 550, Exs. A–H § 4(d)(i). The Opposition's assertion that Judge Arleo "restrict[ed] her ruling" in the NJ Action to preclude a claim for fraud only to the extent based on the omissions that the Parmar Entities "were already

aware of" is equally unavailing. *See* Opp. at 13. While Judge Arleo did consider whether the Releases should be set aside based on the claim that Parmar had actual knowledge of omissions in the Proxy, Judge Arleo specifically held that "even if [the Parmar Entities] were seeking to set aside the release on the grounds that they were fraudulently induced into it, they would be unable to do so." *Alpha Cepheus, LLC*, 2019 WL 7047206, at *6.

Moreover, the Parmar Entities cannot claim that they were fraudulently induced to enter the Releases based on alleged omissions therein, *see* Opp. at 12–14, while at the same time admitting that they were aware of the omissions when they signed the Releases, *see* Counterclaims, ¶ 201 (alleging that Parmar believed there were omissions in the Releases). Parties can "execut[e] general releases that extinguish claims for fraud, including claims for fraud in the inducement, particularly where the party granting the release is on notice of potential fraud claims." *Seven Invs., LLC v. AD Cap., LLC*, 32 A.3d 391, 399 (Del. Ch. 2011). Indeed, enforcing a release in any fraud case "would be impossible if a party could later rescind a release based on the same or similar fraud allegations. A negotiated release would merely become the starting point for further litigation." *Id.* at 400. Therefore, the Parmar Entities cannot bring a claim based on the same allegations which they have already released, *see id.*, and which has already been litigated and decided against them by Judge Arleo, *see supra* Section II.[13] These claims are precluded and must be dismissed.

[13] In fact, the NJ Action considered, and rejected, the argument that because the parties "were aware that the [R]eleases were based on false information, that they are void," and held the Parmar Entities "have not pled any legal ground sufficient to set [the Releases] aside." *Alpha Cepheus, LLC*, 2019 WL 7047206, at *6.

C. The Breach Of Fiduciary Duty Claim Is Based On Conduct Which Took Place Prior To Execution Of The Releases.

Finally, the Parmar Entities argue the breach of fiduciary duty claim is based on conduct which occurred *after* the execution of the Releases in connection with the Merger, *see* Opp. at 12–13, and, therefore, is not barred by the Releases. On the contrary, the breach of fiduciary duty claim is based on three allegations of purported conduct which, pursuant to the plain language of the Counterclaims, all took place *prior to* the Merger and the execution of the Releases in connection therewith. First, the Parmar Entities allege CC Holdco breached its fiduciary duty by failing to disclose and delaying acquisitions "***at the time of the Transaction***" knowing these acquisitions "would increase the value of CHT and ***potentially kill the Transaction***." Counterclaims, ¶ 299 (emphasis added); *see also id.* at ¶ 226. Second, the Parmar Entities allege CC Holdco breached its fiduciary duty by "instructing CC Holdco employees to stop all new sales and acquisitions, because continuing sales and acquisition would significantly increase the value of CHT" and "[b]ecause CC Holdco's object was to remove Parmar and the Parmar Entities,[] to ensure that the value of CHT remained as low as possible." *Id.* at ¶ 300. Third, the Parmar Entities allege CC Holdco breached its fiduciary duty by failing to reimburse them for payments and expenses incurred to engage NACO as purportedly promised during the Merger negotiations. *Id.* at ¶ 302; *see also id.* at ¶¶ 60–66, 167(e).[14] These allegations squarely refer to purported conduct *before* the Merger, and thus are barred by the Releases.

Consistent with Judge Arleo's prior ruling, the clear and unambiguous language of the Releases encompass both Counterclaims asserted against CC Holdco and CHT Holdco as they

[14] In any event, the purported promise to reimburse payments related to NACO is not properly pled as a breach of fiduciary duty claim, but rather, is based on a breach of contract, and thus also fails to state a claim under Rule 12(b)(6). *See infra* Section V; Motion at 40–41.

plainly release any claims relating to the negotiation, execution, or delivery of the Merger and related transaction.[15] Accordingly, as a matter of law, the Counterclaims are barred and must be dismissed with prejudice. *See US Ecology, Inc. v. Allstate Power Vac, Inc.*, No. 2017-0437-AGB, 2018 WL 3025418, at *8 (Del. Ch. June 18, 2018) (dismissing with prejudice plaintiff's claim because "[w]hen the plain terms of a contract release a claim, . . . courts will enforce the release" and the "claim will be barred"); *Seven Invs., LLC*, 32 A.3d at 397–401 (granting motion to dismiss because general release encompassed all claims asserted in complaint).

