UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	:	No. 18 Civ. 6658 (JSR)
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),	:	No. 18 Civ. 10936 (JSR)
Plaintiffs,	:	
v.	:	
PLATINUM MANAGEMENT (NY) LLC, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW OF DEFENDANTS MICHAEL NORDLICHT AND KEVIN CASSIDY IN SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED 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 First Amended Complaint ("FAC") 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 Twelfth Count for aiding and abetting breach of fiduciary duty against Michael Nordlicht and Kevin Cassidy, and (2) the Fourteenth Count for unjust enrichment against Kevin Cassidy. The Agera Executives also join the motion to dismiss of defendant David Bodner on the grounds that the FAC's group pleading fails to satisfy Rules 8 and 9(b). *See* Dkt. Nos. 182, 183.[1]

In response to motions to dismiss, the JOLs amended the Complaint. The FAC clearly excludes the Agera Executives from both the so-called "Platinum Defendants" and "Beechwood Defendants" groups. FAC ¶ 3. However, the FAC's effort to bolster its claims against the Agera Executive consists of adding only more conclusory allegations. Apart from identifying Michael Nordlicht's background as a lawyer (FAC ¶ 612), the FAC pleads *no new specific facts* regarding the Agera Executives or their purported knowledge or roles. *See, e.g.*, FAC ¶¶ 619-24. Thus, the FAC fails to remedy the fatal pleading deficiencies of the initial Complaint. The JOLs' Opposition falls woefully short of rebutting the Agera Executives' showing that the scant conclusory allegations, particularly in the absence of any well-pleaded material facts, fail to state viable claims against the Agera Executives.

[1] The JOLs filed the initial Complaint on November 21, 2018, against 90 defendants. On January 9, 2019, the Agera Executives filed a motion to dismiss (Dkt. Nos. 101-02), as did numerous other defendants. (Dkt. Nos. 68-69, 71-72, 76-85, 87-89, 91, 93-97, 100, 108, 110). In response, the JOLs amended the Complaint (Dkt. No. 156) and filed an omnibus opposition memorandum of law ("Opposition"). Dkt. No. 155.

The FAC asserts 21 counts against 96 defendants based upon two alleged fraudulent schemes: one "scheme" engaged in by the "Platinum Defendants" and the "Beechwood Defendants" from 2012 through 2015; and a second "scheme" 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 FAC – like the initial Complaint – fails to plead specific facts to support its conclusory allegations against the Agera Executives. Of the 1012 paragraphs and 101 exhibits, only 30 paragraphs and 2 exhibits, at best, relate to Michael Nordlicht or Kevin Cassidy. But 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 with respect to the second "scheme" or that Kevin Cassidy was unjustly enriched at any time to the detriment of PPVA.

The aiding and abetting claim continues to be based solely on a single transaction in the alleged second scheme in which the "Platinum Defendants" effected the sale by Principal Growth Strategies, LLC ("PGS") (in which PPVA held an interest) of a convertible note issued by Agera Holdings LLC to a Beechwood entity ("Agera Transaction"). At that time, 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 FAC 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 in connection with the Agera Transaction, specific intent to participate in such breach, or took action to further such breach proximately resulting in damage to PPVA. The FAC fails to establish a secondary liability claim against Michael Nordlicht or Kevin Cassidy.

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

The JOLs' questionable pleading tactics expose their inherent inability to allege a viable unjust enrichment claim. The initial Complaint alleged that Kevin Cassidy was given "a share of the sale proceeds from the Agera Sale, by granting his entity, Starfish, a membership interest in PGS" purportedly "for no consideration." Compl. ¶¶ 52, 471. The Agera Executives' motion to dismiss showed that Complaint Exhibit 86 plainly belied that allegation. Dkt. No. 102 at 5. Exhibit 86 made clear that Kevin Cassidy earned an interest in Agera in consideration for the work he performed to build a successful company. The email stated that, since PGS was selling its full interest in Agera, Kevin Cassidy's interest in Agera should also be monetized. Compl. Exh. 86. Faced with this stark reality that Kevin Cassidy in fact provided consideration for his interest, the JOLs simply *deleted* Exhibit 86 from the FAC and replaced it with the exact opposite allegation that "[t]he grant [of 8% interest in PGS] was made for no consideration." FAC ¶ 645. It is not surprising that the only exhibit deleted from the FAC is Exhibit 86. The JOLs' prior allegation demonstrates the falsity of their new conclusory allegation.

