UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PLATINUM-BEECHWOOD LITIGATION	Civil Action No. 18-cv-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), Plaintiffs, - against - PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	Civil Action No. 18-cv-10936 (JSR)

PLAINTIFFS' OPPOSITION TO MOVING DEFENDANTS' MOTIONS TO DISMISS

HOLLAND & KNIGHT LLP
Warren E. Gluck, Esq.
Barbra R. Parlin, Esq.
John L. Brownlee, Esq. (*pro hac vice forthcoming*)
Timothy D. Belevetz, Esq. (*pro hac vice*)
Richard A. Bixter Jr., Esq. (*pro hac vice)*
31 West 52nd Street
New York, New York 10019
Telephone: 212-513-3200
Facsimile: 212-385-9010

Attorneys for Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation), and for Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation)

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PRELIMINARY STATEMENT

Plaintiffs' Amended Complaint ("**Amended Complaint**") contains 1,012 paragraphs and 101 exhibits. It describes in exhaustive detail Defendants' tortious and fraudulent conduct in connection with the First and Second Schemes, the Security Lock Up and the looting of PPVA for the benefit of Defendants, their friends, family and certain designated creditors/investors.[1]

As the Court is aware, the claims in this case arise out of the relationship between and among PPVA, its general partner Platinum Management, Platinum Management's "Beechwood" and "BEOF" alter egos, the individuals who owned, operated and managed Platinum Management and these related entities, and certain friends, family and related entities.

From late 2012 until 2015, the Platinum Defendants and Beechwood Defendants orchestrated the First Scheme, causing PPVA and its subsidiaries to engage in a series of non-commercial transactions with the Beechwood Entities and others designed to:

(i) falsely inflate the net value ascribed to PPVA's assets, thereby enabling Platinum Management to collect unearned partnership shares/fees;

(ii) prioritize the interests of the Beechwood Entities over the interests of PPVA, by, *inter alia*, consistently subordinating PPVA's prior rights in common collateral to those of the Beechwood Entities, and granting the Beechwood Entities put rights against PPVA; and

(iii) enable the Preferred Investors of the BEOF Funds, who were insiders, friends and designated investors/creditors, to take millions of dollars from the proceeds of the sale of the assets of what was then PPVA's largest investment, Black Elk, in contravention of the prior rights of PPVA and Black Elk's other creditors, while leaving the Black Elk investment worthless to PPVA, and PPVA liable for tens of millions of dollars of fraudulent conveyance and other claims.

By late 2015, with PPVA's collapse imminent and faced with an investigation of the Black Elk Scheme, the Platinum Defendants – with material assistance from the other Defendants – orchestrated the Second Scheme as well as the Security Lock Up, further breaching their duties to

[1] All capitalized terms not defined herein shall have the meaning prescribed to them in the Amended Complaint.

PPVA. As a result of Defendants' fraud, nearly all of PPVA's remaining assets, which were worth at least $300 million at that time, either were stripped out or purportedly encumbered for the benefit of the Beechwood Defendants, select insiders, and PPCO. The wrongful acts and transactions within the Second Scheme, which are detailed in the Amended Complaint, include, *inter alia*:

(i) the Nordlicht Side Letter, a one page document dated January 13, 2016 that was signed by Mark Nordlicht and witnessed by Mark Feuer, which requires PPVA and any of its subsidiaries and affiliates holding the valuable proceeds from the sale of Implant Sciences Corporation to use such proceeds to pay approximately $37 million of uncollectable debt owed to Beechwood by Golden Gate Oil, LLC, for no benefit to PPVA;

(ii) a March 2016 "restructuring" by which tens of millions of dollars of PPVA assets were stripped or encumbered by Platinum Management for the benefit of PPCO and Beechwood;

(iii) a March 2016 "Master Guaranty Agreement" and related documents between and among PPVA, certain of its subsidiaries, and Beechwood, among others, by which Beechwood was granted liens on available PPVA assets to further collateralize otherwise uncollectable debt owed to Beechwood;

(iv) the Security Lockup, which includes the series of transactions, documents and promissory notes that the Platinum Defendants, together with Defendant Seth Gerszberg, caused PPVA to enter into with select redeeming investors and certain creditors of PPVA, by which those investors and creditors preferentially were granted security interests and liens on all assets of PPVA (and in some cases subsidiary assets) to collateralize tens of millions of dollars of equity redemption claims or otherwise specious debt for no additional consideration; and

(v) the June 9, 2016 "sale" of a majority interest in Agera Energy, that was worth between $200-$300 million, to Beechwood and Senior Health Insurance Company of Pennsylvania, for little to no consideration. The Agera Sale was the culmination of the Second Scheme and stripped PPVA of one of its largest remaining assets, after which the limited proceeds of that sale were dissipated.

The Amended Complaint also includes extensive detail on the Movants and their participation in the First and Second Schemes and Security Lock Up including, *inter alia*, the following:

- Allegations regarding the moving Platinum Defendants' employment by or controlling ownership of Platinum Management and/or Beechwood, the basis for the fiduciary duties owed to PPVA, and their direct involvement in the transactions and aiding abetting of the breaches of fiduciary duties (Am. Compl. ¶ 12);

- Allegations regarding the Beechwood Defendants and their work on behalf of both Beechwood and Platinum Management, and their direct involvement in the transactions at issue (Am. Compl. ¶¶ 173-193);

- Allegations regarding each of the Preferred Investors of the BEOF Funds, including facts demonstrating they all were Platinum investors who knew about Black Elk's financial difficulties and that the proposed "opportunity," the "O" in BEOF, was directly at the expense of PPVA, but was being promoted by Platinum Management who was obligated to act in the interests of PPVA. The Amended Complaint details the Preferred Investors of the BEOF Funds' connections to the Platinum Defendants, the substantial assistance and financing they provided to the Black Elk Scheme, the specifics of their investments in the BEOF Funds and their receipt of the proceeds of the Renaissance Sale (Am. Compl. ¶¶ 145-172); and

- Allegations regarding other Defendants, such as Kevin Cassidy and Michael Nordlicht, including allegations that they were actively involved in the negotiation and closing of the Agera Transactions, the culmination of the Second Scheme (Am. Compl. ¶¶ 129-141; 618-630).

- The various transactions comprising the Security Lock Up, including the PPNE Notes, the Twosons Note, the Kismetia Note and the West Loop/Epocs Forbearance and Security Agreement (Am. Compl. ¶¶ 662-751).

These allegations, together with the 101 Exhibits attached to the Amended Complaint, clearly satisfy Plaintiffs' obligations under both Rule 8(a) and Rule 9(b) insofar as they provide a plain statement of Plaintiffs' claims, significant details of the fraud at issue here, and demonstrate clearly that Plaintiffs are entitled to the relief they seek.

Despite the exhaustive detail provided in the Amended Complaint, Movants[2] argue that the Amended Complaint should be dismissed on the ground that it does not provide sufficient detail

[2] As of the date of this filing, Motions to Dismiss or Joinders ("**Motions to Dismiss**") have been filed by the following Defendants in response to the Amended Complaint (collectively, "**Movants**"): David Bodner (Dkt. No. 183); Kevin Cassidy and Michael Nordlicht (Dkt. No. 195); David Ottensoser (Dkt. No. 210); David Steinberg (Dkt. No. 198); Twosons Corporation (Dkt. No. 202); David Levy (Dkt. No. 217); Murray Huberfeld (Dkt. No. 173) Beechwood Trusts Nos. 7-14 (Dkt. No. 189); Daniel Saks (Dkt. No. 193); Estate of Uri Landesman (Dkt. No. 207); Leon Meyers (Dkt. No. 178); Platinum F.I. Group, LLC (Dkt. No. 181); Rockwell Fulton Capital L.P. and Ditmas Park Capital L.P.

to support Plaintiffs' claims against them. Movants' arguments are meritless and should be rejected *in toto* for the following reasons:

First, this Court should reject Movants' argument that Plaintiffs failed to establish that certain of the individual Platinum Defendants owed fiduciary duties to PPVA or that such Defendants breached those duties. To the contrary, the Amended Complaint alleged in detail that each of the individual Platinum Defendants, as well as Platinum Management, owed fiduciary duties to PPVA, by virtue of the positions of trust and oversight they held and the work they actually performed on behalf of PPVA and/or the subsidiaries through which PPVA's investments are held. Indeed, as set forth below, the moving Platinum Defendants held and utilized controlling ownership interests in Platinum Management and/or Beechwood, or were officers of PPVA and/or its asset owning subsidiaries, actively managed PPVA's investments, served on the valuation and risk committees for PPVA and/or were actively involved in executing or negotiating the very transactions comprising the First and Second Schemes.

Under the circumstances, it is simply disingenuous for moving Platinum Defendants Bodner, Levy, Huberfeld, Bernard Fuchs, the Estate of Uri Landesman, Steinberg and Ottensoser to argue that the Amended Complaint does not contain sufficient detail as to the fiduciary duties they owed to PPVA and their role in the First and Second Schemes.

