UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION),

Plaintiffs,

v.

PLATINUM MANAGEMENT (NY) LLC, *et al.*,

Defendants.

NO. 18-CIV-10936 (JSR)

MEMORANDUM OF LAW OF DEFENDANTS MICHAEL NORDLICHT AND KEVIN CASSIDY IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

Defendants Michael Nordlicht and Kevin Cassidy ("Agera Executives") respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), to dismiss the following claims alleged in the Complaint filed by the Joint Official Liquidators ("JOLs") of Platinum Partners Value Arbitrage Fund LP ("PPVA") and PPVA for failure to state a claim: (1) the Ninth Count for aiding and abetting breach of fiduciary duty against Michael Nordlicht and Kevin Cassidy, and (2) the Eleventh Count for unjust enrichment against Kevin Cassidy. The Agera Executives join the motion to dismiss of defendant David Bodner on the grounds that the Complaint's group pleading fails to satisfy Rules 8 and 9(b).[1]

The Complaint asserts 17 counts against 90 defendants based upon two alleged fraudulent schemes: one engaged in by the "Platinum Defendants" and the "Beechwood Defendants" from 2012 through 2015; and a second engaged in by the "Platinum Defendants" beginning in late 2015, with the alleged "material and knowing assistance" by the "Beechwood Defendants" and others, allegedly including Michael Nordlicht and Kevin Cassidy. However, the Complaint fails to plead specific facts to support its conclusory allegations against the Agera Executives. Of the 765 paragraphs and 96 exhibits, only 13 paragraphs and 3 exhibits relate to Michael Nordlicht and/or Kevin Cassidy. However, even these scant allegations are devoid of specific facts to support the conclusory allegations that Michael Nordlicht or Kevin Cassidy aided and abetted purported breaches by the "Platinum Defendants" of fiduciary duties they owed to PPVA or that Kevin Cassidy was unjustly enriched to the detriment of PPVA.

[1] The Agera Executives hereby incorporate by reference the memorandum of law filed by Defendant David Bodner in support of his motion to dismiss the Complaint. (Dkt. No. 72).

The aiding and abetting claim is based on one transaction in the alleged second scheme in which the "Platinum Defendants" sold an indirect interest held by PPVA in Agera Holdings LLC to a Beechwood entity ("Agera Transaction"). At the time of the Agera Transaction, Michael Nordlicht was in-house counsel and Kevin Cassidy was a managing director or senior executive of Agera Energy Inc., the underlying operating company. The Complaint however does not plead any specific facts showing that either Michael Nordlicht or Kevin Cassidy had actual knowledge of any primary breach of fiduciary duty owed by the "Platinum Defendants" to PPVA, specific intent to participate in such breach, or took any action to further such breach proximately resulting in damage to PPVA. Thus, the Complaint fails to establish a secondary liability claim against Michael Nordlicht or Kevin Cassidy.

The Complaint fails also to plead facts to state a claim of unjust enrichment against Kevin Cassidy. There are no facts upon which the Court could infer that Kevin Cassidy was enriched by receiving something of value that belonged to PPVA or at PPVA's expense. The Complaint pleads instead that non-party Starfish Capital Inc. received a payment in exchange for its sale of its membership interest in the purchasing company. The Complaint fails to plead facts establishing that "equity and good conscience" militate against permitting Starfish to retain the payment, let alone Kevin Cassidy.

The JOLs have advised this Court that they are custodians of Platinum Management's servers and are "currently in possession of more than 13 million" documents from that server. Dkt. No. 21 at ¶ 13. Presumably, if there existed facts within those documents to support the conclusory allegations against Michael Nordlicht and Kevin Cassidy, the JOLs would have pleaded them. Accordingly, the Ninth and Eleventh Counts should be dismissed as against them with prejudice.

RELEVANT ALLEGATIONS IN THE COMPLAINT

The Complaint does not allege facts showing that either of two Agera Executives played any active role in any alleged wrongdoing against PPVA. The Agera Executives are not alleged to be members of the "Platinum Defendants" or the "Beechwood Defendants." Compl. ¶¶ 33-34. The factual allegations relating to the Agera Executives are sparse and as follows.