The JOLs have access to Platinum Management's servers and are "currently in possession of more than 13 million" relevant 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 not only in the initial Complaint, but certainly in the FAC filed in response to the Agera Executives' targeted motion to dismiss. The JOLs do not plead specific facts of actionable knowledge or conduct by Michael Nordlicht and Kevin Cassidy because no such facts exist. Accordingly, the Twelfth and Fourteenth Counts should be dismissed as against them with prejudice.

RELEVANT ALLEGATIONS IN THE FAC

Glaringly absent from the FAC are facts showing that Michael Nordlicht or Kevin Cassidy played knowing or substantial roles in any alleged wrongdoing against PPVA. The Agera Executives are not alleged to be members of the "Platinum Defendants" or the "Beechwood Defendants." FAC ¶¶ 3, 34-35. Even after adding 247 paragraphs and 6 exhibits to the Complaint, the allegations in the FAC relating to the Agera Executives remain devoid of facts, wholly conclusory, sparse, unsubstantiated and even contradictory. They are 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. FAC ¶¶ 599, 601. Agera Energy is a wholly-owned subsidiary of Agera Holdings LLC. FAC ¶ 608. 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. FAC ¶¶ 129, 610.

PPVA and PPCO[2] allegedly held 55% and 45% interests, respectively, in 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

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

Holdings ("Note"). FAC ¶¶ 602-03; Exh. 83 at ¶ 1(b).[3]

The FAC alleges that, at the direction of Mark Nordlicht, Agera Energy hired Kevin Cassidy in 2014 as a managing director or senior executive. FAC ¶¶ 137, 604, 606. The FAC alleges that Michael Nordlicht is the nephew of Mark Nordlicht, who, in late 2013, "installed" Michael as the general counsel of Agera Energy. FAC ¶¶ 129, 611, 613. Citing to his LinkedIn profile, the FAC now alleges that Michael Nordlicht "appears to have had no prior experience in private practice or in the energy sector." FAC ¶¶ 612-13.

The gravamen of the claims against Kevin Cassidy and Michael Nordlicht is the June 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." FAC ¶¶ 11(v), 631, 635; Exh. 89.[4] The FAC 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. FAC ¶¶ 11(v), 637-42. Ultimately, PPVA allegedly did not receive a distribution from PGS reflecting fair value following PGS' sale of the Note. FAC ¶¶ 648, 660-61.

The FAC does not plead facts to establish that Michael Nordlich or Kevin Cassidy knew that, through this corporate transaction, the Platinum Defendants allegedly were engaged in a fraudulent scheme or were breaching the fiduciary duty they owed to PPVA by "conspiring to transfer or encumber all or nearly all of PPVA's remaining assets for the benefit of the Beechwood Defendants, select insiders and [PPCO]" or SHIP. FAC ¶¶ 10, 11(v). Any knowledge by Michael Nordlicht and Kevin Cassidy that the Note, and ultimately the company

[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).

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

for which they worked, was being sold – without more – does not constitute culpable knowledge. The FAC does not allege more. No facts are pleaded to transform the Agera Executives' knowledge of a corporate transaction into culpable knowledge and material assistance of a primary breach of fiduciary duty owed by the manager of the seller in that corporate transaction.

The initial Complaint pleaded no facts 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 initial Complaint alleged otherwise.[5] The single assertion of any purported involvement in the sale by the Agera Executives was that the Platinum Defendants purportedly "communicated with Cassidy and Michael Nordlicht regularly by email and in person regarding the Agera Transactions." Compl. ¶ 666. But this allegation was made without pleading a single fact identifying any such purported communication, let alone any communication showing wrongful intent or substantial assistance to a breach of duty owed to PPVA or that injured PPVA.