Second, the Amended Complaint shows that each of the individual Platinum Defendants as well as Platinum Management was complicit in misrepresenting the facts concerning the value of and risk associated with PPVA's assets and investments, particularly given that each of them

(Dkt No. 208); Morris Fuchs, Estate of Jules Nordlicht, Barbara Nordlicht, FCBA Trust, Aaron Parnes, Sarah Parnes, Shmuel Fuchs Foundation and Solomon Werdiger (Dkt. No. 177); Beechwood Capital Group LLC, B Asset Manager II LP, BBLN-PEDCO Corp. and BHLN-PEDCO Corp., (Dkt. No. 200); GRD Estates Ltd. (Dkt. No. 185); and Huberfeld Family Foundation, Inc. (Dkt. No. 205). Defendant Bernard Fuchs failed to file his Motion to Dismiss in this case, and instead filed solely on the consolidated docket, Civil Action No. 18-cv-6658 (JSR) (Dkt. No. 107). Plaintiffs' respond to Bernard Fuchs' Motion to Dismiss as if it was properly filed, but reserve all rights.

had a significant policy making role in assessing and/or communicating the value of and risk associated with PPVA's assets and investments and in structuring the transactions related thereto. These fraudulent misrepresentations and omissions were routinely made to PPVA in the form of monthly NAV statements. As a result of the Platinum Defendants' misrepresentations, omissions and actions, PPVA's NAV was inflated and overstated. Plaintiffs have also alleged with particularity how the Beechwood Defendants, via their direct and indirect ownership, via the myriad Beechwood vehicles, and via the revolving-door Beechwood-Platinum managerial employees, aided and abetted this fraud and breach of fiduciary duty.

In connection with the Second Scheme, the Platinum Defendants routinely failed to account for debt – and particularly Beechwood debt: to wit, PPVA-level or subsidiary-level claims or encumbrances that ***necessarily*** affected on PPVA's NAV. Hence, in addition to the many asset values being overstated, the values ascribed were *gross* – failing to account for the all-important "N" in *net* asset value.

The Platinum Defendants' actions and misrepresentations and omissions enabled them to loot PPVA by charging unearned and fraudulent fees and bonuses, or in any case materially aided and abetted other Platinum Defendants in respect of same.

Similarly, the Amended Complaint alleges facts showing how the other Defendants, such as the Beechwood Defendants, the BEOF Funds, the Preferred Investors of the BEOF Funds, Michael Nordlicht, Kevin Cassidy, Michael Katz and Seth Gerszberg, knew about and substantially assisted the Platinum Defendants' various tortious actions during the First and Second Scheme. These Defendants, including Cassidy and the Preferred Investors of the BEOF Funds, were unjustly enriched as a result.

Third, this Court also should reject Movants' specious claim that the Amended Complaint does not have sufficient specific allegations about them in particular because it refers in certain places to Defendants as a group. The Amended Complaint contains specific allegations against each Defendant more than sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6). That there are certain instances where the Plaintiffs employ group pleading due to the "tight weave" of Defendants involved in the First and Second Schemes, document readability, and the secondhand information being relied upon by the Plaintiffs is not sufficient to dismiss under Rule 12(b)(6). *Anwar*, 728 F. Supp. 2d at 405-06; *In re Hellas Telecomms. (Lux.) II SCA,* 535 B.R. 543, 561-62 (Bankr. S.D.N.Y. 2015) (noting that courts relax the particularity requirement for pleading fraud where the plaintiff is a bankruptcy trustee or a third party who is pleading fraud on secondhand information.).

Group pleading is clearly appropriate here because the fraudulent omissions and misrepresentations at issue were complex, continuous and ongoing, in the form of misrepresentations of PPVA's asset and investment values and the true nature of the transactions comprising the First and Second Schemes, including the use of Beechwood, its myriad ownership vehicles and intentionally complex, falsely papered transactions, to misrepresent the PPVA asset valuations via purported third party transactions, Beechwood's alter-ego relationship to Platinum, and the Black Elk Scheme.

Any generalities contained in the Amended Complaint will be resolved through the discovery process, where Plaintiffs will gain access to documents and information in the possession of the individual Platinum Defendants, Beechwood Defendants, the Preferred Investors of the BEOF Funds, the other Defendants and certain third parties, including SHIP. Any arguments that the allegations themselves are insufficient to state the claims alleged are wholly without merit.

Moreover, the terms "Platinum Defendants," "Beechwood Defendants" and "Preferred Investors of the BEOF Funds" are defined terms within the complaint. When it is alleged that either group engaged in an act, it is clear that plaintiffs mean that each defendant within the group executed or aided in the execution of that act except to the extent that such defendant no longer was employed at the relevant entity the time.

For all of these reasons, the Motions to Dismiss should be denied.

APPLICABLE LEGAL STANDARD

"On a motion to dismiss under Fed R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted, the court must accept the well-pleaded factual allegations in the complaint as true ... to determine whether the complaint itself is legally sufficient." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001) (citing *Grandon v. Merrill Lynch & Co.,* 147 F.3d 184, 188 (2d Cir. 1998)).

To survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face,'" and claims based upon fraudulent conduct must be "stated with particularity." *In re Refco Sec. Litig.*, 759 F. Supp. 2d 301, 315 (S.D.N.Y. 2010) (Rakoff, J.) (citing Fed. R. Civ. P. 9(b)) ("*Refco I*"); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009) (setting forth pleading requirements under Rule 8). "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." *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 120 (2d Cir. 2013) (internal quotation marks omitted).

Fraud claims require allegations sufficient to create a plausible inference of fraudulent intent and to provide "fair notice of the plaintiff's claim and the factual ground upon which it is based." *Refco I*, 759 F. Supp. 2d at 315. Fraudulent intent may be alleged generally, Fed. R. Civ.

P. 9(b), and "may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Id.* (*quoting Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

This Court previously has held that "[t]he group pleading doctrine allows particular statements or omissions to be attributed to individual defendants even when the exact source of those statements is unknown" where the complaint "allege[s] facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs" in order to connect defendants to statements. *Anwar*, 728 F. Supp. 2d at 405-06; *see also In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 262-64 (S.D.N.Y. 2011) (applying group pleading doctrine to common law claims). So too, this Court also has held that Rule 9(b) is satisfied where the complaint's allegations "inform each defendant of the nature of his alleged participation in the fraud." *Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 388 (S.D.N.Y. 2016) (citation omitted).

ARGUMENT

I. The Amended Complaint is Sufficiently Pled against the Moving Defendants

A. The Breach of Fiduciary Duty Claims against the Platinum Defendants

"[A] breach of fiduciary duty claim is usually a fact-specific inquiry" not properly undertaken on a motion to dismiss. *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 506 (S.D.N.Y. 2011); *Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 19 A.D.3d. 107, 110 (1st Dep't 2005). "On a motion to dismiss, it is often impossible to say that plaintiff will be unable to prove the existence of a fiduciary relationship." *Childers v. N.Y. & Presbyterian Hosp.*, 36 F. Supp. 3d 292, 308 (S.D.N.Y. 2014) (internal quotation marks omitted and citation omitted); *Mosdos Chofetz Chaim, Inc. v. RBS Citizens, N.A.*, 14 F. Supp. 3d 191, 208 (S.D.N.Y. 2014) ("[A] claim alleging the existence of a fiduciary duty usually is not subject to dismissal under Rule 12(b)(6).").

Nevertheless, the Motions to Dismiss filed by Platinum Defendants Bodner, Huberfeld, Levy, Bernard Fuchs, Steinberg, Ottensoser, and the Estate of Uri Landesman argue that these Movants did not owe any fiduciary duty to PPVA and that Plaintiffs insufficiently pled a breach of such fiduciary duty. This argument is wholly without merit, because, as detailed below and in the Amended Complaint, these Defendants regularly acted on behalf of PPVA at the most senior of levels, making representations for and signing documents concerning tens or hundreds of millions of dollars, on behalf of PPVA, with no regard for corporate formalities for any of the entities affiliated with the Platinum Defendants.

It is beyond cavil that senior management at this level of responsibility owe fiduciary duties. The Amended Complaint contains detailed allegations against each of these Defendants, as well as the other Platinum Defendants,[3] describing the basis for their fiduciary obligations to PPVA and their involvement in the First and Second Schemes. The following is a non-exhaustive summary of the allegations set forth against these particular moving Defendants:

a. **David Bodner and Murray Huberfeld** – David Bodner and Murray Huberfeld were controlling owners and co-lead managers of Platinum and Beechwood. They wielded their power and control via intermediaries and voting control over the relevant management entities, including via appointing and controlling outward facing Platinum and Beechwood managers and their secretary. The approval of Bodner and Huberfeld was required for significant decisions – including the hiring of key personnel and investment decisions for multiple Platinum related entities. They directly or indirectly held ownership interests in Platinum Management and Beechwood (via vehicles or trusts they controlled and used to further the schemes), and thus personally benefitted from the inflated fees and other payments made by PPVA to Platinum Management as a result of the First and Second Schemes. Am. Compl. ¶¶ 68-86. Huberfeld and Bodner were involved in every aspect of the First and Second Schemes, including:

- the overvaluation of PPVA's assets via the establishment of Beechwood, which they indisputably owned, and Plaintiffs allege they controlled via the Beechwood Trust Defendants, to enrich the Platinum Defendants with unearned fees; (Am. Compl. ¶¶ 330-386)

[3] The Amended Complaint includes additional details as to the non-moving Platinum Defendants as well as others, in order to avoid any further motions to dismiss under Fed. R. Civ. P. 9(b).