Agera Energy is a retail energy company that is alleged to have been formed by the "Platinum Defendants" based upon assets purchased through a bankruptcy proceeding in 2014. Compl. ¶¶ 434, 436. Agera Energy is a wholly-owned subsidiary of Agera Holdings LLC. Compl. ¶ 443. Agera Holdings was owned 95.01% by Michael Nordlicht and 4.99% by MF Energy Holdings, which in turn was owned by Defendant Mark Feuer. Comp. ¶¶ 50, 445.

PPVA and PPCO[2] allegedly held 55% and 45% interests, respectively, in Principal Growth Strategies, LLC ("PGS"), which in turn held a promissory note issued by Agera Holdings. The promissory note was for $600,071.23 and was convertible into 95.01% of the outstanding capital securities of Agera Holdings ("Note"). Compl. ¶¶ 437-38; Ex. 78 at ¶ 1(b).[3]

The Complaint alleges that, at the direction of Mark Nordlicht, Agera Energy hired Kevin Cassidy in 2014 as a managing director or senior executive. Comp. ¶¶ 52, 439, 441. The Complaint alleges that Michael Nordlicht is the brother of Mark Nordlicht and, upon the advice of Mark Nordlicht, Michael Nordlicht was hired as in-house counsel of Agera Energy in 2014. Compl. ¶¶ 50, 446.

The gravamen of the claims against Kevin Cassidy and Michael Nordlicht is the June

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[2] "PPCO" is Platinum Partners Credit Opportunities Master Fund, LP, which is alleged to be "another Platinum Management operated fund." Compl. ¶ 10.

[3] For the purposes of a motion to dismiss, "[t]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *International Audiotext Net. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995).

2016 sale by PGS of the Note issued by Agera Holdings to AGH Parent LLC, an entity allegedly "controlled directly by the Platinum Defendants and Beechwood Defendants and for the benefit of SHIP." Compl. ¶¶ 11(v), 459, 463; Ex. 84.[4] The Complaint alleges that the purchase price of $170 million was less than the fair value of the Note and that the non-cash portion of the purchase price paid for the Note was not worth the value attributed to such non-cash consideration. Compl. ¶¶ 11(v), 464-69. Ultimately, PPVA allegedly did not receive a distribution from PGS reflecting fair value following PGS' sale of the Note. Compl. ¶¶ 473, 485-86.

Tellingly, there are no facts alleged to demonstrate that Michael Nordlicht or Kevin Cassidy played any role in PGS' sale of the Note, took any action to cause the sale, set the sale price, structured the sale transaction, distributed the sales proceeds, or made any representations regarding the sale or the Note. Indeed, the Complaint alleges otherwise. The Complaint alleges that Mark Nordlicht "began planning an insider sale" of the Note (Compl. ¶ 450), "the Platinum Defendants and Beechwood Defendants coordinated the terms of the Agera Sale" (Comp. ¶ 451), "[t]he terms of the Agera Sale were negotiated by and among Defendants Steinberg, Taylor and Narain, all operating under the instructions of the other Platinum Defendants, the Beechwood Defendants and SHIP" (Compl. ¶ 452), and the sale "transaction was executed, performed, overseen and then managed by Narain and Illumin." Compl. ¶ 453.

The Complaint conclusorily alleges that "the Platinum Defendants communicated with Cassidy and Michael Nordlicht regularly by email and in person regarding the Agera Transactions." Compl. ¶ 666. But the Complaint fails to plead even a single fact identifying any such purported communication. Nor does the Complaint allege any connection whatsoever

[4] "SHIP" is defendant Senior Health Insurance Company of Pennsylvania. Compl. ¶ 11(v).

between Michael Nordlicht and Kevin Cassidy, on the one hand, and PPVA, on the other hand.

The Complaint does not allege that Michael Nordlicht received anything of any value in connection with PGS' sale of the Note.