The FAC does not close this gap. The FAC's new allegations regarding the Agera Executives' purported knowledge of and participation in the alleged "second scheme" remain conclusory and unsupported by specific facts or conduct. *See* FAC ¶¶ 619-24.

The FAC repeats the allegations that, by March 2016, Mark Nordlicht, Bodner, Huberfeld, Levy, Bernard Fuchs and Katz began pursuing an insider sale of Agera to a "[B]eechwood led consortium." FAC ¶ 618. The FAC again alleges that "the specific terms by

[5] The initial Complaint alleged 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. These same allegations remain in the FAC. *See* FAC ¶¶ 619, 625.

which the sale was effected were put in place by Steinberg, Ottensoser, Taylor and Narain. . . ." FAC ¶ 619. And the Agera Transaction allegedly "was executed, performed, overseen and then managed by Narain and Illumin." FAC ¶ 625. The FAC now simply adds the conclusion that those defendants were somehow "operating with the knowledge of and in conjunction with [among others] Cassidy and Michael Nordlicht." FAC ¶ 619. One is left to guess exactly how either Michael Nordlicht or Kevin Cassidy had actual knowledge of a primary breach of fiduciary duty against PPVA or substantially assisted such breach. There are no facts from which an inference can be derived that Michael Nordlicht or Kevin Cassidy knew that PPVA would not or did not receive fair value following the sale by PGS of the Note. There are no facts identifying a specific act, statement, document, transaction, or decision by either of the Agera Executives that injured PPVA or helped others to do so. The FAC's conclusory allegations simply do nothing to transform ordinary actions taken by a lawyer or a senior executive of an operating company into knowingly and wrongfully helping others' purported misdeeds in connection with the sale of the Note.

For example, the FAC alleges that "Steinberg and Michael Nordlicht, together with help from Cassidy, also worked together to create the schedules and back up for the deal documents." FAC ¶ 619. The FAC alleges that "Steinberg, Ottensoser, Michael Nordlicht, Narain and Cassidy, worked together to prepare the documents by which the various parts of the Agera transaction were accomplished." FAC ¶ 623. Not a single document is identified or alleged to be included among the FAC's 101 exhibits. Nor are any specific facts alleged to demonstrate that any such document was out of the ordinary course of business, false, misleading, or otherwise used to perpetuate some wrongdoing.

The FAC alleges that "Michael Nordlicht participated in and helped facilitate the closing

of the Agera Transactions, to the detriment of PPVA." FAC ¶ 130. Again, not a specific fact is alleged from which the Court can infer any culpable knowledge or substantial assistance. Without more, the FAC simply alleges that a lawyer worked on a corporate deal.

The FAC baldly alleges that "Michael Nordlicht and Kevin Cassidy actively participated in the negotiation and closing of the Agera Transactions, with actual knowledge of the deflated sale price and that Beechwood would be paid substantial fees from the closing." FAC ¶ 624. Similarly, the FAC conclusorily alleges that the Agera Executives were somehow "deeply involved in the negotiation of the Agera Transactions." FAC ¶ 905. Not a single specific fact is pleaded or single exhibit identified to support these bald allegations. Moreover, these allegations are flatly *contradicted* by the allegations in the initial Complaint. *See, e.g.*, Compl. ¶¶ 450-53.

The FAC repeats the allegation that "Platinum Defendants communicated with Cassidy and Michael Nordlicht regularly by email and in person" (FAC ¶ 905), but again fails to plead even a single fact identifying any such purported communication. Thus, no inferences can be drawn from any such communications. The scarcity of facts in the JOLs' second attempt to plead claims is revealing in the face of the JOLs' access to 13 million documents from Platinum Management's server (*see* Dkt. No. 21 at ¶ 13) and the JOLs' subpoena power.