- the Black Elk Scheme, via Beechwood and the BEOF Funds, which they owned and controlled, and the series of transactions among PPVA, Beechwood and/or affiliated entities in order to encumber or strip PPVA's remaining valuable assets; (Am. Compl. ¶ 427-502)

- sourcing investment opportunities, meeting with and marketing to important investors, and developing investment strategy for PPVA and its investments, including, for example, its investment in China Horizon/Yellow River; (Am. Compl. ¶ 12)

- the management and operation of PPVA and of Platinum Management, meetings with attorneys, interviewing new personnel, and meeting with investment partners; (Am. Compl. ¶ 12) and

- as owners and controlling minds of Beechwood, participation in transactions comprising the Second Scheme, including the Agera Transactions. (Am. Compl. ¶ 12).

The Amended Complaint further details how both Bodner and Huberfeld, due to their checkered history, did not have official "titles" at PPVA. Instead, they covertly conducted Platinum's day-to-day business by way of a "secretary" who would relay their directives to the other Defendants. Am. Compl. ¶ 12. Notwithstanding this, it is clear that both Bodner and Huberfeld were among the primary decision makers overseeing PPVA. On or about May 25, 2018, Huberfeld pled guilty to federal charges of conspiracy to commit wire fraud, in connection with a bribe Huberfeld offered to Norman Seabrook, the former President of the Correction Officer's Benevolent Association of New York ("**COBA**"), in exchange for COBA's investment of $20 million with PPVA and other Platinum-affiliated funds. Am. Compl. ¶ 71.

b. **David Levy** – David Levy is the nephew of Murray Huberfeld. From and after 2015, Levy served as co-chief investment officer of PPVA alongside Nordlicht. Levy also was a portfolio manager with responsibility for overseeing and managing several of PPVA's most significant investments, including Implant Sciences and Black Elk. He also was appointed as an officer/manager of certain of the PPVA subsidiaries, including DMRJ, in which PPVA held its investments. Levy served on the valuation committee for PPVA. Am. Compl. ¶ 49-52.

Levy was instrumental in the creation of Beechwood and served as chief investment officer of the Beechwood enterprise. Beechwood marketed Levy to potential clients as a member of its management team and specifically highlighted Levy's eight years of experience with Platinum Management as a key to Beechwood's future success. In late 2014/early 2015, in the wake of the Black Elk Scheme, Levy returned to work at Platinum Management. Levy remained an owner of Beechwood after his return to Platinum Management. Am. Compl. ¶ 53.

Levy was involved in every aspect of the First and Second Schemes, including, inter alia, (i) using his position as a member of the valuation committee to falsely inflate

the value of PPVA's assets, particularly during the period from 2012 through 2016, in order to report information that resulted in PPVA's NAV being inflated and overstated during that period, and thus causing PPVA to pay excessive fees and other amounts to the Platinum Defendants; (ii) orchestrating the Black Elk Scheme, including exerting control over Black Elk's affairs; (iii) orchestrating the series of transactions among PPVA and the Beechwood Entities designed to mask the inflation of PPVA's NAV and the overpayment of fees and other amounts to the Platinum Defendants; (iv) orchestrating the series of transactions among PPVA, Beechwood and/or affiliated entities in order to encumber or strip PPVA's remaining valuable assets; and (v) using his position to cause PPVA to engage in the transactions referred to herein as the Security Lock-Up. Am. Compl. ¶ 54.

c. **David Steinberg** – Steinberg was a portfolio manager and eventually had the title of co-chief risk officer for Platinum Management and PPVA, with responsibility for assessing the risk associated with PPVA's assets and investments, which is a significant determinant of value. Steinberg also was a member of the valuation committee, tasked with providing valuations for PPVA's assets and investments. Steinberg was involved with, and responsible for, negotiating and executing numerous transactions involving PPVA that are part of both the First Scheme and Second Scheme, including, but not limited to, the Black Elk Scheme, the January 2015 Montsant loan, the PEDEVCO transaction, the March 2016 Restructuring and the Agera Transactions. Steinberg executed many of these agreements on behalf of PPVA and its subsidiaries as an authorized signatory, and thus was acting as an agent and fiduciary for those entities in such capacity. Am. Compl. ¶ 12(vi).[4]

d. **David Ottensoser** – Ottensoser served as general counsel and Chief Compliance Officer for Platinum Management and PPVA. As general counsel for PPVA, Ottensoser was responsible for documenting the transactions comprising the First and Second Schemes. He also was involved in creating Beechwood and worked as general counsel for Beechwood during its initial stages, providing legal services to Beechwood and PPVA even when they ostensibly were on opposite sides of a transaction. He was a member of the risk committee and thus responsible for assessing the risk associated with PPVA's investments and assets, a key component of value. Am. Compl. ¶ 12(ix).

e. **Uri Landesman** – Landesman held the title of President of Platinum Management and co-chief investment officer of PPVA until Spring 2015. He was responsible for all trading, asset allocation and risk management on behalf of PPVA. In connection with the First Scheme, Landesman was responsible for marketing PPVA on behalf of Platinum Management, and making representations concerning PPVA's NAV. Despite his direct

[4] David Steinberg cannot rely on *in pari delicto* as a defense to Plaintiffs' claims. It is clear he was an insider who held a position of trust and authority with respect to PPVA as well as at least two of its owned subsidiaries, Montsant and PGS, that were directly involved in the transactions comprising the First and Second Scheme described in the Amended Complaint, and served as co-chief risk officer for PPVA, It is black letter law in New York that "insiders cannot rely upon the *in pari delicto* defense." *In re Lehr Constr. Corp.*, 528 B.R. 598, 609 (Bankr. S.D.N.Y. 2015); *aff'd*, 551 B.R. 732 (S.D.N.Y.), *aff'd*, 666 Fed. Appx. 66 (2d Cir. 2016). Courts exclude officers, directors, and management from relying on the *in pari delicto* defense because "it would be absurd to allow a wrongdoing insider to rely on the imputation of his own conduct to the corporation as a defense." *In re Refco Inc. Sec. Litig., Inc.*, 2010 WL 6549830, at *15 (S.D.N.Y. Dec. 6, 2010), *aff'd in part*, 779 F. Supp. 2d 372 (S.D.N.Y. 2011).

knowledge of PPVA's lack of liquidity and the Platinum Defendants' misrepresentation of PPVA's NAV, Landesman routinely misrepresented PPVA's financial condition to potential investors and others. Landesman was a member of the PPVA risk committee, and in that capacity was responsible for assessing the risks associated with PPVA's investments and assets, which were significant factors in determining PPVA's NAV. Landesman also was a member of the PPVA valuation committee. In that capacity, he was responsible for assessing the value of PPVA's investments and assets and reporting such values so that PPVA's NAV could be accurately determined and any fees and other charges accurately calculated. Landesman was involved with sourcing investment opportunities, meeting with and marketing to important investors, and developing investment and business strategy for PPVA and its investments. He remained involved with and informed about the business and operations of PPVA and its financial condition even after resigning as President of Platinum Management, and continued to speak with investors. He also drew a salary and distributions after his resignation so he personally benefitted from the inflated distributions, fees and other amounts paid to Platinum Management by PPVA. Am. Comp. ¶ 12(ii), 55-66.

f. **Bernard Fuchs** – While Fuchs did not have an official title with PPVA, he held a significant ownership interest with Platinum Management, and exerted control over PPVA and its affairs. Among other things, Bernard Fuchs met with and marketed to important investors, dealing with issues concerning liquidity and redemptions, and developed business and investment strategy for PPVA, with full knowledge of the Platinum Defendants' misrepresentations made to PPVA. Fuchs coordinated, with others, the Black Elk Scheme and facilitated the Agera Transactions. He also was involved in the management and operation of PPVA and Platinum Management, participating in meetings with attorneys and potential investment partners and negotiating personnel matters. During the period leading up to the Cayman Liquidation, Fuchs was tasked with communicating with investors who were seeking truthful information as to the status of their unfulfilled redemption requests, but did not tell them the truth concerning the status of PPVA's financial situation and solvency. During late 2015 and the first quarter of 2016, Fuchs engaged in numerous discussions with investors seeking information concerning the status of PPVA, their investments and requests for redemption, often exchanging emails with Nordlicht, Bodner, Huberfeld, Levy and/or Landesman concerning the best response to those investor inquiries and/or forwarding on such inquiries. During his exchanges with investors, Bernard Fuchs misrepresented the financial status of PPVA and failed to state truthful information concerning PPVA's actual financial status, even encouraging investors to invest additional funds at a time when PPVA was unable to pay redemptions and potentially insolvent. In one email exchange during the last week of February 2016, Fuchs berated an investor who suggested that it would be forced to send a letter to the SEC seeking an investigation as to why investors had not been paid for long outstanding redemption requests if those redemption requests were not honored, claiming that the letter had done damage to Platinum Management's business. Am. Compl. ¶¶ 12(v), 82, 111-119.

