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), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	No. 18 Civ. 10936 (JSR)

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

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PRELIMINARY STATEMENT

The Agera Executives' moving memorandum made clear that the FAC does not plead sufficient facts to state a viable claim for aiding and abetting breach of fiduciary duty against either Michael Nordlicht or Kevin Cassidy or a claim for unjust enrichment against Kevin Cassidy.[1] Based upon a review of the JOLs' omnibus opposition to all motions to dismiss (Dkt. No. 223), it appears that the JOLs did not even read the Agera Executives' moving memorandum of law.

The JOLs make no effort to address the Agera Executives' arguments. The JOLs completely ignore the case law cited by the Agera Executives that demonstrates that the conclusory allegations in the FAC are insufficient as a matter of law. The JOLs do not cite a single legal authority to the contrary. The JOLs do not and cannot point to specific factual allegations in the FAC to support their claims. Rather, the JOLs repeat the conclusory allegations of the FAC and baldly argue without supporting legal authority that such allegations are sufficient. They are not. Despite two attempts at pleading the two claims against the Agera Executives, two opportunities to oppose the Agera Executives' motions to dismiss, and their review of over 13 million documents from Platinum Management's server, the JOLs' allegations against the Agera Executives fail as a matter of law and must be dismissed with prejudice.

ARGUMENT

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

The JOLs wholly ignore the case law cited by the Agera Executives. The JOLs do not refute that, to state a claim for aiding and abetting a breach of fiduciary duty, they must plead sufficient factual detail to demonstrate that Michael Nordlicht and Kevin Cassidy each had (a)

[1] All defined terms set forth herein shall have the same meanings as defined in the Agera Executives' Memorandum of Law in Support of Their Motion to Dismiss ("Mem."). Dkt. No. 121.

actual knowledge of the alleged primary wrongful conduct by the Platinum Defendants, (b) provided "substantial assistance" to aid in that breach of fiduciary duty, and that (c) PPVA suffered actual damages as a proximate result of each of their alleged substantial assistance. Mem. 13-16, *citing Sharp Int'l Corp. v. State Bank & Trust Co.*, 403 F.3d 43, 49-52 (2d Cir. 2005). The opposition does not (and cannot) point to specific facts alleged in the FAC to establish the existence of any one, let alone all, of the required elements of the claim. Thus, the claim must be dismissed.

First, the JOLs do not dispute that, in order to survive a motion to dismiss, they must plead facts establishing that the Agera Executives had ***actual knowledge*** of the primary breach of fiduciary duty. Mem. 13-15, *citing Krys v. Pigott*, 749 F.3d 117, 128-30 (2d Cir. 2013); *Sharp*, 403 F.3d at 49. However, the JOLs' opposition is silent in response to the Agera Executives' showing that the FAC does not plead facts that meet the actual knowledge standard. *Compare* Mem. 14-15 *with* Opp. 21-23. The JOLs do not, and cannot, point to any well-pleaded facts to support the conclusory allegation that the Agera Executives had "actual knowledge" of the Platinum Defendants' alleged primary breach. In the absence of well-pleaded facts and legal authority, the JOLs' conclusory arguments are woefully insufficient.

The JOLs argue 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*." Opp. 22 (emphases added). It is not clear whether this is an attempt to allege actual knowledge of some unidentified *wrongful conduct*. If it is, it fails as a matter of law. The FAC does not allege that Michael Nordlicht transferred the equity interest in Agera Holdings "for no consideration." *See* FAC ¶ 643. The FAC does, however, allege that Michael Nordlicht "did not pay anything for the equity he held in Agera Holdings." FAC ¶ 614. Thus, if he paid no

consideration for the equity and received no consideration upon transferring that equity, no inference of wrongful knowledge, intent or conduct may be drawn from his equity interest in Agera Holdings. These facts would establish that Michael Nordlicht was, at best, a nominee.

The FAC is simply devoid of any facts 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 duties they owed to PPVA. FAC ¶¶ 10, 900. *See* Mem. 13-15.