The FAC also does not allege any connection whatsoever between Michael Nordlicht and Kevin Cassidy, on the one hand, and PPVA, on the other hand. The FAQ makes the naked assertion that Kevin Cassidy "exerted control over PPVA and its subsidiaries in connection with the Second Scheme Transactions" (FAC ¶ 141), but is devoid any factual support whatsoever. There are no facts pleaded to give rise to any affirmative duty owed by Kevin Cassidy or Michael Nordlicht to act with respect to PPVA.

The FAC adds the new allegation that Michael Nordlicht "did not pay anything for the

equity he held in Agera Holdings." FAC ¶ 614. But the FAC does not allege that Michael Nordlicht *received* anything of any value in connection with PGS' sale of the Note or the transfer of "all of the equity and voting interests" in Agera Holdings from Michael Nordlicht to AGH Parent. FAC ¶ 643. Thus, no inference of wrongful knowledge, intent or conduct may be drawn from Michael Nordlicht's equity interest in Agera Holdings.

In a feeble attempt to shore up their claims against Kevin Cassidy, the JOLs simply deleted allegations and an exhibit from the Complaint because the motion to dismiss showed that such allegations and exhibit undermined their claims. 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 an exhibit 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 earned an interest in Agera in consideration for the work he performed to build a successful company. Compl. ¶ 471; Exh. 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 motion to dismiss showed that these allegations doomed the claims against Kevin Cassidy. *See* Dkt. No. 102 at 5, 10-11, 12-13.

Rather than addressing this contradiction, the JOLs simply removed their prior allegation and exhibit from the FAC. *Compare* Compl. ¶ 471 ("A true and correct copy of an April 1, 2016 email from Steinberg to Narain, discussing the need to 'take care of Kevin'" is attached hereto as Exhibit 86.") *with* FAC ¶ 645 (striking that language and exhibit, instead stating the exact

opposite: "The grant was made for no consideration"). It cannot be that Cassidy both did *and* did not provide consideration. Yet the JOLs have pleaded both to this Court, exposing the utter lack of a good faith basis in fact to support their allegations.

Moreover, the purchase agreement between PGS and Starfish shows that Starfish sold its 8% membership interest in PGS to PGS in exchange for $7 million in cash and $6,552,000 of certain preferred interests in AGH Parent. FAC ¶ 646; Exh. 91. The FAC thus pleads that PGS received consideration from Starfish (not Cassidy) in exchange for the cash and membership interests paid to Starfish. The FAC 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. FAC ¶¶ 138, 605-07. 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 conduct 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 any transaction alleged in the FAC. Thus, the prior conduct cannot bolster the deficient claims, but is irrelevant and should be disregarded by the Court.[6]

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

To survive a motion to dismiss under Rule 12(b)(6), the complaint "must contain either

[6] In a further effort to taint Kevin Cassidy, the FAC alleges that he was hired by Agera Energy "despite the fact that he had no prior experience in the energy sector." FAC ¶ 606. Yet, this allegation is flatly contradicted by the irrelevant allegations that Kevin Cassidy worked for Optionable Inc., a company in the energy sector and specifically "natural gas derivatives." FAC ¶¶ 138, 605-07.

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).

Contrary to the JOLs' argument (Opp. at 26), the pleadings do not meet the criteria for the narrow exception to the "generally rigid requirement [under Fed. R. Civ. P. 9(b)] that fraud be pleaded with particularity." *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). That exception sometimes applies where, unlike here, bankruptcy and trustee liquidators may be pleading at a disadvantage because the "facts are peculiarly within the opposing party's knowledge." *Id.*; *see also Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987) (explaining that "the degree of particularity required" depends on the plaintiff's access to the "pertinent facts"); *see also* Dkt. No. 183 at 15-17 (citing authorities and explaining the limited application of this narrowly construed exception, which has no application to the JOLs in this case). There simply is no *per se* application of this exception to bankruptcy or trustee liquidators and where, as here, a liquidator is in possession of the *opposing party's* documents, he or she will be held to the particularity standards of Rule 9(b). *See Liquidation Tr. v. Daimler AG (In re Old CarCo LLC)*, 435 B.R. 169, 192 (Bankr. S.D.N.Y. 2010) (finding "no justification to relax the particularized standard" where liquidation trustee had reviewed documents from many relevant parties prior to filing complaint). The JOLs admittedly are in control of Platinum Management's servers and "in