Based on the foregoing and other allegations set forth in the Amended Complaint, it is clear that these Defendants, like the other Platinum Defendants, owed fiduciary duties to PPVA due to the trust reposed in them in connection with their management of PPVA's affairs and their ability to exert control over PPVA, its assets and investments.

Contrary to the moving Platinum Defendants' contentions that they were mere bystanders to the fraud and that the Plaintiffs are relying on conclusory allegations (which contentions are themselves conclusory), the Amended Complaint provides extensive detail as to the involvement of these Defendants in the acts and transactions comprising the First and Second Schemes, and the method by which these Defendants were enriched by the overvaluation of PPVA's NAV and the eventual encumbrance and dissipation of PPVA's assets.

Further, the Amended Complaint sufficiently pleads aiding and abetting claims against Defendants Bodner, Huberfeld, Bernard Fuchs, Levy, Steinberg, Ottensoser, and Landesman in connection with their roles as Platinum Defendants and/or Beechwood Defendants, as it is clear they provided substantial assistance to Platinum Management and the other individual Platinum Defendants, in connection with the First and Second Schemes. Therefore, even assuming, *arguendo*, that Huberfeld, Levy, Bernard Fuchs, Bodner, Steinberg, Ottensoser, and Landesman did not owe fiduciary duties to PPVA (although they clearly did), Plaintiffs have adequately pleaded aiding and abetting breach of fiduciary claims against each of them.

The Amended Complaint also properly pleads aiding and abetting claims against the moving Beechwood Defendants, who provided substantial assistance to the Platinum Defendants. Until 2014, Daniel Saks worked as a portfolio manager at Platinum Management and was involved in the significant overvaluation of Golden Gate Oil as well as transactions related thereto, including the Nordlicht Side Letter, which was a significant part of the fraudulent overstatement of PPVA's

NAV during the First Scheme. Saks also was involved with various transactions related to Black Elk. In late 2014, Saks replaced Levy as chief investment officer for BAM, and later served as President of BAM during at least 2015. During this period, Saks was involved in transactions among PPVA and the Beechwood Entities that are part of the First Scheme, including, *e.g.*, the 2015 Montsant loan by which PPVA "borrowed" $35 million from one of the Beechwood Entities' clients in order to repurchase the by then worthless Black Elk 13.75% Senior Secured Bonds that the Beechwood Entities had purchased from PPVA, other Platinum related funds, and on the open market as part of the Black Elk Scheme and also pay interest due to the Beechwood Entities on the Golden Gate Loan. As alleged in the Amended Complaint, the purchase price for the 13.75% Senior Secured Bonds was 93% of par, even though by then, such Bonds were basically worthless. In his roles at Platinum Management and BAM, Saks provided substantial assistance with the First and Second Schemes, particularly the overvaluation of PPVA and Beechwood's co-investments. Am. Compl. ¶ 173-177, 324, 336, 374, 383.

The Moving Beechwood Entity Defendants, including Beechwood Capital Group LLC, B Asset Manager II LP, BBLN-PEDCO Corp. and BHLN-PEDCO Corp., were Beechwood Entities created by the Platinum Defendants to carry out the fraudulent acts of the First and Second Schemes. Those entities were involved directly in the transactions comprising the First and Second Scheme, including for example, the PEDEVCO transactions (for the PEDCO entities), while BAM was the investment advisor that carried out all investment activity for the Beechwood Entities. The Amended Complaint provides extensive detail regarding how these Beechwood Entities were created as the alter ego of Platinum Management, with common ownership among Nordlicht, Huberfeld, Bodner and Levy, the sharing of common offices, and a revolving door of employees

being shared and used for a common fraudulent purpose. Am. Compl. ¶ 330-399. Under all of these circumstances, Moving Defendants' motions should be denied.

B. Plaintiffs Have Stated Claims for Fraud and Conspiracy Against the Platinum Defendants

Movants Bodner, Huberfeld, Bernard Fuchs, Levy, Steinberg, Ottensoser, and the Estate of Uri Landesman allege that Plaintiffs' fraud claim should be dismissed on the ground that Plaintiffs failed to identify particular misrepresentations by the Platinum Defendants and the damages suffered by PPVA as a result. These Defendants likewise assert that the conspiracy claim should be dismissed for failure to allege facts satisfying the elements thereof. These arguments also should be rejected, as they misconstrue New York law applicable to fraud claims against fiduciaries, and they misstate the law on conspiracy altogether.

To plead a claim for fraud under New York law, a plaintiff must allege: (i) a material misrepresentation of a fact; (ii) knowledge of its falsity; (iii) an intent to induce reliance; (iv) justifiable reliance by the plaintiff; (v) and damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP,* 12 N.Y.3d 553, 558 (2009). It is well settled, however, that the obligation to plead a material misrepresentation is replaced with a duty to disclose in the following three circumstances: (i) "where the parties are in a fiduciary relationship; (ii) under the 'special facts doctrine,' where 'one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge'; or (iii) where a party has made a partial or ambiguous statement, whose full meaning will only be made clear after complete disclosure.'" *Greene v. Gerber Prod. Co.*, 262 F. Supp. 3d 38, 71 (E.D.N.Y. 2017) (citing *Aetna Cas. and Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 582 (2d Cir. 2005)); *see also Pramer S.C.A. v. Abaplus Int'l Corp.*, 76 A.D.3d 89, 98 (1st Dep't 2010). The "special facts" doctrine requires satisfaction of a two-prong test: "that the material fact was information peculiarly within [the]

knowledge of [the defendant], and that the information was not such that could have been discovered by [the plaintiff] through the exercise of ordinary intelligence." *Jana L. v. W. 129th St. Realty Corp.*, 22 A.D.3d 274, 278 (1st Dep't 2005) (internal citations omitted); *see Senior Health Insurance Co. of Pa. v. Beechwood Re Ltd.*, 345 F.Supp. 3d 515, 532-533 (S.D.N.Y. 2018) (relying upon New York's "special facts" doctrine in holding that certain Beechwood Defendants had a duty to disclose).

During the course of the First and Second Schemes, each of the Platinum Defendants engaged in an effort to misrepresent PPVA's NAV, misdirect the proceeds of the Black Elk sale, and transfer or encumber the last, good assets of PPVA via direct, consideration-less asset transfers or guarantees, preferential security interests and liens, an intentionally wrongful "restructuring" and "sale" of PPVA's most valuable remaining asset, its interest in Agera, which had been valued in excess of $300 million, for less than $60 million in instantly dissipated cash and other, near worthless consideration, all while stating outwardly to PPVA and its administrator, SS&C, that the NAV of PPVA was approximately $700 million (when in fact the NAV was negative).

The Platinum Defendants, as executives and decision makers for Platinum Management, had at all times material, knowledge of the falsity of these statements, which were made on a continuing and ongoing basis. The Platinum Defendants caused PPVA to pay Platinum Management unearned distributions, fees and other amounts as a result of the artificially inflated NAV, to the significant detriment of PPVA. Further, the Platinum Defendants misrepresented the nature of various transactions that they caused PPVA and its subsidiaries to enter into with Beechwood, PPCO, the Preferred Investors of the BEOF Funds and other insiders, which resulted in the loss of PPVA's assets and hundreds of millions of dollars in creditor claims.

The Platinum Defendants had a duty to disclose the accurate NAV to PPVA, the liabilities

being incurred by PPVA – including with respect to Black Elk, the "Nordlicht Side Letter" – the Security Lockup, and the Master Guaranty, either as fiduciaries of PPVA, or as those with superior knowledge of PPVA's true NAV under the "special facts" doctrine. Not only did the Platinum Defendants continuously misrepresent and fail to disclose the true value of PPVA's assets and investments during the period of the First and Second Schemes, they actively caused PPVA to pay Platinum Management excessive and unearned fees and distributions based on those misrepresentations and non-disclosures. Accordingly, the Plaintiffs have sufficiently pleaded claims for fraud under New York law.

Plaintiffs also have pleaded a claim for civil conspiracy under New York law against the Platinum and Beechwood Defendants. Under well settled New York law, a "plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan." *Ray Legal Consulting Grp. v. DiJoseph*, 37 F. Supp. 3d 704, 723 (S.D.N.Y. 2014) (citation omitted). To "recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement." *Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dep't 2012). Tort liability "may be imposed based on allegations of conspiracy which 'connect nonactors, who might otherwise escape liability, with the [tortious] acts of their coconspirators.'" *Treppel v. Biovail Corp.*, No. 03 Civ. 3002, 2005 WL 2086339 at *5 (S.D.N.Y. August 30, 2005) (citation omitted).