Second, the Agera Executives showed that the allegations of ***substantial assistance*** in the FAC amounted to conclusory phrases like "help," "negotiated," "participated," or "actively participated" without any substantiation, specificity, or detail of any such participation, and which were contradicted by allegations against other defendants. Mem. 15-16. The Agera Executives showed also that the allegations that the Agera Executives "prepared" unidentified documents that somehow may have been used in some unidentified manner in the Agera Transaction lacked factual support and did not establish that any document was out of the ordinary course of business, false, misleading, or otherwise used to perpetuate some wrongdoing. Mem. 16. In opposition, JOLs simply repeat the FAC's conclusory allegations that the Agera Executives have already demonstrated were patently deficient. Opp. 22-23. The JOLs cite to no legal authority, controlling or otherwise, to support the sufficiency of their conclusory allegations of "substantial assistance."

The JOLs contend that the FAC "details" Michael Nordlicht's "substantial assistance to the closing of the Agera Transaction" because he "executed the documents by which the entity he owned was transferred to a nominee of the Beechwood Entities." Opp. 22, *citing* FAC ¶¶ 618-30. The FAC details no such facts anywhere, let alone in paragraphs 618-30. Moreover, the moving

memorandum showed that any consent by Michael Nordlicht to the Agera Transaction could not, as a matter of law, constitute substantial assistance to a breach of fiduciary duty. *See* Mem. at 16-17, *citing 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 JOLs do not address, let alone rebut, this authority.

The JOLs argue that they sufficiently pleaded that Kevin Cassidy substantially assisted the Platinum Defendants' purported breach because he allegedly "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." Opp. 23, *citing* FAC ¶ 620. The JOLs however fail to explain the "mechanism" of how the payment of consideration to Starfish in exchange for its 8% membership interest of PGS (FAC Exh. 91) could constitute substantial assistance to the Platinum Defendants' alleged breach of fiduciary duty to PPVA.[2]

Tacitly recognizing the lack of facts establishing "substantial assistance," the JOLs resort to allegations of mere association with one of the Platinum Defendants. The JOLs repeatedly argue that the FAC alleges sufficient facts to support the aiding and abetting claim ***because*** the Agera Executives "had long-standing ties with the Platinum Defendants" and ***because*** Defendant Mark Nordlicht hired each of the Agera Executives for roles at Agera Energy. Opp. 21-23. The fact that the Agera Executives are the nephew and a former colleague of Mark Nordlicht is not a substitute for factual allegations establishing substantial assistance.

Third, the JOLs do not dispute that the FAC must allege that the defendant's substantial assistance ***proximately caused*** the harm to PPVA on which the primary liability is predicated, and

[2] The JOLs seek to create a negative inference by alleging that Kevin Cassidy sought to avoid employee withholding taxes. Opp. at 23; FAC ¶ 620. Notably, there is no allegation that any applicable taxes were not paid.

that "but-for causation" is insufficient. *See* Mem. at 17, *citing Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 370-71 (S.D.N.Y. 2007); *see also Kolbeck v. LIT Am.*, 939 F. Supp. 240, 249 (S.D.N.Y. 1996). The only attempt to meet this basic causation requirement is the JOLs' argument that, "[i]f not for [Michael Nordlicht's] assistance, the Agera Transactions could not have closed, and PPVA would not have been damaged." Opp. 22. This argument is classic but-for causation, not the required proximate causal connection, and is insufficient as a matter of law. *See Kolbeck*, 939 F. Supp. at 249 (dismissing breach of fiduciary duty claim for failure to plead proximate cause).[3]

The Twelfth Count must be dismissed as to both of the Agera Executives with prejudice.

II. THE FAC FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT AGAINST KEVIN CASSIDY.

The moving memorandum showed that the FAC does not plead facts to state a claim of unjust enrichment against Kevin Cassidy because these are no facts alleged to establish that (a) Kevin Cassidy received a benefit at the expense of PPVA, or (b) "equity and good conscience" require that the consideration paid to Starfish by PGS for its 8% interest be turned over to PPVA. Mem. 18-20. The JOLs' opposition does not refute the arguments raised by the Agera Executives, distinguish the authority cited by the Agera Executives, or remedy the FAC's fatal pleading deficiencies. Instead, the opposition repeats the FAC's conclusory allegations, which, as shown in the moving memorandum, fail to state a claim for unjust enrichment against Kevin Cassidy.