The Complaint alleges that the "Platinum Defendants" and "Beechwood Defendants" "gave Cassidy a share of the sale proceeds from the Agera Sale, by granting his entity, Starfish, a membership interest in PGS," purportedly "for no apparent consideration." Compl. ¶¶ 52, 471. However, these allegations are belied not only by other facts pleaded in the Complaint, but also by the purchase agreement attached to the Complaint. Contrary to the allegation of "paying Cassidy millions of dollars out of the proceeds thereof for no apparent consideration" (Compl. ¶¶ 52, 664), an April 1, 2016 email makes clear that Kevin Cassidy had an interest in Agera in consideration for the work he performed to build a successful company. Compl. ¶ 471; Ex. 86 ("He got to this great ending and we need to pay him.") The email stated that, since PGS was selling its "full" interest in Agera, Kevin Cassidy's interest in Agera should also be monetized. *Id*. The purchase agreement between PGS and Starfish Capital, Inc. shows that Starfish sold its 8% membership interest in PGS in exchange for $7 million in cash and $6,552,000 of certain preferred interests in AGH Parent. Compl. ¶ 472; Ex. 87. The Complaint thus pleads that PGS received consideration from Starfish (not Cassidy) in exchange for the cash and membership interests paid to Starfish. The Complaint does not allege that the purchase price paid for Starfish's interest in PGS was not a fair market price.

Tacitly recognizing the paucity of factual allegations against Kevin Cassidy, the JOLs attempt to taint him by citing to his "two prior stints in prison" and conviction in 2011 in connection with misstatements of the value of natural gas derivatives. Compl. ¶¶ 52, 440-42. The recitation of Kevin Cassidy's historical misconduct, for which he took full responsibility,

cannot rescue the fatal factual deficiencies of the claims asserted against him. There is no allegation that any prior conviction prohibited Kevin Cassidy from working at Agera Energy. This prior history is not alleged to be connected to the "Platinum Defendants," the "Beechwood Defendants," PPVA, or the transactions alleged in the Complaint. Thus, the prior conduct cannot bolster the deficient claims, but is irrelevant and should be disregarded by the Court.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

To survive a motion to dismiss under Rule 12(b)(6), the complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl, Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citations and emphasis omitted). A complaint will not satisfy the pleading requirements if it offers only '"labels and conclusions' or 'a formulaic recitation of the elements of a cause of action,'" and does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). Accordingly, "[w]hile the Court must take as true all well-pleaded facts, *conclusory allegations must be disregarded*." *Pollio v. MF Global, Ltd.*, 608 F. Supp. 2d 564, 572 (S.D.N.Y. 2009) (emphasis added; citation omitted).

Moreover, the factual allegations must meet a "plausibility" standard. *Twombly*, 550 U.S. at 564. In this connection, the complaint must plead sufficient facts to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, *quoting Twombly*, 550 U.S. at 570; *see also Prout v. Vladeck*, 316 F. Supp. 3d 784, 797 (S.D.N.Y. 2018). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. However, where a complaint "pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"

Id. Thus, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id*. at 679.

Where, as here, the claims sound in fraud, the heightened pleading standard requires the underlying circumstances to be stated with particularity. *See* Fed. R. Civ. P. 9(b); *see also Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d. 381, 387 (S.D.N.Y. 2007) ("Rule 9(b) provides that the circumstances of fraud must 'be alleged with particularity,' requiring 'reasonable detail as well as allegations of fact from which a strong inference of fraud reasonably may be drawn'"). This heightened pleading requirement applies to a claim of aiding and abetting a breach of fiduciary duty that involves an alleged fraud. *See Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2013); *see also Kolbeck v. LIT Am.*, 939 F. Supp. 240, 245 (S.D.N.Y. 1996). Similarly, Rule 9(b)'s heightened pleading requirement applies to claims of unjust enrichment that are "based on the same predicate allegations relating to a fraudulent scheme" that form the gravamen of a complaint. *See DeBlasio v. Merrill Lynch & Co.*, No. 07 Civ. 318 (RJS), 2009 U.S. Dist. LEXIS 64848, at *35-36, 39 (S.D.N.Y. July 27, 2009).

As shown below, the Complaint cannot withstand this legal scrutiny and must be dismissed as against Michael Nordlicht and Kevin Cassidy.

II. THE COMPLAINT FAILS TO STATE A CLAIM FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AGAINST MICHAEL NORDLICHT OR KEVIN CASSIDY.