Here, the Amended Complaint contains over 1000 well-pled allegations, nearly all of which detail the ways in which the moving Platinum and Beechwood Defendants engaged in a corrupt agreement to carry out the First and Second Schemes and the overt acts taken by each of them in furtherance of these schemes. The Amended Complaint contains details of actions by

each defendant in furtherance of the conspiracy and explains how those acts enable the conspiracy to proceed. It also explains how the conspiracy damaged PPVA.

As such, the Moving Defendants' attempt to dismiss the fraud and conspiracy claims should be denied.

C. The Claims against the Preferred Investors of the BEOF Funds

Plaintiffs' Amended Complaint likewise alleges aiding and abetting fraud and breach of fiduciary duty claims against the Preferred Investors of the BEOF Funds, along with a claim for unjust enrichment in connection with their receipt of the fraudulent proceeds from the Renaissance Sale.

At root, Plaintiffs allege that the Preferred Investors of the BEOF Funds, longstanding Platinum investors who knew that Black Elk was overvalued by PPVA, were offered an interest in an "unaffiliated" fund labeled *Black Elk Opportunities* by Platinum Management, which they knew had fiduciary duties to PPVA, and knowingly participated and executed the wrongful "opportunity" – a scheme to recoup their failed investment at the expense of PPVA.

The Amended Complaint includes detailed allegations as to the substantial assistance and financing the Preferred Investors of the BEOF Funds provided to the Platinum Defendants in connection with the Black Elk conspiracy, which is at the heart of the First Scheme, and their knowledge of the tortious conduct at the heart of the Black Elk Scheme. For example, the Amended Complaint alleges:

- The BEOF Funds were a standalone mechanism by which Platinum Management personnel, their family and friends, and certain preferred investors were offered the opportunity to knowingly invest in Black Elk "outside of the regular funds," to the detriment of PPVA. Am. Compl. ¶¶ 145-172, 439.

- Twosons was one of the "important client[s] and good friend[s]" to which Murray Huberfeld pitched an investment in Black Elk via the BEOF Funds during the first quarter of 2013. Others investors included Jules and Barbara Nordlicht, Mark Nordlicht's parents,

and the Huberfeld Family Foundation, an investment vehicle related to Murray Huberfeld. Am. Compl. ¶ 145-172, 439-442. Twosons also independently held direct interests in Black Elk as a standalone investor and had special knowledge regarding the asset as a result. Am. Compl. ¶¶ 685-714.

- Collectively, the Preferred Investors of the BEOF Funds purchased $40 million of the Series E preferred equity pursuant to contribution agreements executed between Black Elk and BEOF I during the first quarter of 2013. Am. Compl. ¶ 442.

- Black Elk's financial difficulties throughout 2013 were publicly known and, on information and belief, the Preferred Investors of the Black Elk Funds had raised concerns regarding their investments by early 2014. Am. Compl. ¶¶ 460-462.

- The Preferred Investors of the BEOF Funds provided substantial assistance to the Black Elk Scheme, by swapping its Black Elk equity for bonds, in order to rig the consent solicitation vote for the Black Elk Indenture. Am. Compl. ¶ 465-471.

- The Preferred Investors of the BEOF Funds received a total of $36 million in connection with their participation in the Black Elk Scheme. Am. Compl. ¶ 492.

The Amended Complaint also includes background on each of the individual Preferred Investors of the BEOF Funds for which the Plaintiffs have available knowledge, including, among others, Twosons Corporation, Jules and Barbra Nordlicht, and the Huberfeld Family Foundation. Am. Compl. ¶ 145-172.

In summary, the Preferred Investors of the BEOF Funds were friends and insiders of certain of the Platinum Defendants, who benefitted from those relationships and were able to avoid significant losses notwithstanding having invested in Black Elk equity at a time when Black Elk's financial condition was on the brink of insolvency.

The arguments raised by the moving Preferred Investors of the BEOF Funds – that they were only passive investors with no knowledge of the tortious conduct of the other Defendants – are not simply not credible given that many were family or longtime associates of Platinum Management executives and willfully invested and then rolled over their investment in the BEOF Funds at a time when Black Elk was publicly reporting significant financial difficulties in the wake

of the Black Elk Explosion.[5] The scheme is clear on its face: the Preferred Investors of the BEOF Funds are those insiders to which PPVA's rights would be subordinated, leaving PPVA with significant creditor claims and the Preferred Investors of the BEOF Funds, rather than PPVA, with the bulk of the proceeds resulting from the Renaissance Sale. Moreover the well-pled and plausible allegations in the Amended Complaint must be accepted as true for the purposes of a motions to dismiss.

These allegations sufficiently plead the claims against the Preferred Investors of the BEOF Funds, as they allege substantial assistance provided to Platinum Defendants and others in execution of the Black Elk Scheme.

The Amended Complaint also sufficiently plead a claim for unjust enrichment against the Preferred Investors of the BEOF Funds. An unjust enrichment claim is available in situations where "circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012); *see Senior Health Insurance Co. of Pa.*, 345 F.Supp. at 532-533 (permitting SHIP to amend its unjust enrichment claims against various Beechwood Defendants to include non-conclusory factual allegations).

Here, the factual allegations underlying the unjust enrichment claim against the Preferred Investors of the BEOF Funds are well-pled and non-conclusory. The Amended Complaint sets forth in exhaustive detail how the Preferred Investors of the BEOF Funds knowingly entered into transactions outside the structure of PPVA in order to subordinate PPVA and unjustly enrich themselves by way of the Renaissance Sale Proceeds. Am. Comp. ¶¶ 427-502. Paragraph 493

[5] In addition to these arguments, Defendant GRD Estates Ltd. argued that service of process of the Plaintiffs' Initial Complaint was insufficient under Fed. R. Civ. P. 4(f). The Plaintiffs note that the attorneys of record for GRD Estates Ltd. have agreed to accept service of the Amended Complaint on behalf of their client. Further, Defendant Huberfeld Family Foundation, Inc. raises the incredulous argument that its upcoming settlement with the bankruptcy estate for Black Elk somehow deprives the Plaintiffs of standing. This argument is wholly without merit as the Amended Complaint specifically alleges facts and causes of action in connection with damages incurred by PPVA.

of the Amended Complaint contains a table listing the indirect equity investment held by each Preferred Investor of the BEOF Funds, and the distribution received by each of them as a result of the Renaissance Sale. These factual allegations and others set forth in the Amended Complaint are sufficient to plead a claim for unjust enrichment under New York law.

D. The Claims against the Agera Executives

The Plaintiff's Amended Complaint alleges claims for aiding and abetting breach of fiduciary duty against Kevin Cassidy and Michael Nordlicht (the "**Agera Executives**") in connection with their substantial assistance in closing the Agera Transactions, which was the culmination of the Second Scheme and resulted in the dissipation of more than $100 million in PPVA Assets on the day after Murray Huberfeld's arrest on June 8, 2016. The Amended Complaint also includes an unjust enrichment claim against Cassidy, in connection with his receipt of $13,552,000 in Agera proceeds through his alter ego, Starfish Capital, Inc.

The Agera Executives separately argue[6] that the Amended Complaint should be dismissed as against them on the ground that Plaintiffs failed to show that they rendered substantial assistance to the Platinum Defendants in connection with the Agera Transactions. According to the Agera Executives, the Amended Complaint merely contains conclusory allegations that are insufficient to plead an aiding and abetting claim. In addition, Cassidy claims that there was consideration for the monies Starfish received, *i.e.*, the repurchase of the PGS membership interests he was gifted the day before, and thus the unjust enrichment claim also fails. The Agera Executives' arguments should be rejected outright and once again, are themselves conclusory.

As is evident from the Amended Complaint, both Michael Nordlicht and Cassidy had long-standing ties to the Platinum Defendants. The Amended Complaint details the ways in which the

[6] These defendants also move to dismiss based on the group pleading arguments raised by other defendants and addressed below.

Agera Executives were actively involved in **effectuating** the Agera Transactions. As such, they cannot claim merely to have been "inactive" bystanders to those transactions.

For example, the Amended Complaint alleges that in or about late 2013, Nordlicht installed Michael Nordlicht, his nephew, as the general counsel of Agera Energy, despite the fact that he had no prior experience in private practice or in the energy sector. Am. Compl. ¶ 129. In fact, Michael Nordlicht was installed at Agera soon after graduating from law school. The Amended Complaint further alleges that Michael Nordlicht held a 95.01% indirect equity interest in Agera Energy, which he gave up for no consideration as part of the Agera Transactions, an action that makes little sense unless he was aware of and sought to assist the successful completion of the underlying deal. *Id*.