The JOLs cite absolutely no legal authority that supports their contention that the FAC's sparse allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss. Indeed, in the single case cited by the JOLs, the unjust enrichment claim was dismissed because, like here, plaintiff

[3] The JOLs do not even attempt to make such a flawed argument with respect to Kevin Cassidy.

failed to allege that defendant was enriched at the expense of plaintiff. *See* Opp. 23, *citing Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 20 (2d Cir. 1983).

The FAC and the purchase agreement attached thereto indisputably establish that Starfish (and not Kevin Cassidy) sold its membership interest in PGS in exchange for $13,552,000 and, thus, PGS received consideration from Starfish. FAC ¶ 646, Exh. 91. In a seemingly half-hearted attempt to establish that Kevin Cassidy benefitted from the transaction, the JOLs argue that he is Starfish's "alter-ego." Opp. 21, 24. The JOLs' argument does not save the day because the FAC makes no attempt to plead facts to establish alter-ego liability. "[I]n order to properly plead an alter-ego theory under New York law, a plaintiff must establish two elements: (1) complete control and domination by the parent company; and (2) that this domination was used to perpetrate a fraud or wrong upon the plaintiff." *Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 170 F.R.D. 361, 375 (S.D.N.Y. 1997). Where the only mention of the alter ego theory is a conclusory assertion that a company is an "alter ego," this pleading standard is not met. *Id*. (dismissing alter ego claims for failure to state a claim). Likewise, here, the FAC does not allege a single fact to establish an alter-ego relationship between Kevin Cassidy and Starfish. FAC ¶ 645.

Nor do the JOLs remedy their failure to plead that Kevin Cassidy was enriched at PPVA's expense and that equity and good conscience require restitution. *See Dolmetta*, 712 F.2d at 20. The JOLs do not refute the Agera Executives' showings that (a) the FAC does not plead an "actual, substantive relationship" between PPVA and Kevin Cassidy, and (b) the relationship between Kevin Cassidy and PPVA is too attenuated to withstand a Rule 12(b)(6) motion to dismiss. Nor do they distinguish any of the supporting authority. *Compare* Mem. 19 *with* Opp. 21-24.

The JOLs' inability to state a viable claim for unjust enrichment is further exposed by their "flip-flopping" allegations and arguments as to whether Kevin Cassidy or Starfish provided

consideration for the 8% membership interest in PSG. *See* Mem. at 3, 9-10. The moving memorandum clearly identified the JOLs' underhanded deletion of Complaint Exhibit 86 from the FAC because it showed that Kevin Cassidy had *earned* an interest in Agera in consideration for the work he performed to build Agera into a successful company. Mem. 9-10. The FAC deleted that proof of consideration and substituted it with the exact opposite (and false) allegation that "[t]he grant was made for no consideration." FAC ¶ 645. The JOLs' opposition does not attempt to reconcile these contradictory allegations. Instead, the JOLs revert again to the email at Complaint Exhibit 86 by quoting a portion of the language out of context. This time, the JOLs quote the phrase "to take care of Kevin" and argue 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*." Opp. 24 (emphasis added). To be sure, nowhere does the FAC allege that Starfish was granted an ownership interest in consideration of any action by Kevin Cassidy "in effectuating the Agera Transactions" in June 2015. The email stated that, since PGS was selling its "full" interest in Agera, Kevin Cassidy's interest in Agera also should be monetized. Compl. Exh. 86. The JOLs' continuous attempts to re-characterize the consideration given for Starfish's interest in PGS makes transparent the JOLs' inability to plead the elements of a claim for unjust enrichment against Kevin Cassidy.

The Fourteenth Claim against Kevin Cassidy should be dismissed with prejudice.

CONCLUSION

For all of the foregoing reasons, 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.

Dated: New York, New York
February 15, 2019

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