possession of more than 13 million documents" including "all or nearly all of the relevant documentation" (Dkt. No. 21 at ¶¶ 11, 13), and have been reviewing the "relevant Platinum server data since April 2018." Opp. at 19. Under these circumstances, the JOLs are not entitled to the benefit of any relaxed pleading standard.[7]

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

II. THE FAC 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 FAC 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 FAC 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);

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[7] Even if the Court were to find that a relaxed pleading standard was appropriate under these circumstances, the allegations against the Agera Executives are still deficient. As demonstrated below, the JOLs' claims are wholly conclusory and the JOLs have not adduced the required "specific facts supporting a *strong inference* of fraud" even under the relaxed standard. *Wexner*, 902 F.2d at 172 (emphasis added) ("This exception to the general rule must not be mistaken for a license to base claims of fraud on speculation and conclusory allegations."); *see also First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 179 (2d Cir. 2004) ("Although it is true that matters peculiarly within a defendant's knowledge may be pled 'on information and belief,' this does not mean that those matters may be pled lacking any detail at all.").

see also Kolbeck, 939 F. Supp. at 246. The FAC does not plead facts establishing actual knowledge by the Agera Executives.

Rather, the FAC 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" (FAC ¶ 908) and "actual knowledge of the deflated sale price and that Beechwood would be paid substantial fees from the closing." FAC 624. However, the FAC is bereft of any facts to support these wholly conclusory allegations. 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. FAC ¶¶ 10, 900. The FAC is devoid of facts to support the inferences that Michael Nordlicht or Kevin Cassidy actually 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. FAC ¶¶ 11(v), 641-43, 649-61. Indeed, the only document allegedly reflecting the valuation of PPVA's interest in PGS is alleged to have been "circulated among the Platinum Defendants," but not to the Agera Executives. FAC ¶¶ 616, 638, Exh. 70.

In the absence of facts supporting the FAC's conclusions, there can be no inference that the Agera Executives had actual knowledge of the alleged wrongful conduct comprising the purported 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). Indeed, the

JOLs' Opposition was silent in response to the showing by the Agera Executives that the initial Complaint failed to plead facts sufficient to establish the intent element of the aiding and abetting claim. The FAC does not (and cannot) cure this pleading deficiency.

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, 126, 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 FAC does not meet this pleading requirement.

The FAC fails to plead specific facts that, if true, would establish that Michael Nordlicht or Kevin Cassidy provided affirmative substantial assistance to, or helped conceal, the Platinum Defendants' alleged primary breach of fiduciary duty owed to PPVA.

Lacking any factual support is the conclusory 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." FAC ¶¶ 906-07. The JOLs glibly add phrases like "help," "negotiated," "participated," or "actively participated" without any substantiation of any such participation at all. FAC ¶¶ 130, 619, 623-24, 904-07. These statements are not supported by any facts (let alone well-pleaded facts), serve only to recite the elements of the claim in an

attempt to fend off a motion to dismiss, and must be disregarded by the Court. *See Iqbal*, 556 U.S. at 678; *Pollio*, 608 F. Supp. 2d at 572. The absence of factual support is not surprising because the FAC alleges that other defendants "controlled and owned" the relevant entities, and other defendants "planned" "negotiated," "effected," "executed," "performed," "oversaw," "managed" and "marketed" the Agera Transaction, not Kevin Cassidy or Michael Nordlicht. FAC ¶¶ 190-91, 193, 618-19, 625-30.

The conclusory allegations that Michael Nordlict and Kevin Cassidy prepared undescribed "schedules and back up for the deal documents" or undescribed "documents by which the various parts of the Agera transaction were accomplished" (FAC ¶¶ 619, 623) are not supported by a single fact from which the Court may infer any culpable substantial assistance in a wrong against PPVA. There are no facts to show that any such document was out of the ordinary course of business, false, misleading, or otherwise used to perpetuate some wrongdoing.

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 (FAC ¶¶ 904, 907) does not supply the missing link. The Agera Transaction involved the sale to AGH Parent of the convertible Note issued by Agera Holdings. FAC ¶¶ 631, 633. Upon conversion of the Note, the voting and equity rights of 95.01% of Agera Holdings would become vested in AGH Parent. FAC ¶ 603, Exh. 83 at ¶ 1(a). The FAC 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. As a matter of law, any such consent could not constitute 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 FAC 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. FAC ¶ 906. The FAC 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 they supposedly owed to PPVA. The FAC also alleges that Cassidy "exerted control over PPVA and its subsidiaries" in connection with the sale by PGS of the Note. FAC ¶ 141. However, not a single fact is pleaded to support this bald allegation. 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.

Third, the FAC must allege that a 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 FAC 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 FAC fails to plead any facts to establish the required causal connection between the Agera Executives' alleged conduct and the alleged harm suffered by PPVA. While the JOLs allege that the purported first

and second schemes "could not have occurred" without the involvement of other defendants' drafting, negotiation, or participation (FAC ¶ 12(ix)), the FAC makes no such allegation regarding the Agera Executives because it simply is not true. This allegation would constitute only but-for causation, and not the required proximate causal connection, which is insufficient.

Finally, the JOLs are in a position to plead facts with the detail required by Rule 9(b) because (1) since April 2018, they have had over 13 million documents from Platinum Management's server (Dkt. No. 21 at ¶ 13), and (2) they amended the Complaint *after* the Agera Executive's motion to dismiss and thus the JOLs had opportunity to correct the deficiencies pointed out in that motion. The JOLs' failure to do so makes plain that there are no facts to establish actual knowledge and substantial assistance by the Agera Executives.

III. THE FAC 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 Fourteenth 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 FAC does not allege that Kevin

Cassidy was enriched or received a benefit at the expense of PPVA. Rather, the FAC pleads that Kevin Cassidy was "enriched" because *Starfish* allegedly "received millions of dollars in Agera sales proceeds in exchange for nothing." FAC ¶ 903. 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 and it was in consideration of the sale of its interests. FAC ¶ 646, Exh. 91. This allegation is not actionable against Kevin Cassidy.[8]

With respect to Starfish, the FAC itself belies the allegation that it received $13 million "in exchange for nothing." The FAC alleges that PGS entered into a contract with Starfish whereby PGS "'repurchase[d]' Starfish's membership interests in PGS for $13,552,000." FAC ¶ 646. 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.

[8] In an attempt to address their pleading deficiencies, the JOLs now allege that "[Defendant] Steinberg also worked directly with Cassidy and his counsel to create the mechanism" by which Starfish was paid a portion of the Agera purchase price. FAC ¶¶ 620, 645. First, there are no facts pleaded to support the allegation. Second, even if this allegation were accepted as true, it does nothing to change the fundamental fact that non-party Starfish - and not Kevin Cassidy - received payment from the Agera sales proceeds. Similarly, Plaintiffs have offered no facts to support their offhand characterization of Starfish as "Cassidy's alter ego." FAC ¶ 645.

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 FAC fails to allege a single act of direct dealing between Kevin Cassidy (or Starfish) and PPVA, let alone any substantive relationship between them. The FAC baldly asserts that "Platinum Management caused PPVA and its subsidiaries to have a direct relationship with … Cassidy." FAC ¶ 929. However, there are no facts pleaded anywhere in the FAC 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 FAC does not plead a single direct dealing or communication with PPVA whatsoever.

In sum, the FAC 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 requested that the Court enter an order (a) dismissing the Twelfth Count as against both Michael Nordlicht and

Kevin Cassidy and the Fourteenth 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.

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