The Amended Complaint also details that Michael Nordlicht provided substantial assistance to the closing of the Agera Transactions, working with Steinberg, Ottensoser, Narain and Cassidy to prepare the documents and schedules by which the various parts of the Agera Transactions were accomplished. He also executed the documents by which the equity he owned was transferred to a nominee of the Beechwood Entities. Am. Compl. ¶¶ 618-630. If not for his assistance, the Agera Transactions could not have closed, and PPVA would not have been damaged. These facts clearly are sufficient to plead a claim that Michael Nordlicht aided and abetted the Platinum Defendants' breach of their fiduciary duties relating to the Agera Transaction.

So too, the Amended Complaints alleges sufficient facts of aiding and abetting claims against Cassidy. Like Michael Nordlicht, Cassidy was placed at Agera by Nordlicht in or about 2014. In Cassidy's case, it appears that the job was a *quid pro quo* relating to Optionable, Inc., a fund with which Cassidy and Nordlicht both were involved. Optionable collapsed after Cassidy was arrested for deliberately misstating the value of its natural gas derivatives. Cassidy, who had

served two prior stints in prison, was sentenced to 30 months incarceration. Nordlicht hired Cassidy as a managing director for Agera immediately after his release from prison, despite the fact that he had no prior experience in the energy sector. Am. Compl. ¶¶ 137-141.

The Amended Complaint further alleges that Cassidy was involved in the preparation of the documents related to the Agera Transactions, working with Steinberg, Ottensoser, Narain, Michael Nordlicht and the other persons involved to finalize the transactions. Cassidy (and his counsel) also worked directly with Steinberg to create the mechanism by which 8% of the Agera purchase price was paid to an entity set up by Cassidy to avoid having any taxes withheld from such payment. Am. Compl. ¶¶ 618-630. The forgoing allegations demonstrate substantial assistance and knowledge of the underlying breach, and are sufficient to state an aiding and abetting breach of fiduciary duty claim against Cassidy.

There also are ample allegations to state a claim for unjust enrichment against Cassidy. Under New York law, to prevail on a claim for unjust enrichment, a plaintiff must establish; (i) that the defendant benefitted; (ii) at the plaintiff's expense; and (iii) that "equity and good conscience" require restitution. *See Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 20 (2d Cir. 1983). Here, the Amended Complaint explains that while it was typical for portfolio managers to receive bonus compensation calculated as a percentage of the increase in the *net* value of the investments they managed, between 2014 and June 2016, Platinum Management routinely alleged in responses to SEC inquiries that Cassidy was not employed as a portfolio manager at Platinum Management. Cassidy also did not have a written contract with Platinum Management, PPVA or PGS that would entitle him to any payment in connection with the sale of the Agera Note. Am. Compl. ¶¶ 620-622.

The Amended Complaint further alleges that, despite these denials, Starfish, an entity created and controlled by Cassidy, was made a party to the Agera Transactions as a means of paying Cassidy 8% of the total proceeds of the sale, which amounted to millions of dollars. To that end, it alleges that Starfish was granted an ownership interest in PGS the *day prior* to the Agera Sale in order to "take care of Kevin" due to his efforts in effectuating the Agera Transactions. Notably, during the period between 2014 and June 2016, Cassidy was paid a salary of $135,000 per year and Starfish was paid approximately $2.5 million by Agera in connection with Cassidy's work at Agera. Amended Complaint at ¶¶ 622, 644-646. As such, it is clear that the Amended Complaint states a claim for unjust enrichment against Cassidy.

E. Civil RICO Claims against the Platinum and Beechwood Defendants

The civil RICO claim in the Amended Complaint is premised upon the Platinum Defendants' and the Beechwood Defendants' coordinated and continuous scheme to overvalue and then strip PPVA of its assets. This set of defendants executed their scheme by repeatedly misrepresenting PPVA's true NAV, and, when it became clear PPVA was no longer viable, by transferring or encumbering its assets for the benefit of insiders and to the detriment of PPVA.

Defendants Bodner, Levy, Bernard Fuchs, Huberfeld, Landesman, Ottensoser, Saks, and Steinberg (the "**RICO Movants**") move to dismiss the RICO claim on the grounds that the Complaint fails to allege with the requisite particularity that they engaged in the predicate acts, mail fraud and wire fraud, sufficient to constitute a pattern of racketeering activity. Defendant Steinberg further moves to dismiss on the ground that the Complaint fails to allege that he was employed by or associated with a RICO enterprise and that he conducted or participated in the conduct of the RICO enterprise's affairs, as required under 18 U.S.C. § 1962(c), the civil RICO statute.

Section 1962(c) makes it illegal to conduct the affairs of an enterprise through a pattern of racketeering. The statute includes the following:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.

The elements of the offense are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.* 473 U.S. 479, 496 (1985). An "enterprise" is an "individual, partnership, corporation, association, or other legal entity, and any union or group of individuals in fact although not a legal entity." 18 U.S.C. § 1961(4). A "pattern of racketeering activity" means "at least two acts of racketeering activity within ten years." *Id.* § 1961(5). "Racketeering activity" refers to a broad range of enumerated predicate criminal offenses that includes mail fraud and wire fraud under 18 U.S.C. §§ 1341 and 1343, respectively.[7]

The Amended Complaint alleges a closed-ended scheme, that is, one comprising a "series of related predicates extending over a substantial period of time." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 242 (1989). The requisite period of time to find closed-ended continuity is at least two years. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2d Cir. 2004). The Amended Complaint alleges predicate acts from 2013 until June 2016, which is more than two years.

The Amended Complaint includes specific allegations tying the RICO Movants to the scheme. For example, with regard to Bodner, the Amended Complaint alleges that he co-founded and co-owned Beechwood, a sham entity created to serve as the vehicle by which: (i) PPVA's

[7] Although securities fraud is also listed among the predicate offenses, 18 U.S.C § 1964(c) specifically excludes that offense unless the defendant has been convicted of securities fraud.

NAV and assets were propped up and overvalued through a series of sham transactions, (ii) Beechwood bought Black Elk Bonds then sold them back to PPVA in knowing perpetuation of the Black Elk Scheme, and (iii) PPVA's interests were subordinated to those of insiders. The Amended Complaint further alleges that Bodner was a concealed, controlling person of PPVA, responsible for developing business strategy, sourcing new investments and marketing to investors. All of this was effected by Bodner using wires and mail, including, but not limited to, email communication. Am. Compl. ¶ 12(iv).

With regard to Levy, the Amended Complaint alleges, *inter alia*, that he was the co-chief investment officer of PPVA beginning in 2015, and prior to that, a portfolio manager for several of PPVA's investments. Levy is a founder and co-owner of Beechwood, the alter ego of Platinum Management created by Nordlicht, Huberfeld, Bodner, Taylor, Feuer and himself to carry out the First and Second Schemes. As a member of the valuation and risk committees tasked with valuing PPVA's assets and risks related thereto, Levy was directly responsible for the overvaluation of PPVA's assets and the misrepresentations and omissions in connection therewith. Levy actively participated in the First and Second Schemes by use of the wires and email, including, but not limited to, email communication. In addition, while acting as chief investment officer for the Beechwood Entities, Levy was instrumental in effectuating the Black Elk Scheme. Am. Compl. ¶¶ 12, 49-54, 260-261, 263, 324, 345, 347.

With regard to Huberfeld, the Amended Complaint alleges, *inter alia*, that he co-founded and controlled Platinum and co-owned and controlled Beechwood, the alter ego of Platinum Management created to serve as the vehicle by which (i) PPVA's NAV and assets were propped up and overvalued, (ii) Beechwood bought Black Elk Bonds then sold them back to PPVA in knowing perpetuation of the Black Elk Scheme, and (iii) PPVA's interests were subordinated to

those of insiders. The Amended Complaint further alleges that Huberfeld was involved with sourcing investment opportunities, meeting with and marketing to important investors and developing business and investment strategy for PPVA. He also was involved in the management and operation of PPVA and of Platinum Management, taking part in meetings with attorneys, interviewing new personnel, and meeting with investment partners. As an owner, Huberfeld was a direct beneficiary of all of the inflated distributions, fees and other payments made to Platinum Management by PPVA. All of this was effected by Huberfeld using wires and mail, including, but not limited to, email communication. Am. Compl. ¶¶ 12, 13, 65, 67-73, 82-86, 116.

With regard to Fuchs, the complaint and Amended Complaint allege, *inter alia*, he was a holder of membership interests in Platinum Management, and that he was responsible for attracting investment, deploying investment capital and stating the purported NAV to the PPVA partnership. Am. Compl. ¶ 12(v). All of this was effected by Fuchs using wires and mail, including, but not limited, to email communication. Am. Compl. Exhibit 2.

With regard to Landesman, the Amended Complaint alleges, *inter alia*, that he was an owner of and the President of Platinum Management and that he was responsible for attracting investment, deploying investment capital and stating the purported NAV to the PPVA partnership. It alleges that he was a member of the risk and valuation committees, and so was directly responsible for evaluating and determining the value of PPVA's assets and investments and communicating same. In spite of his direct knowledge of PPVA's liquidity issues and the Platinum Defendants' misrepresentation of PPVA's NAV, he routinely misrepresented PPVA's financial condition. Am. Compl. ¶¶ 12(ii), 55-66.