A claim for aiding and abetting a breach of fiduciary duty requires (a) a breach of fiduciary obligations owed to plaintiff, (b) that the defendant knowingly induced or participated in the breach, and (c) plaintiff suffered actual damages as a proximate result. *See Sharp Int'l Corp. v. State Bank & Trust Co.*, 403 F.3d 43, 49 (2d Cir. 2005). The Complaint falls woefully

short of pleading facts to establish the existence of any one of these material elements against either of the two Agera Executives.

First, with respect to knowledge, the Complaint must plead facts showing that defendant had actual knowledge of the primary breach of duty. *Sharp*, 403 F.3d at 49; *see also Krys*, 749 F.3d at 128. "Constructive knowledge of the breach of fiduciary duty by another is legally insufficient." *Krys*, 749 F.3d at 128, *quoting Krys v. Butt*, 486 F.App'x 153, 157 (2d Cir. 2012); *see also Kolbeck*, 939 F. Supp. at 246. The Complaint does not plead facts establishing actual knowledge by the Agera Executives.

The Complaint conclusorily alleges that Kevin Cassidy and Michael Nordlicht had "actual knowledge that the Platinum Defendants were breaching their fiduciary obligations to PPVA by engaging in the Agera Transactions." Compl. ¶ 669. However, the Complaint is bereft of any facts to support this wholly conclusory allegation. While the Complaint concludes that Kevin Cassidy and Michael Nordlicht "had knowledge" of the Agera Sale (Compl. ¶¶ 50, 52), there are no facts pleaded to allow the Court to draw the inference that Kevin Cassidy or Michael Nordlicht had actual knowledge that the Platinum Defendants allegedly transferred PPVA's interest in PGS "for the benefit of the Beechwood Defendants, select insiders, and [PPCO]," and in breach of their fiduciary duty to PPVA. Compl. ¶¶ 10, 661. The Complaint is devoid of facts to support the inferences that Michael Nordlicht or Kevin Cassidy knew that the Note purchase price allegedly was less than fair market value, the non-cash consideration paid for the Note "had little or no actual value," $10 million of the cash consideration was "unaccounted for," or PPVA received "little to no consideration" for its indirect interest in the Note. Compl. ¶¶ 11(v), 459-71, 474-86. In the absence of facts supporting these conclusions, there can be no inference that the Agera Executives had actual knowledge of the alleged

wrongful conduct comprising the alleged primary breach of fiduciary duty by the Platinum Defendants. *See Krys*, 749 F.3d at 129-30 (affirming dismissal of aiding and abetting breach of fiduciary duty claim because of the failure to plead facts establishing actual knowledge of the primary fraud and breach).

Second, the inducement or participation prong requires facts pleading that the defendant provided "substantial assistance" to the primary violator. *Sharp*, 403 F.3d at 50, *citing Kaufman v. Cohen*, 307 A.D.2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dep't 2003). As the Second Circuit explained, substantial assistance requires affirmative conduct, mere inaction will not suffice:

> Substantial assistance may only be found where the alleged aider and abettor "affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." … "The mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff."

Sharp, 403 F.3d at 50 (citations omitted); *see also SPV OSUS Ltd. v. AIA LLC*, No. 15-cv-619 (JSR), 2016 U.S. Dist. LEXIS 69349, at *19 (S.D.N.Y. May 26, 2016); *Rabin v. Dow Jones & Co.*, No. 14-cr-4498 (JSR), 2014 U.S. Dist. LEXIS 143428, at *2 (S.D.N.Y. Sept 24, 2014), *Ferring B.V. v. Allergan, Inc.*, 4 F. Supp. 3d 612, 625 (S.D.N.Y. 2014). Again, the Complaint does not meet this pleading requirement.

The Complaint fails to plead specific facts that, if true, would establish that Michael Nordlicht or Kevin Cassidy provided affirmative assistance to, or helped conceal, the Platinum Defendants' alleged primary breach of fiduciary duty owed to PPVA. The Complaint alleges that the Agera Executives "exerted control over PPVA and its subsidiaries" in connection with the sale by PGS of the Note. Compl. ¶¶ 50, 52. However, not a single fact is pleaded to support these bald allegations. There is not a single factual allegation of any contact between either of the two Agera Executives, on the one hand, and "PPVA and its subsidiaries," on the other hand. Similarly lacking any factual support is the allegation that Kevin Cassidy and Michael Nordlicht

"orchestrat[ed] the Agera Transactions in order to transfer PPVA's interest in Agera Energy to the Beechwood Defendants." Compl. ¶¶ 667-68. The absence of factual support is not surprising because, as shown above, the Complaint alleges that other defendants "negotiated," "executed," "performed," "oversaw" and "managed" the Agera Transaction, not Kevin Cassidy or Michael Nordlicht. Compl. ¶¶ 450-53.

The allegation that Michael Nordlicht "consented" to the Agera Transaction or the purported transfer of his voting and equity interest in Agera Holdings to AGH Parent (Compl. ¶¶ 665, 668) does not supply the missing link. The Agera Transaction involved the sale to AGH Parent of the convertible Note issued by Agera Holdings. Compl. ¶¶ 459, 463. Upon conversion of the Note, the voting and equity rights of 95.01% of Agera Holdings would become vested in AGH Parent. Compl. ¶ 438, Ex. 78 at ¶ 1(a). The Complaint does not (and cannot) establish that any alleged consent by Michael Nordlicht as the 95.01% equity member of Agera Holdings to the sale of the Note constituted substantial assistance to the Platinum Defendants' alleged breach of fiduciary duty owed to PPVA. Any such consent was not an inducement of a breach of fiduciary duty or participation in such breach. Rather, at best, such consent may have removed an impediment or constituted forbearance, but does not establish substantial assistance as a matter of law. *See Sharp*, 403 F.3d at 52 (State Street's "express written consent to the Noteholder's purchase of an additional $25 million of subordinated notes" without which "the transaction would not be consummated" did not constitute substantial assistance to a breach of fiduciary duty, but merely "forbearance").

The Complaint conclusorily alleges that Kevin Cassidy "substantially assisted and participated" in the Platinum Defendants' alleged breach of fiduciary duty based upon the receipt by Starfish of $13,552,000 in cash and interests in AGH Parent. Compl. ¶ 667. The Complaint

utterly fails to explain how Starfish's sale of its interest in PGS in exchange for $13,552,000 in cash and interests in AGH Parent could constitute substantial assistance by Kevin Cassidy to the Platinum Defendants' breach in connection with PGS' sale of the Note to AGH Parent. There are simply no facts alleged connecting Cassidy (or Starfish) to PPVA, let alone an alleged breach by the Platinum Defendants of duties owed to PPVA.

The Complaint's conclusory allegations against Kevin Cassidy and Michael Nordlicht do not rise to the level of substantial assistance necessary to state an aiding or abetting claim. At best, the allegations (if supported by facts) would describe inactivity, which, in the absence of an affirmative duty to act, are fatally insufficient as a matter of law. *See SPV*, 2016 U.S. Dist. LEXIS 69349, at *19 ("where a defendant owes no direct fiduciary duty to the plaintiff, mere inaction cannot constitute substantial assistance"). No facts are pleaded to give rise to any affirmative duty owed by Kevin Cassidy or Michael Nordlicht to act with respect to PPVA.

Third, the Complaint must allege that the defendant's substantial assistance proximately caused the harm on which the primary liability is predicated. *See Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 370-71 (S.D.N.Y. 2007). The Complaint must allege more than "but-for causation," it must allege that the "injury was 'a direct or reasonably foreseeable result of the conduct.'" *Id.*; *see also Kolbeck*, 939 F. Supp. at 249. Here, the Complaint fails to plead any facts to establish the required causal connection between the Agera Executives' alleged conduct and the alleged harm suffered by PPVA.

Finally, the JOLs should be in a position to plead facts with the detail required by Rule 9(b) because they possess more than 13 million documents from Platinum Management's server. *See* Dkt. No. 21 at ¶ 13. The JOLs' failure to do so makes plain that they do not possess facts to establish actual knowledge and substantial assistance by the Agera Executives.

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT AGAINST KEVIN CASSIDY.

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 879 N.Y.S.2d 355, 361 (2009) (citation omitted). To state a claim for unjust enrichment, a complaint must allege "that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004); *see also In re Optimal U.S. Litig.*, 813 F. Supp. 2d 383, 402 (S.D.N.Y. 2011). The Eleventh Count does not plead facts to state a claim of unjust enrichment against Kevin Cassidy.

First, a "complaint does not state a cause of action in unjust enrichment if it fails to allege that defendant received something of value which belongs to the plaintiff." *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 260 (S.D.N.Y. 2012). The Complaint does not allege that Kevin Cassidy was enriched or received a benefit at the expense of PPVA. Rather, the Complaint pleads that Kevin Cassidy was "enriched" because *Starfish* allegedly "received millions of dollars in Agera sales proceeds in exchange for nothing." Compl. ¶ 664. There are no well pleaded facts showing that Kevin Cassidy – as opposed to non-party Starfish – received any sales proceeds. Rather, the purchase agreement itself shows that *Starfish* received $13 million. Compl. ¶ 472, Ex. 87. This allegation is not actionable against Kevin Cassidy.

With respect to Starfish, the Complaint itself belies the allegation that it received $13 million "in exchange for nothing." The Complaint alleges that PGS entered into a contract with Starfish whereby "PGS repurchased Starfish's membership interests in PGS for total consideration of $13,552,000." Compl. ¶ 472. Thus, Starfish received the $13 million in

consideration of its sale of its 8% interest in PGS. There are no facts pleaded to establish that the purchase price paid by PGS did not reflect fair market value. There are no facts pleaded establishing that "equity and good conscience" require that any consideration paid to Starfish by PGS be turned over to PPVA. *See Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734, 741 (S.D.N.Y. 2012) (dismissing unjust enrichment claim where plaintiff failed to establish that equity and good conscience required restitution because "a plaintiff must plead some expectation of compensation that was denied in order to recover under a theory of unjust enrichment").

Second, an unjust enrichment claim "'requires some type of direct dealing or actual, substantive relationship" between the plaintiff and defendant. *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD), 2014 U.S. Dist. LEXIS 46368, at *42, (S.D.N.Y. Mar. 28, 2014), *quoting Reading Int'l, Inc. v. Oaktree Capital Mgmt.*, 317 F. Supp. 2d 301, 334 (S.D.N.Y. 2003). If the relationship is "too attenuated," the unjust enrichment claim must be dismissed. *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16 (2007); *see also In re Commodity Exch. Inc.*, 213 F. Supp. 3d 631, 677-8 (S.D.N.Y. 2016) ("Because Plaintiffs have failed to allege that they had any relevant relationship with the Defendants or that Defendants were enriched at Plaintiffs' expense, the SAC fails to state a claim for unjust enrichment"). Here, the Complaint fails to allege a single act of direct dealing between Kevin Cassidy (or Starfish) and PPVA, let alone any substantive relationship between them. The Complaint baldly asserts that "Platinum Management caused PPVA and its subsidiaries to have a direct relationship with … Cassidy." Compl. ¶ 690. However, there are no facts pleaded anywhere in the Complaint from which the Court can infer any such direct relationship. It is not plausible to conclude that Kevin Cassidy was enriched at PPVA's expense where the Complaint does not plead a single direct dealing or communication with PPVA whatsoever.

In sum, the Complaint fails to state a claim for unjust enrichment against Kevin Cassidy. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 27 F. Supp. 3d 447, 479 (S.D.N.Y. 2014) (dismissing unjust enrichment claim where the relationship between the parties was too attenuated and explaining that "it makes little sense to conclude that a particular defendant bank somehow improperly obtained profits intended for a certain plaintiff when those two parties never transacted or otherwise maintained a business relationship at all").

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Defendant Bodner's memorandum of law in support of his motion to dismiss, it is respectfully submitted that the Court enter an order (a) dismissing the Ninth Count as against both Michael Nordlicht and Kevin Cassidy and the Eleventh Count as against Kevin Cassidy with prejudice and without leave to replead, and (b) granting Michael Nordlicht and Kevin Cassidy such further relief as the Court deems just.

Dated: New York, New York
January 9, 2019

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