IV. The Counterclaims Should Be Dismissed Because They Are Derivative And Belong Exclusively To The Trustee.

The allegations which form the basis of the fraudulent misrepresentation and breach of fiduciary duty claims are derivative, and, thus, belong to and can only be asserted by or on behalf of CHT (or, here, the Trustee). *See* Counterclaims at ¶¶ 291, 299–300. Accordingly, the Parmar Entities lack standing under Rule 12(b)(1), and the Counterclaims should be dismissed to the extent that they are based on derivative allegations. *See* Motion at 27–31. The Opposition fails to rebut these points by mischaracterizing the allegations of the Counterclaims, citing inapposite law, and failing to address arguments made in the Motion. *See* Opp. at 8–12.

As an initial matter, courts look to the law of the state of incorporation to determine whether claims are direct or derivative. *See* Motion at 28, n.9. Here, Delaware law governs this analysis. *Id.* While the Opposition does not dispute that Delaware law governs, it cites to five cases in support of the Parmar Entities' position that the Counterclaims are not derivative claims, four of which do not apply Delaware law and the one case which does apply Delaware law did not consider

[15] The Opposition fails to address the Motion's arguments that under the plain language of the Releases, each of the Parmar Entities are a "Releasing Party" and CC Holdco and CHT Holdco are "Released Parties," *see* Motion at 25–26, and, thus, concedes these points. *See Cole*, 2018 WL 4680989, at *7.

shareholder or investor claims and did not apply a derivative analysis.[16] On this point alone, these cases are inapposite and irrelevant.

Nevertheless, the Opposition argues that the Counterclaims do not allege harms to CHT and all its shareholders, and therefore, the claims are not derivative. The premise of the Parmar Entities' position is that the fraudulent misrepresentation claim alleges "not all shareholders but only [the Parmar Entities], were fraudulently induced into signing the merger documents," and that the breach of fiduciary duty claim alleges CC Holdco breached fiduciary obligations owed to them as minority shareholders. Opp. at 8. This is a mischaracterization of the plain language of the Counterclaims, which directly allege that "CHT's shareholders" were fraudulently induced to enter the Merger related documents. *See, e.g.*, Counterclaims, ¶ 202 ("[i]n a further effort to induce CHT's shareholders"); *id.* at ¶ 204 ("made further fraudulent misrepresentations to the shareholders"). In reality, the fraudulent misrepresentation claim is based on "numerous" purported misrepresentations and omissions affecting the value of CHT which injury was "acquiring CHT at an unreasonably low value," *see* Counterclaims, ¶ 291, and the breach of fiduciary duty claim is based on purported breaches of fiduciary duty by CC Holdco in an alleged effort to devalue CHT's shares, *id.* at ¶¶ 299–300. *See* Motion at 29. While the Opposition claims that the purported injury is individualized to the Parmar Entities, the injury they have alleged would be no different from any other shareholder, which makes the claims derivative as a matter of law.

[16] *See Small v. Goldman*, 637 F. Supp. 1030, 1032–33 (D.N.J. 1986) (applying New Jersey law); *Borak v. J. I. Case Co.*, 317 F.2d 838, 842 (7th Cir. 1963) (applying Wisconsin and California law); *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1118–19 (2d Cir. 1975) (applying New York law); *U.S. Gypsum Co. v. Quigley Co. (In re G-I Holdings, Inc.)*, 755 F.3d 195, 207–08 (3d Cir. 2014) (applying Delaware law but finding no reason to apply "direct/derivative inquiry" because parties litigating claims were not shareholders or investors in company, which was a non-profit non-stock corporation); *Svigals v. Lourdes Imaging Assocs., P.A.*, No. 18-cv-1736-NLH-JS, 2018 WL 6178863, at *7–8 (D.N.J. Nov. 27, 2018) (applying New Jersey law).

Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004) (holding that to sustain a direct claim, the "claimed direct injury must be independent of any alleged injury to the corporation," and "[t]he stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail ***without showing an injury to the corporation***") (emphasis added). Indeed, the Parmar Entities explicitly seek damages on behalf of CHT shareholders and allege injury to CHT by purportedly being devalued. *See, e.g.*, Counterclaims, 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.") (emphasis added).

Here, the purported injury to all CHT shareholders—indeed CHT itself—would be the same as the purported injury to the Parmar Entities. *See Feldman v. Cutaia*, 956 A.2d 644, 655 (Del. Ch. 2007) (finding a claim which "falls upon all shareholders equally" a derivative claim under the *Tooley* test) (citation omitted), *aff'd*, 951 A.2d 727 (Del. 2008). For example, in *BET FRX LLC v. Myers*, No. 2019-0894-KSJM, 2022 WL 1236955, at *7 (Del. Ch. Apr. 27, 2022), the plaintiff alleged that the defendants breached their fiduciary duties, and the court explained that "[t]he gist of each of these allegations is that" the defendants performed certain actions to "devalue [the company]." The court held that "[t]his is a textbook derivative claim" because the company suffered the alleged harm, and the company would receive the benefit of any recovery or other remedy. *Id.*; *see also In re Syncor Int'l Corp. S'holders Litig.*, 857 A.2d 994, 997 (Del. Ch. 2004) (finding claims derivative where alleged misconduct reduced value of corporation itself).[17]

[17] The cases cited by the Parmar Entities do not provide a different result, even assuming they were applying Delaware law (and they are not). *See Small*, 637 F. Supp. at 1031, 1033 (applying New Jersey law when plaintiff was induced to sell her stock in closely held corporation, which is not at issue here); *Borak*, 317 F.2d at 842 (applying Wisconsin and California law where plaintiffs alleged special preemptive right exclusive to them and no other shareholders, which is not at issue

Additionally, because the Trustee has exclusive standing to assert causes of action belonging to CHT, only the Trustee can bring derivative claims on CHT's behalf. *See* Motion at 28. In connection with a settlement approved by this Court on August 21, 2019, the Trustee, on behalf of CHT, has already settled and released any claims against CC Holdco and CHT Holdco. Doc. Nos. 221-1, 232; *see also* Motion at 10–11, 30–31. The Opposition fails to address the existence of such settlement, as well as the Motion's arguments regarding its application to the derivative claims, and, thus, waives any rebuttal to the same. *See Cole*, 2018 WL 4680989, at *7.

Moreover, even assuming the derivative claims did not belong to the Trustee (who already settled them), the Motion also established that the Parmar Entities do not have standing to assert a derivative claim under Delaware law because they are not ***current*** shareholders of CHT and never made a necessary pre-suit demand that CHT pursue those claims in the first instance. *See* Motion at 30 n.10. Again, the Opposition fails to address these issues, and concedes them. *See Cole*, 2018 WL 4680989, at *7.

Accordingly, the Counterclaims should be dismissed pursuant to Rule 12(b)(1), to the extent that they are based on derivative allegations, *see* Counterclaims, ¶¶ 291, 299–300.[18]

V. The Counterclaims Should Be Dismissed For Failure To State A Claim Under Rule 12(b)(6).

The Motion established that the Parmar Entities failed to plead viable claims for fraudulent misrepresentation and breach of fiduciary duty under Rule 9(b) and Rule 12(b)(6). *See* Motion at

here); *Vincel*, 521 F.2d at 1119 (applying New York law where plaintiff alleged anti-trust violations causing corporate injury); *Svigals*, 2018 WL 6178863, at *7–8 (applying New Jersey law recognizing the "special injury" test, which the Delaware Supreme Court rejected in *Tooley*).

[18] The only even arguably direct claim is based on the pre-Merger "promise" that certain expenses related to the prospective NACO transaction would be reimbursed, but that claim is barred for numerous other reasons as addressed herein and in the Motion. *See infra* Section V; *see also* Motion at 37–41.

31–41. In response, the Opposition cites to no case law and provides no rebuttal to the many cases and arguments found in the Motion, failing, among other things, to even mention the breach of fiduciary duty claim. Moreover, while the Opposition does not dispute the application of Rule 9(b) to the Counterclaims, it also makes no meaningful effort to satisfy its heightened pleading standard. To the contrary, the Opposition simply recites the elements of fraud and repeats the conclusory allegations of the fraudulent misrepresentation claim as if repetition of a fictional narrative somehow suffices for the detail required by Rule 9(b). *See* Opp. at 17–19. It does not. In fact, it does not even satisfy basic pleading standards. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (alteration in original). The Parmar Entities recite legal principles and conclusory statements of "facts" but have not—and cannot—show how or why their claims survive. They do not and must be dismissed.

Fraudulent Misrepresentation. Specifically, the Opposition does not rebut CC Holdco's and CHT Holdco's dispositive arguments that the Parmar Entities engage in improper group pleading for their fraudulent misrepresentation claim and fail to establish individualized causation. *Id.* at 33–34. This alone requires dismissal of their fraudulent misrepresentation claim. *See Flanagan v. Girl Scouts of Suffolk Cnty., Inc.*, No. 21-cv-7153-KAM-ARL, 2023 WL 6594885, at *8 (E.D.N.Y. Aug. 25, 2023) (finding plaintiff's failure to address argument in opposition to defendants' motion to dismiss "amounts to a concession of th[e] argument"), *report and recommendation adopted as modified*, 2023 WL 6307362 (E.D.N.Y. Sept. 28, 2023). Like the conclusory allegations of the Counterclaims, the Opposition also makes bald conclusions of unspecific "lies" and "misrepresentations" purportedly made by "Plaintiffs" and "CC Capital

Plaintiffs," *see* Opp. at 17–19, without making any attempt to identify the speaker or to distinguish between CC Holdco and CHT Holdco. This utterly fails to state a claim with particularity and is grounds for dismissal. *See Goldin v. Tag Virgin Islands, Inc.*, No. 651021/2013, 2014 WL 2094125, at *10 (N.Y. Sup. Ct. May 20, 2014) (dismissing "allegations made collectively as to the 'TAG Defendants'" as improper "group pleading" which "do[] not suffice to state a fraud claim"). And while the Opposition creates a story about how the claim is stated in specificity, *see* Opp. at 17–18, this story is not grounded by any specific, particular facts sufficient to satisfy the Rule 9(b) pleading standard. *See In re Lion Cap. Grp.*, 44 B.R. 690, 698 (Bankr. S.D.N.Y. 1984) (holding defendants' counterclaims failed to meet minimum level of pleading because, although they "allege particular kinds of misrepresentations," they did "not ground their allegations in specific facts relevant to their claims"); *see also IKB Int'l S.A. in Liquidation v. Bank of Am. Corp.*, 584 F. App'x 26, 27 (2d Cir. 2014) (particularity "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"). In short, the Opposition fails to address any of the arguments advanced in the Motion for failure to plead a single element of fraudulent misrepresentation.

Because the Parmar Entities have not adequately pled fraudulent misrepresentation with the requisite particularity, nor rebutted any of the well-made arguments in the Motion, the claim must be dismissed.

Breach of Fiduciary Duty. Further, the Opposition does not even attempt to address any of CC Holdco's arguments regarding the Parmar Entities' failure to state a claim for breach of fiduciary duty. In particular, the Motion established that the breach of fiduciary duty claim must be dismissed because the Parmar Entities have failed to allege the existence of a fiduciary

relationship between CC Holdco and each of the Parmar Entities (and a breach thereof) and because the claim is based on a breach of contract. Motion at 37–41. The Parmar Entities' failure to raise any argument in their Opposition to rebut these dispositive issues concedes the points. *In re UBS AG Sec. Litig.*, No. 07-cv-11225-RJS, 2012 WL 4471265, at *18 n.18 (S.D.N.Y. Sept. 28, 2012) (finding that because plaintiff "did not directly address" the defendants' argument in its opposition brief, "it has conceded the point by silence"), *aff'd sub nom. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014); *see also Cole*, 2018 WL 4680989, at *7 (explaining a party's failure to address an issue in its opposition to a motion to dismiss "amounts to a concession or waiver of the argument"). This alone requires dismissal of their breach of fiduciary duty claim. Further, the Parmar Entities ignore wholesale the numerous cases cited in the Motion dismissing breach of fiduciary duty claims where no fiduciary relationship exists and dismissing "bootstrapped" contract claims. *See* Motion at 40–41. The breach of fiduciary duty claim must be dismissed under Rule 9(b) and Rule 12(b)(6).

Because the Parmar Entities have not adequately pled a claim for breach of fiduciary duty with the requisite particularity, nor rebutted any of the well-made arguments in the Motion, the claim must be dismissed.

CONCLUSION

For the foregoing reasons and the reasons set forth in CC Holdco's and CHT Holdco's Motion, the Counterclaims brought by the Parmar Entities should be dismissed with prejudice.

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