With regard to Ottensoser, the Amended Complaint alleges, *inter alia*, that he sent two emails circulating a copy of the executed Nordlicht Side Letter to Manela and another Platinum

Management executive, both emails were sent in furtherance of the unlawful attempt to deplete PPVA of its value for the benefit of insiders. In addition, Ottensoser was involved in drafting and negotiating the various documents by which the transactions comprising the First and Second Scheme were effectuated, including the Agera Transactions. Ottensoser accomplished this by using wires and mail, including, but not limited to, email communication. Am. Compl. ¶¶ 105-110, 473.

With regard to Saks, the Amended Complaint includes an allegation that he operated Beechwood as an intermediary through his role as chief investment officer and President of BAM, was an instrumental part of Beechwood's involvement in the First and Second Schemes, and acted as signatory on behalf of various Beechwood Entities in connection with several of the transactions among Beechwood Entities and PPVA. Am. Compl. ¶ 173-177.

With regard to Steinberg, the Amended Complaint alleges, *inter alia*, that he was a portfolio manager, member of the valuation and risk committees, and eventually co-chief risk officer, and thus responsible for assessing the value of, and risk associated with, PPVA's assets and investments and communicating same. The Amended Complaint further alleges that Steinberg was involved in drafting and negotiating the various documents by which the transactions comprising the First and Second Schemes were effectuated. Steinberg accomplished all of the foregoing using wires and mail, including, but not limited to, email communication.

The Amended Complaint properly pleads with the requisite particularity the RICO Movants' participation in the unlawful enterprise. For all of these reasons, the RICO Movants' motion to dismiss the RICO claim as to them should be denied.

II. The Plaintiffs Employ the Group Pleading Standard as Permitted

Movants collectively seek dismissal on the ground that the claims are pled with insufficient particularity as to each of them individually, and instead rely on group pleading. Movants are wrong.

It is clear that the Amended Complaint provides ample detail as to the actions of each individual Movant. That being said, given the number of Defendants and the scope, timeframe and collective nature of the fraudulent conduct set forth in the Amended Complaint, Plaintiffs employ group pleading where appropriate to describe the series of tortious acts committed by a tight weave of corporate insiders controlling and executing the day-to-day operations of Beechwood, Platinum Management, and the BEOF Funds. Under circumstances such as those present in this case, the group pleading doctrine "allows particular statements or omissions to be attributed to individual defendants even when the exact source of those statements is unknown." *Anwar*, 728 F. Supp. 2d at 405.

In a complex, multi-defendant action such as this, the group pleading doctrine allows a plaintiff to comply with the general pleading rule that fraudulent statements must be linked directly to the party accused of the fraudulent intent, at least as to individuals with direct involvement in the business of the company and the alleged fraudulent conduct. *SEC v. Landberg*, 836 F. Supp. 2d 148, 156 (S.D.N.Y. 2011) (citing *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 641 (S.D.N.Y. 2007)); *Elliott Assocs., L.P. v. Hayes*, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000), *aff'd*, 26 F. App'x 83 (2d Cir. 2002) ("The group pleading doctrine is an exception to the requirement that the fraudulent acts of each defendant be identified separately in the complaint."). Contrary to defendants' assertions, the group pleading doctrine also applies to common law fraud claims and breach of fiduciary duty claims that are rooted in fraud. *See Schwartzco Enters. LLC v. TMH Mgmt., LLC*, 60 F. Supp. 3d 331, 345, 352-53 (E.D.N.Y. 2014). Both forms of claims are alleged

with respect to the First and Second Schemes with substantial particularity in the detailed Amended Complaint.

The doctrine applies to "corporate insiders" with direct involvement in the everyday business of the company. *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 373 (S.D.N.Y. 2012) (Rakoff, J.) (citing *Camofi Master LDC v. Riptide Worldwide, Inc.*, No. 10 Civ. 4020(CM), 2011 WL 1197659, at *6 (S.D.N.Y. Mar. 25, 2011)); *Anwar*, 728 F. Supp. 2d at 405-06 ("In order to invoke the group pleading doctrine against a particular defendant the complaint must allege facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs, at the entity issuing the statement.") (citing *In re Alstom SA*, 406 F. Supp. 2d 433, 449 (S.D.N.Y. 2005)).

For example, in *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Secs., LLC*, 797 F.3d 160 (2d Cir. 2015), a trial court found that three Wachovia subsidiaries were "insiders or affiliates participating in the offer of securities," such that group pleading was sufficient. *Id.* at 173. The Second Circuit held that there is no requirement to identify single entities in a group where statements or actions are attributable to the group:

> "Even under the heightened pleading standard of Rule 9(b), Plaintiffs are not obliged to disaggregate these affiliates to pursue their fraud claim. Where a plural author is implied by the nature of the representations—for instance, where, as here, (1) the alleged fraud is based on statements made in the offering materials and (2) the complaint gives grounds for attributing the statements to the group—group pleading may satisfy the source identification required by Rule 9(b). … [W]e hold that there is no fixed requirement in such circumstances to identify a single entity within the group on pain of dismissal."

Id. Similarly, in *Szulik v. Tagliaferri*, the court found that allegations grouping two defendants together into one unit "no less than 298 times" adequately distinguished "roles of each participant such that both can ascertain the role he or she played" because plaintiff alleges they "omitted and

concealed the same information and were acting in concert to perpetuate the fraud." 966 F. Supp. 2d 339, 360-61 (S.D.N.Y. 2013); *see also DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) ("[N]o specific connection between fraudulent representations in [offering memorandum]" and defendants is necessary where defendants are insiders or affiliates participating in the offering).

Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372 (S.D.N.Y. 2010), which arose out of an action against feeder funds to the Madoff Ponzi scheme and the individuals who ran them, is directly on point. In that case, the court held that group pleading was appropriate given the "tight weave of connections" between certain defendants, identified as the "Fraud Defendants." *Id.* at 406. The court further held that because one of the Fraud Defendants, FGG, controlled the day-to-day operations of FGG and its corporate partners, "any entity that in turn was a corporate insider to FGG's day-to-day operations has the requisite connection for the group pleading doctrine to apply." *Id.*; *see also Polar Int'l Brokerage Corp. v. Reeve*, 108 F. Supp. 2d 225, 238 (S.D.N.Y. 2000) (group pleading doctrine was appropriate for grouping defendants—including a private equities firm initiating a tender offer, an indirectly owned subsidiary of the firm, individual officers and directors of the target corporation, and investment banks working on the offer—where they drafted and/or approved offering documents).

In this case, the Platinum Defendants and Beechwood Defendants were corporate insiders of Platinum Management and Beechwood, Platinum Management's alter ego. As set forth in the Amended Complaint, the Platinum Defendants each exerted managerial control over PPVA in a fiduciary capacity and are named as Defendants due to their direct involvement in one or more of the high-value, illusory, and fraudulent transactions comprising the First and Second Schemes.

Similarly, the individual Beechwood Defendants consist of a tight weave of owners, executives and corporate insiders of the Beechwood Entities, a collection of entities established in part to implement the First and Second Schemes and loot PPVA of its assets. Each of the Platinum Defendants and the Beechwood Defendants were directly involved in the day-to-day implementation of the First and Second Schemes during the time of their respective employment with Platinum Management and/or Beechwood. The general allegations in the Amended Complaint are coupled with specific allegations of communications and conduct sufficient to "inform each defendant of the nature of his alleged participation in the fraud." *Fernandez*, 222 F. Supp. 3d at 388.

The Preferred Investors of the BEOF Funds also consist of a group of insiders, including family members, friends and select investors, each of whom either is a Platinum Defendant or is personally connected to Mark Nordlicht, Murray Huberfeld, Bernard Fuchs, David Bodner or one of the other Platinum Defendants.

The Preferred Investors all share common characteristics:

(i) they were acutely aware of the actions of the Platinum and Beechwood Defendants in furtherance of the Black Elk Scheme, as well as the wholly false nature of Beechwood's representations that it was unaffiliated with Platinum Management in connection with the Black Elk subordination;

(ii) they each entered into a series of transactions in order to intentionally place their preferred investments outside of the corporate structure of PPVA at PPVA's expense; and

(iii) they materially and knowingly aided and abetted the Platinum Defendants' breach of their fiduciary duties to PPVA and were unjustly enriched from the fraud that they aided and

abetted, namely, receipt of a significant portion of the Renaissance Sale proceeds to PPVA's detriment and while saddling PPVA with substantial liabilities. Am. Compl. ¶¶ 427-502.

Under the circumstances, group pleading is appropriate because the Defendants form a tight weave of corporate insiders, affiliates, preferred investors and their family members, who worked in concert to defraud PPVA and loot PPVA's assets over the course of several years by engaging in a series of deceptive transactions permeated by fraud and which were papered in the most complex manner so as to obfuscate the truth and provide a veneer of legitimacy.

For all of these reasons, the group pleading doctrine applies to the Amended Complaint, and the allegations against the Platinum Defendants, Beechwood Defendants and Preferred Investors of the BEOF Funds are sufficient and appropriate. *See, e.g., Sunrise Indus. Joint Venture v. Ditric Optics, Inc.*, 873 F. Supp. 765, 772 (E.D.N.Y. 1995) (holding that "the particularity requirement of Rule 9(b) is appropriately relaxed where the individual defendant is a corporate insider").

III. The Relaxed Pleading Standard Afforded to the JOLs

Moving Defendants also seek dismissal on the ground that the Amended Complaint fails to satisfy the standards for pleading under Fed. R. Civ. P. 8(a) and 9(b). Yet, Rule 8(a) merely requires a short and plain statement of the claim, and the Amended Complaint's 1,012 paragraphs of factual allegations and 101 exhibits clearly satisfy Rule 9(b)'s requirement to state with particularity the circumstances of the fraud perpetuated by defendants. See Fed. R. Civ. P. 8(a) and 9(b). *A fortiori*, there is no question that the Amended Complaint meets the relaxed pleading standard applicable to fraud claims brought by bankruptcy trustees and liquidators. *See In re Hellas*, 535 B.R. at 561-62; *In re Ahead by a Length, Inc.*, 100 B.R. 157, 166–68 (Bankr. S.D.N.Y. 1989) (applying a relaxed pleading standard where bankruptcy trustee asserted fraud and defendants had "first-hand knowledge of the acts described.").

A relaxed standard is appropriate for claims based in fraud brought by trustees because "it is often the trustee, a third party to the fraudulent transaction, that must plead the fraud on secondhand knowledge for the benefit of the estate and all of its creditors." *In re Bennett Funding Grp., Inc.*, 367 B.R. 269, 297 (Bankr. N.D.N.Y. 2007) (citing *Secs. Inv'r Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 310 (Bankr. S.D.N.Y. 1999)); *see also In re Collins*, 540 B.R. 54, 59 (Bankr. E.D.N.Y. 2015) (citing *Gredd v. Bear Stearns Sec. Corp. (In re Manhattan Inv. Fund Ltd.)*, 310 B.R. 500, 505 (Bankr. S.D.N.Y. 2002)) ("[C]ourts take a liberal approach in construing allegations of actual fraud pled by a trustee, because the trustee is a third party outsider to the transaction and must plead fraud based upon second hand knowledge."); *In re BLMIS, LLC*, 445 B.R. 206, 219 (Bankr. S.D.N.Y. 2011) (when the trustee's "lack of personal knowledge is compounded with complicated issues and transactions which extend over lengthy periods of time, the trustee's handicap increases and … he should be afforded even greater latitude."). In order to survive dismissal, a trustee or liquidator is only required to show that its pleading is more than speculation or conclusory allegations. *See In re ICP Strategic Credit Income Fund Ltd.*, No. 13-12116 (REG), 2015 WL 5404880, at *9 (Bankr. S.D.N.Y. Sept. 15, 2015)

In determining whether a liquidator has satisfied Rule 9(b), courts look at the "totality of the circumstances." *In re Collins*, 540 B.R. at 59. Among other things, courts consider whether the liquidator already has had access to discovery. *See Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987) (quoting *Hassett v. Zimmerman (In re O.P.M. Leasing Servs., Inc.)*, 32 B.R. 199, 202 (Bankr. S.D.N.Y. 1983)) ("[T]he degree of particularity required should be determined in light of such circumstances as whether the plaintiff has had an opportunity to take discovery of those who may possess knowledge of the pertinent facts."). Here, Plaintiffs only recently gained access to the PPVA documents located on the Platinum servers, and have had no discovery from

Beechwood, the Preferred Investors of the BEOF Funds, the other individual defendants, and many relevant third parties such as SHIP.

Courts also look at the complexity of the transactions. *See In re Lehman Bros. Holdings Inc*., 469 B.R. 415, 449 (Bankr. S.D.N.Y. 2012) (denying motion to dismiss and finding trustee met Rule 9(b) because "the transactions at issue are so extraordinarily complicated and intertwined that describing them with any further detail would pose a special challenge"). In this case, Defendants engaged in many transactions that were made purposefully complex so as to escape detection and effectuate the very schemes alleged.

Courts similarly may consider whether the detailed information is uniquely in the knowledge of the defendants, as it is here. *See Bennett Funding Group*, 367 B.R. at 297 (citing *Stratton Oakmont*, 234 B.R. at 310 (finding trustee had satisfied Rule 9(b), "given the length of time during which the fraud in question is alleged to have occurred, its level of complexity, and [defendant's] status as a corporate insider the entire time of the alleged fraud"); *In re Ridley*, 453 B.R. 58, 75 (Bankr. E.D.N.Y. 2011) (denying motion to dismiss even though plaintiff "does not identify the individuals at Allstate who made these statements or exactly when these communications occurred, much of that information is more likely to be available to Allstate or peculiarly within Allstate's, not Ridley's, control."); *In re White Metal Rolling & Stamping Corp*., 222 B.R. 417, 430 (Bankr. S.D.N.Y. 1998) ("Since a bankruptcy trustee rarely has personal knowledge of [] events preceding his appointment, he can plead scienter based upon information and belief" by "plead[ing] the basis of his belief.").

Where facts are exclusively within the knowledge of defendants, a complaint will satisfy Rule 9(b) if it contains a statement of facts upon which plaintiff's belief is founded. *See In re Michel*, 572 B.R. 463, 472 (Bankr. E.D.N.Y. 2017) (citing *Segal v. Gordon*, 467 F.2d 602, 608 (2d

Cir. 1972)) (finding fraud claim that concerns matters peculiarly within the adverse parties' knowledge satisfies Rule 9(b) if it is "accompanied by a statement of facts upon which the belief is founded"); *Bennett Funding Grp.*, 367 B.R. at 298 (finding pleading on information and belief is acceptable "as to facts peculiarly within the opposing party's knowledge, in which event the allegations must be accompanied by a statement of the facts upon which the belief is based."); *Prince v. Madison Square Garden*, 427 F. Supp. 2d 372, 385 (S.D.N.Y. 2006) (same).

Here, the JOLs are the Joint Official Liquidators of PPVA, with authority pursuant to Orders of the Grand Court of the Cayman Islands and the United States Bankruptcy Court of the Southern District of New York to liquidate the assets of PPVA and bring litigation on its behalf. *See Hellas Telecomms,* 535 B.R. at 561-62. As such, the JOLs have asserted claims "secondhand," based largely upon their review of a subset of relevant data since April 2018, while Defendants have "firsthand knowledge of the acts described," including the series of complex and intertwined transactions comprising the First and Second Schemes. *Ahead by a Length*, 100 B.R. at 166–68.

As set forth in the Amended Complaint, in what is respectfully submitted to be exhaustive detail, the Defendants purposefully "papered" the acts and transactions at issue in order to make them seem legitimate to outside parties. The transactions also were made purposefully complex, to hide the fact that they were permeated by fraud, deceit and a breach of trust.

Certain Movants note that the JOLs are custodians of PPVA's documents, and for this reason alone, the pleading standard under Rule 9(b) should not be relaxed. This view is contrary to well-settled law, where trustees and liquidators are often afforded relaxed pleading standards even while in possession of a debtor's books and records. The present matter is in its infancy, so no discovery has yet been conducted, let alone completed or substantially completed.

In any case, while the JOLs currently have access to the PPVA-specific documents

previously stored on Platinum Management's servers, they only gained access to those documents recently and have not by any means completed a review of the same, nor have they obtained any discovery from the defendants in this case or many relevant third parties. So too, documents do not tell the complete story, particularly given that many were created so as to be intentionally misleading or obfuscatory. Thus, discovery of conversations among the Defendants, including the Preferred Investors of the BEOF Funds, and most importantly, the Beechwood Defendants, will provide a fuller understanding of the facts.

Under all of these circumstances, this Court should deny Defendants' motion and find that Plaintiffs have satisfied both Rule 8(a) and Rule 9(b).

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CONCLUSION

WHEREFORE, the Plaintiffs respectfully request that this Court deny the Movants' Motions to Dismiss in their entirety, and grant any appropriate relief that this Court deems just and proper.

Dated: February 11, 2019
New York, New York

HOLLAND & KNIGHT LLP

By: /s/ Warren E. Gluck, Esq.
Warren E. Gluck, Esq.

Warren E. Gluck, Esq.
Barbra R. Parlin, Esq.
John L. Brownlee, Esq. (*pro hac vice forthcoming*)
Timothy D. Belevetz, Esq. (*pro hac vice*)
Richard A. Bixter Jr., Esq. (*pro hac vice*
HOLLAND & KNIGHT LLP
31 West 52nd Street
New York, New York 10019
Telephone: 212-513-3200
Facsimile: 212-385-9010
Email: warren.gluck@hklaw.com
barbra.parlin@hklaw.com
john.brownlee@hklaw.com
timothy.belevetz@hklaw.com
richard.bixter@hklaw.com

Attorneys for Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation), and for Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation)