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Attorney for Defendants Beechwood Capital Group, LLC, B Asset Manager LP, B Asset Manager II LP, Beechwood Re Investments, LLC, Beechwood Re Holdings, Inc., Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd., Beechwood Bermuda International Ltd., BAM Administrative Services, LLC, Illumin Capital Management LP, BBLN-PEDCO Corp., BHLN-PEDCO Corp., Mark Feuer, Scott Taylor, and Dhruv Narain

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	18-cv-06658 (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.	18-cv-10936 (JSR)

NOTICE OF MOTION TO DISMISS

PLEASE TAKE NOTICE that Defendants Beechwood Capital Group, LLC, B Asset Manager LP, B Asset Manager II LP, Beechwood Re Investments, LLC, Beechwood Re Holdings, Inc., Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd., Beechwood

Bermuda International Ltd., BAM Administrative Services, LLC, Illumin Capital Management LP, BBLN-PEDCO Corp., BHLN-PEDCO Corp. (collectively, the "Beechwood Entities"), Mark Feuer, Scott Taylor, and Dhruv Narain (collectively, the "Beechwood Individuals"), upon the accompanying Memorandum of Law and the Declaration of Ira S. Lipsius (with exhibits), dated April 22, 2019, will move, by and through their undersigned counsel, before the Honorable Jed S. Rakoff, United States District Judge, at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl St., Courtroom 14B, New York, New York 10007, at such date as the Court will determine, for an Order pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6) dismissing with prejudice the Second Amended Complaint of Plaintiffs Martin Trott and Christopher Smith, as the 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) as follows: all causes of action brought against the Beechwood Individuals and Illumin Capital Management LP; and all causes of action but the alter ego allegations brought against the Beechwood Entities.

PLEASE TAKE FURTHER NOTICE that pursuant to the Court's March 28, 2019 Order: (1) Plaintiffs must file their answering papers (if any) by May 13, 2019; (2) Defendants must file their reply papers by May 23, 2019; and (3) Oral argument on the motions to dismiss shall be heard on June 4, 2019 at 10:00 a.m.

Dated: April 22, 2019
New York, New York

LIPSIUS BENHAIM LAW LLP

By: */s/ Ira S. Lipsius*
Ira S. Lipsius

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Attorney for Defendants Beechwood Capital Group, LLC, B Asset Manager LP, B Asset Manager II LP, Beechwood Re Investments, LLC, Beechwood Re Holdings, Inc., Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd., Beechwood Bermuda International Ltd., BAM Administrative Services, LLC, Illumin Capital Management LP, BBLN-PEDCO Corp., BHLN-PEDCO Corp., Mark Feuer, Scott Taylor, and Dhruv Narain

To: All counsel of record (via ECF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	18-cv-06658 (JSR)
TROTT, et al., Plaintiffs, -v- PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	:	18-cv-10936 (JSR)

DECLARATION OF IRA S. LIPSIUS IN SUPPORT OF THE BEECHWOOD PARTIES' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

I, Ira S. Lipsius, hereby declare and state as follows:

1. I am a partner with the law firm Lipsius Benhaim Law LLP, counsel for the "Beechwood Parties," which are Beechwood Capital Group, LLC, B Asset Manager LP, B Asset Manager II LP, Beechwood Re Investments, LLC, Beechwood Re Holdings, Inc., Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd., Beechwood Bermuda International Ltd., BAM Administrative Services, LLC, Illumin Capital Management LP, BBLN-PEDCO Corp., and BHLN-PEDCO Corp. (collectively, the "Beechwood Entities"), and officers and former officers of those entities, Mark Feuer, Scott Taylor, and Dhruv Narain (collectively, the "Beechwood Individuals").

2. I submit this declaration, together with the attached exhibits, in support of the Beechwood Parties' motion to dismiss the Second Amended Complaint by 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).

3. Attached hereto as Exhibit 1 is a true and correct copy of the Notice of Entry (including its corresponding exhibits) of the decision of Justice Charles Edward Ramos of the Supreme Court of the State of New York, County of New York on the defendants' motion to dismiss in the matter *DMRJ Group LLC v. B Asset Manager and BAM Administrative Services, LLC*, No. 655181/2017 (Sup. Ct. N.Y. Cty. decided Dec. 11, 2018).

4. Attached hereto as Exhibit 2 is a true and correct copy of an excerpt from the transcript from the hearing held before this Court on March 7, 2019 in the matter *Trott et al. v. Platinum Management (NY) LLC et al.*, No. 18-cv-10936 (S.D.N.Y.).

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2019, in Kew Gardens, New York.

/s/ Ira S. Lipsius______________
IRA S. LIPSIUS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DMRJ GROUP LLC,

Plaintiff,

v.

B ASSET MANAGER, LP, and BAM ADMINISTRATIVE SERVICES, LLC,

Defendants.

Index No. 655181/2017

Justice Charles Edward Ramos
IAS Part 53

Motion Sequence No. 001

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of an Order of the Honorable Charles Edward Ramos, J.S.C., dated December 11, 2018, and duly entered in the Office of the Clerk for New York County on December 12, 2018, in which the Court granted that portion of Defendants' motion to dismiss the Second and Third Causes of Action in Plaintiff's Complaint, and denied that portion of Defendants' motion to dismiss the First Cause of Action in Plaintiff's Complaint, together with a copy of the transcript of proceedings of July 17, 2018 containing the Court's Decision.

Dated: New York, New York
December 13, 2018

PROSKAUER ROSE LLP

By

Mark D. Harris
Steven H. Holinstat
11 Times Square
New York, New York 10036
(212) 969-3000
Attorneys for Defendants

TO: Warren E. Gluck, Esq.
Mitchell J. Geller, Esq.
HOLLAND & KNIGHT LLP
31 West 52nd Street
New York, NY 10019
Attorneys for Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DMRJ GROUP LLC,

Plaintiff,

v.

B ASSET MANAGER, LP, and BAM ADMINISTRATIVE SERVICES, LLC,

Defendants.

Index No. 655181/2017

Justice Charles Edward Ramos
IAS Part 53

STIPULATION ON DEFENDANTS' MOTION TO DISMISS

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for Plaintiff and Defendants, as follows:

1. This stipulation is submitted by the parties in accordance with the Court's August 22, 2018 Decision (NYSCEF Doc. No. 35).

2. Annexed hereto as **Exhibit A** is a true and correct copy of the July 17, 2018 transcript of the oral argument on Defendants' Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment, Motion Sequence No. 1 (the "Motion") in which the Court granted that portion of the Motion seeking the dismissal of the Second and Third Causes of Action in Plaintiff's Complaint, and denied that portion of the Motion seeking the dismissal of the First Cause of Action in Plaintiff's Complaint.

3. Annexed hereto as **Exhibit B** is a true and correct copy of an errata sheet containing proposed corrections to the transcript that have been agreed to by the parties.

4. The Parties respectfully request that the Court "So Order" the transcript, as corrected by the attached errata sheet.

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Dated: New York, New York
September 12 2018

HOLLAND & KNIGHT LLP LLP
Attorneys for Plaintiff

By: ______________________
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Exhibit A

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2 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM : PART 53
3 --X
DMRJ GROUP LLC
4
Plaintiff
5
- against -
6
B ASSET MANAGER LP AND BAM ADMINISTRATIVE SERVICES LLC
7
Defendants
8 --X
Index No. 655181/2017 60 Centre Street
9 New York, New York
July 17, 2018
10
B E F O R E :
11
HONORABLE CHARLES E. RAMOS,
12 Justice

13 A P P E A R A N C E S:

14
Attorney for the Plaintiff
15 HOLLAND & KNIGHT LLP
31 West 52nd Street
16 New York, NY 10019
By: WARREN E. GLUCK, ESQ.
17 MITCHELL J. GELLER, ESQ.

18 Attorney for the Defendant
PROSKAUER ROSE LLP
19 ELEVEN TIMES SQUARE
New York, NY 10036-8299
20 By: STEVEN H. HOLINSTAT, ESQ.
LINDSEY OLSON COLLINS, ESQ.

21

22

23 DEBRA SMITH,
OFFICIAL COURT REPORTER

24

25

26

DS

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1 Proceedings
2 THE COURT: Good morning, everyone. This is
3 a motion to dismiss. Defendant, please use the
4 lecturn.
5 MR. HOLINSTAT: Good morning, Your Honor. My
6 name is Steve Holinstat from Proskauer Rose.
7 THE COURT: I am sorry, gentlemen?
8 MR. HOLINSTAT: Your Honor, my name is Steve
9 Holinstat for the defendant B Asset Manager LP and BAM
10 Administrative Services LLC collective with BAM.
11 We bring this motion to dismiss, Your Honor,
12 to dismiss the complaint of plaintiff DMJR Group LLC,
13 or DMJR, which complaint seeks to disavow DMJR's
14 contractual obligations under a January 2016
15 cross-collateralization pledge to use a portion of the
16 55 million that DMRJ received from sale of Implant to
17 satisfy monies that are due and owing to BAM by a DMRJ
18 affiliate Golden Gate.
19 Your Honor, DMRJ claims that the January
20 pledge is void for three reasons under three causes of
21 action. First, they claim that Mr. Nordlicht who
22 signed the pledge on DMRJ's behalf lacked authority to
23 bind DMRJ. Second, they claim the pledge was
24 superseded by March 2016 guarantee. Third, they claim
25 that the January cross-collateralization pledge is void
26 for lack of consideration.

DS

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1 Proceedings
2 Your Honor, the undisputed facts taken from
3 the complaint, the documents referenced in the
4 complaint, and the various public filings demonstrate
5 that each of these grounds are meritless as a matter of
6 law.
7 The facts of this case are relatively simple
8 and undisputed. DMRJ is a wholly owned subsidiary of
9 Platinum Partners Value Arbitrage Fund, or PPVA, whose
10 sole purpose according to public filings is to sell and
11 own assets for the benefit of PPVA. PPVA, in turn, is
12 an investment fund that invests through various
13 subsidiaries like DMRJ and various companies.
14 This case involves two PPVA investments
15 relevant to the cross-collateralization pledge. The
16 first is an investment in Golden Gate. PPVA formed
17 Golden Gate as a PPVA affiliate and then had another
18 PPVA subsidiary, Precious Capital, lend Golden Gate
19 25 million dollars under senior secured promissory
20 notes.
21 THE COURT: So that's their money?
22 MR. HOLINSTAT: That's their money. In
23 February 2014, the defendants BAM came in and took out
24 PPVA's position. They bought the 25 million-dollar
25 note from Precious and they became then the note holder
26 under Golden Gate.

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1 Proceedings
2 THE COURT: Just for the 25 million?
3 MR. HOLINSTAT: Just the 25 million. The
4 second PPVA investment is in Implant itself. Here,
5 PPVA through its wholly owned subsidiary DMRJ lent
6 Implant about 30 million dollars in senior secured
7 notes and provided another line of credit in,
8 approximately, amount of 23 million.
9 Similar to the Golden Gate scenario in March
10 of 2014, BAM lent 20 million dollars to Implant that
11 was used to partially pay down Implant's obligation to
12 DMRJ.
13 THE COURT: But that obligation was in-house,
14 wasn't it?
15 MR. HOLINSTAT: So, DMRJ lent Implant, which
16 is not a PPVA affiliate, 50 million dollars.
17 THE COURT: I thought they were affiliated.
18 MR. HOLINSTAT: BAM came in, lent 20 million,
19 which was used to reduce DMRJ's debt. In connection
20 with that transaction, BAM and DMRJ entered into an
21 intercreditor agreement.
22 THE COURT: To give you priority?
23 MR. HOLINSTAT: Which gave us priority.
24 By December 2015, three critical events had
25 occurred. First, Implant had engaged in investment
26 banker to explore sale of Implant to a third party. At

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1 Proceedings

2 the same time, by the end of 2015, Implant was
3 delinquent according to its public filings on the
4 interest that was due and payable to BAM, on the BAM
5 note, the BAM debt.
6 As of December 31, 2015 --
7 THE COURT: Was Implant the primary obligor
8 there?
9 MR. HOLINSTAT: Yes. So, Implant owed about
10 1.7 million in interest according to its public filings
11 on the interest allocation and under the BAM notes, BAM
12 was entitled to declare default and accelerate the
13 entire 20 million in unpaid principal.
14 THE COURT: Which would have wiped out the
15 plaintiff's interest?
16 MR. HOLINSTAT: Well, not necessarily. We
17 think the value of Implant was greater than the
18 20 million or the 22 million owed to BAM. However, in
19 their opposition papers, DMRJ acknowledges that had BAM
20 declared a default in December of 2015, it likely would
21 have interfered with Implant's pending sale efforts.
22 It could have, and as they claim, it could have reduced
23 the sale significantly and it could have wiped out the
24 sale entirely.
25 So, Your Honor, so, for instance, if the
26 default -- if Implant were going to get a bid of

DS

1 Proceedings
2 80 million dollars, the first 22 million would go to
3 BAM, the next 56 million would go to DMRJ.
4 However, if that sale got reduced from
5 80 million to, let's say, 30 million, we still get our
6 entire 22 million, their 56 million recovery gets
7 reduced to a little under nine million. So, to avoid a
8 BAM default against Implant, Mark Nordlicht executed
9 the January cross-collateralization pledge in
10 January 2016.
11 THE COURT: But the commitment on the part of
12 BAM to accommodate the plaintiff is not memorialized in
13 that letter.
14 MR. HOLINSTAT: That's true, Your Honor, it's
15 not.
16 THE COURT: It makes it difficult for me to
17 grant your motion just on the papers. This is a 3211
18 motion, correct?
19 MR. HOLINSTAT: It is, Your Honor.
20 Well, Your Honor, there are three causes of
21 action here. The consideration is the third cause of
22 action. There are two others. We do think that it's
23 undisputed that there is consideration. In fact, the
24 only suggestion is the naked assertion that there is
25 not, and I can get into that. There is clearly --
26 THE COURT: My problem, and it's just a

DS

1 Proceedings

2 technical one, is that you're kind of -- you're getting

3 motion creep. You are going from 3211 to 3212. You

4 are really starting to make a motion now for summary

5 judgment because you're assuming something that's not

6 in the record and that is there is no allegation in the

7 complaint that there was a quid pro quo.

8 MR. HOLINSTAT: Your Honor, the publicly

9 filed documents and the documents in the complaint and

10 those referenced in them lead to no other conclusion,

11 but, Your Honor, we certainly believe that there is

12 consideration, there is no dispute that there isn't,

13 but there are two other causes of action which clearly

14 are satisfied on a 3211 --

15 THE COURT: The authority note?

16 MR. HOLINSTAT: The first is Mr. Nordlicht's

17 authorization to sign.

18 THE COURT: His authorization comes from the

19 manager, right?

20 MR. HOLINSTAT: Yes.

21 THE COURT: The manager and then they cite to

22 5.5 which says the manager has limited powers.

23 MR. HOLINSTAT: Let me take you through that.

24 THE COURT: Counselor, don't be bouncing up

25 and down, okay? You had too much coffee this morning.

26 MR. HOLINSTAT: So, Your Honor, their first

DS

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1 Proceedings

2 argument is Mr. Nordlicht did not report to bind DMRJ.

3 THE COURT: They tried to anyway.

4 MR. HOLINSTAT: The agreement itself plainly

5 says that Mr. Nordlicht says I do it on behalf of PPVA

6 and all of its affiliates. The complaint alleges that

7 DMRJ is a wholly owned subsidiary of PPVA and,

8 therefore, by definition, is an affiliate, so that

9 argument should go out the window.

10 They next say that Mr. Nordlicht didn't have

11 authority. There is a December 31, 2014 authorization

12 form in which he is the first individual listed as

13 DMRJ's chief investment officer with authority to bind

14 DMRJ, so clearly --

15 THE COURT: But the authority is signed off

16 by the manager whose name I don't recall and there were

17 two resolutions in that brand of authority. One is

18 specific to a number of individuals to execute

19 documents in furtherance of the manager's efforts or

20 purposes.

21 Then there is a second resolution that is a

22 little bit more general which I think is the one you

23 are relying on but isn't the signer's authority limited

24 by the manager's authority which is limited by 5.5?

25 MR. HOLINSTAT: But, Your Honor, the manager

26 is PPVA. Mr. Nordlicht is the chief investment officer

11 of 29

1 Proceedings

2 of PPVA.

3 THE COURT: Which exhibit is that?

4 MR. HOLINSTAT: The January pledge or the --

5 THE COURT: No, the authorization.

6 MR. HOLINSTAT: The written authorization,

7 Your Honor, is Thomas Exhibit 2.

8 THE COURT: Now, start at the beginning.

9 "I, Uri Landesman, consents and ratifies the

10 following resolutions." So, we have to look now at 5.5

11 of the operating agreement.

12 MR. HOLINSTAT: That's Exhibit 2 of the

13 Kennedy affidavit.

14 THE COURT: 5.5 says that notwithstanding the

15 foregoing, the managers may not make any of the

16 following decisions without two thirds of the members

17 voting. H is a biggie: To obligate the company in any

18 manner for liability in excess of $10,000. We're

19 talking here about millions of dollars.

20 MR. HOLINSTAT: That's true, Your Honor, but

21 if you look at Page 16 --

22 THE COURT: Page 16 of the?

23 MR. HOLINSTAT: Of that document. It's

24 signed by--

25 THE COURT: Platinum Partners.

26 MR. HOLINSTAT: Mr. Nordlicht as chairman of

DS

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1 Proceedings

2 Platinum Management LLC, which is alleged in the DMRJ's

3 complaint --

4 THE COURT: What you are saying would be kind

5 of hard to claim that he didn't have authority. I

6 understand your point and it's a very good one but you

7 are asking for 3211 determination now.

8 MR. HOLINSTAT: I am, Your Honor, but there

9 has to be some legitimate basis. First they come and

10 they say there is no authorization. We provide the

11 written authorization. They say, well, you need the

12 manager's consent. Well, the manager is PPVA. Clearly,

13 PPVA consented. PPVA is Mr. Nordlicht and

14 Mr. Nordlicht is the cofounder of Platinum Partners,

15 which is the umbrella organization for all the Platinum

16 entities.

17 THE COURT: We don't know that because

18 Platinum is in liquidation, isn't it?

19 MR. HOLINSTAT: It is but at this time it was

20 not. As alleged in their own pleadings, Mr. Nordlicht

21 is the chief investment officer of PPVA. He's the chief

22 investment officer of Platinum Management LLC, which

23 they allege in their complaint, the general partner, an

24 investment manager of PPVA, and he is the chief

25 investment officer of DMRJ.

26 Clearly, when Mr. Nordlicht -- I mean, they

DS

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1 Proceedings
2 don't dispute that he had the authority on behalf of
3 PPVA to execute the January cross-collateralization
4 pledge. He was giving his consent to bind DMRJ, which
5 he certainly had the right under DMRJ's operating
6 agreement and under the authorized signatory form.
7 THE COURT: I'm not disagreeing with the
8 logic, I think you have a viable defense here, and it
9 may be sustainable on summary judgment but I don't see
10 how I can grant it on 3211.
11 MR. HOLINSTAT: Your Honor, what's the
12 disputed issue of fact here? If the only person that
13 could give the consent was PPVA, and it's undisputed
14 that PPVA gave that consent when it executed the
15 pledge--
16 THE COURT: But you have to take the document
17 on its face, which states -- what exhibit was that, the
18 letter we're relying on, the side letter? What exhibit
19 is that?
20 MR. HOLINSTAT: The side letter itself?
21 THE COURT: Yes.
22 MR. HOLINSTAT: So, it is exhibit --
23 THE COURT: Exhibit 1 to the Kennedy
24 affidavit?
25 MR. HOLINSTAT: Yes, Exhibit 1 to the Kennedy
26 affidavit.

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1 Proceedings

2 THE COURT: He agrees on behalf of Platinum

3 Partners Value Arbitrage Fund to credit opportunity

4 master fund in and each affiliate. Plaintiff, this is

5 the chairman of the board, right, of Platinum partners?

6 MR. HOLINSTAT: Yes.

7 THE COURT: Plaintiff, how can you allege

8 that he doesn't have authority? Is there something

9 that we haven't seen yet that would limit his authority

10 as -- not the operating agreement because the operating

11 agreement, if I'm not mistaken -- let me make sure I am

12 looking at the right one.

13 MR. HOLINSTAT: Your Honor, do you want

14 plaintiff to come up and switch?

15 THE COURT: The operating agreement that you

16 are making reference to, or I am, is the DMRJ Group

17 LLC. He's doing this as the chairman of the board.

18 MR. HOLINSTAT: Yes, Your Honor. He's

19 Platinum.

20 THE COURT: What limits the chairman's

21 authority?

22 MR. GLUCK: May I? Warren Gluck representing

23 the plaintiff DMRJ Group LLC.

24 In answer to the Court's question right away

25 setting aside the consideration point --

26 THE COURT: The air conditioning is turned up

DS

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1 Proceedings

2 so high, the fan, I can barely hear you. You have to

3 speak very loudly.

4 MR. GLUCK: Setting aside the consideration

5 superseding, the Court has asked a specific question

6 regarding the limitation on the authority of Mark

7 Nordlicht to his chief investment officer, or was chief

8 investment officer, not chairman of any board of PPVA.

9 THE COURT: Not only that, apparently he's

10 also chairman of the board of a parent company.

11 MR. GLUCK: PPVA is the master company. PPVA

12 is the Cayman Islands Limited Partnership that, in

13 turn, was managed by a New York entity called Platinum

14 Management.

15 Now, the limitation on Mr. Nordlicht derives

16 not from his status as an officer of PPVA, but from his

17 status with respect to DMRJ.because the--

18 THE COURT: Why do you say that? He's

19 signing on behalf of everybody.

20 MR. GLUCK: Yes, and this is --

21 THE COURT: And his authority, the authority

22 he was granted in the limited liability company

23 operating agreement does not remove authority he

24 otherwise would have as chairman of the board.

25 MR. GLUCK: Absolutely right. What we are

26 suggesting and arguing, and this is our position, is

DS

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2 that in order for DMRJ to enter this contract, there
3 needed to be, according to the DMRJ article of
4 incorporation, which they have, there needed to be a
5 PPVA resolution. The dispute here --
6 THE COURT: Now, what requires the resolution
7 of Platinum Partners?
8 MR. GLUCK: It's in the operating agreement.
9 I believe it's clause 7.2.
10 THE COURT: We're going back now to the
11 operating agreement of the plaintiff.
12 MR. GLUCK: In the operating agreement for
13 DMRJ -- 5.5, excuse me.
14 THE COURT: Yes.
15 MR. GLUCK: 5.5, DMRJ operating agreement,
16 notwithstanding anything of the foregoing --
17 THE COURT: That deals with the operating
18 managers. He didn't sign as operating manager.
19 MR. GLUCK: Correct. My point here is that
20 the same document -- they're presenting an argument to
21 this Court that the very document pursuant to which
22 Mr. Nordlicht was purporting to bind DMRJ is also the
23 very consent that's required, and what our point is,
24 no, a separate consent is required, there is a
25 circularity here.
26 It cannot be that when Mr. Nordlicht signs a

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1 Proceedings

2 document, that it is also a resolution. That is their

3 argument. Correct me if I am wrong, but they are

4 saying that this side letter is the very resolution

5 required by Article 5.5 and that's where we disagree.

6 THE COURT: There is no resolution required

7 by 5.5.

8 MR. HOLINSTAT: Again, Your Honor, there is

9 no written consent required and if there is, the reason

10 that the cross-collateralization pledge provides the

11 consent for both PPVA and DMRJ is because the agreement

12 expressly says that. You don't need a second agreement

13 and there is nothing in the operating agreement that

14 requires two separate consents.

15 Mr. Nordlicht had the authority on behalf of

16 PPVA to consent to the pledge. He did so in the pledge

17 on behalf of PPVA. He also did so in the same document

18 on behalf of DMRJ by consenting on behalf of all of the

19 affiliates.

20 THE COURT: Your motion is granted to the

21 extent of dismissing the authorization defense.

22 MR. HOLINSTAT: Thank you, Your Honor.

23 THE COURT: You still haven't satisfied on

24 the consideration.

25 MR. HOLINSTAT: If I can, Your Honor, may I

26 address the superseding? So, the second argument, Your

DS

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1 Proceedings

2 Honor, that they have raised, the second cause of

3 action is that the March guarantee superseded the

4 January cross-collateralization pledge.

5 The law in New York, Courts consider three

6 factors to determine whether or not one contract

7 supersedes the second. The first, and most important,

8 is there an integration or merger clause? Here, the

9 defendant or the plaintiff concedes there is no such

10 merger or integration clause in the --

11 THE COURT: Which exhibit is the March?

12 MR. HOLINSTAT: The March guarantee is

13 Exhibit 9 of the complaint.

14 THE COURT: 9?

15 MR. HOLINSTAT: Exhibit 9.

16 THE COURT: To the Thomas affidavit?

17 MR. HOLINSTAT: In the Thomas affidavit, it's

18 Exhibit one, tab 9.

19 THE COURT: It's annexed to the complaint?

20 MR. HOLINSTAT: Yes, it's Exhibit 9 of the

21 complaint.

22 THE COURT: You didn't tab them.

23 MR. HOLINSTAT: I have a copy here, Your

24 Honor.

25 THE COURT: That document is not in Kennedy's

26 affidavit, declaration?

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1 Proceedings
2 MR. HOLINSTAT: I will check, Your Honor. It
3 is. It is Exhibit 6 to Mr. Kennedy's affidavit.
4 THE COURT: This is March 21st?
5 MR. HOLINSTAT: Correct.
6 Plaintiffs concede, Your Honor, there is no
7 integration or merger clause anywhere in the March
8 guarantee, at which point Your Honor stands in stark
9 contrast to the intercreditor agreement between DMRJ
10 and BAM which, in fact, does contain such a clause,
11 section 8.20, which is Thomas Exhibit 5.
12 Also, Your Honor, nothing in the March
13 guarantee purports to supersede, terminate, or
14 otherwise modify any of DMRJ's obligations under the
15 January pledge. So they failed to satisfy the first
16 factor. The second factor, do the two agreements
17 address the same rights?
18 THE COURT: Well, what about paragraph 2?
19 MR. HOLINSTAT: Paragraph 2 of the master
20 guarantee, Your Honor?
21 THE COURT: Of the master guarantee
22 agreement. Would that also relate to the January 13th
23 side letter?
24 MR. HOLINSTAT: I don't believe so, Your
25 Honor, but there is -- what is in particular is
26 Paragraph 23.

DS

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1 Proceedings

2 THE COURT: Page?

3 MR. HOLINSTAT: It is Page 10 of Exhibit 6,

4 which is the March guarantee. Remedy is not exclusive.

5 The remedies conferred upon the creditor parties in

6 this guarantee are intended to be in addition to and

7 not in limitation of any other remedy or remedies

8 available to the creditor parties which include BAM.

9 Those remedies, Your Honor, are the very

10 remedies under the January cross-collateralization

11 pledge. And why? Because the January pledge allowed

12 BAM to go directly against DMRJ to obtain the proceeds

13 of the Implant sale, the 55 million they received, to

14 satisfy Golden Gate's debt to BAM. PPVA did this. It

15 has, you know, money in one hand, money in the other.

16 In the March guarantee, there is nothing in

17 there that addresses DMRJ's obligation, it only

18 addresses PPVA's obligation and limits PPVA's

19 obligation capped at 20 million dollars, okay? So,

20 these agreements can exist in tandem.

21 BAM could have gone after PPVA for 20 and the

22 balance against DMRJ, it could have gone after DMRJ for

23 all of it, it could have done any combination of that.

24 That's what paragraph 23 allows and, in fact,

25 contemplates.

26 THE COURT: Are these various agreements the

DS

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1 Proceedings
2 subject of emails back and forth prior to the execution
3 of the March 21st master guarantee agreement?
4 MR. HOLINSTAT: Your Honor, discovery hasn't
5 been taken. However, Mr. Kennedy submitted an
6 affidavit saying he's spoken to Mr. Nordlicht, he has
7 spoken to the other Platinum people, he has access to
8 any and all documents that he wants as PPVA's
9 liquidator in charge of DMRJ, in charge of PPVA. If
10 they had a document, they submitted a bunch of things
11 that were not in the record in Mr. Kennedy's affidavit,
12 they should have come forward with that.
13 The document on itself, even if there were
14 emails, it doesn't matter, you have got a clear
15 document.
16 THE COURT: Usually something like this would
17 be somewhat confirmed in a writing or an email.
18 MR. HOLINSTAT: Your Honor, it might have but
19 it might not have but the reality is they've got a
20 document which on its face and as a matter of law does
21 not purport in any way, shape or form to supersede the
22 January guarantee.
23 THE COURT: Let me hear from plaintiff.
24 MR. GLUCK: Thank you, Your Honor.
25 What I would like to do because there's been
26 quite a bit of colloquy so far is address the guarantee

DS

22 of 29

1 Proceedings

2 point, make one point on the authority argument which I

3 realize this Court has ruled on but I did want to refer

4 the Court to note 4, footnote 4, Page 14 of our brief:

5 Moreover, no amendment to the DMRJ operating

6 agreement was permitted without the written consent of

7 the profit interest members of DMRJ if such amendment

8 would have an adverse effect on the profit interest

9 members rights to distributions and allocations.

10 Now, clearly, a 30 million-dollar guarantee

11 would have that right. I make that point for the record

12 because in our view, Your Honor, point one is that the

13 very same document cannot be circular, it cannot be

14 that written authorization required and, secondly,

15 there was a second limitation within that DMRJ

16 operating agreement.

17 On the issue --

18 THE COURT: Now talk to me about the master

19 guarantee agreement and why in your view that nullifies

20 the January 13th side letter.

21 MR. GLUCK: Sure. We agree on the test. I

22 would like to make a note to the Court as well on

23 guarantee but in relation to the superseding argument,

24 there is a three-factor test and there is no dispute

25 here as to the first fact. There is no merger clause.

26 As to the second and third factors, we have a very

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2 significant dispute.

3 The Court asked whether there were emails and

4 why those emails are not presently in the record. The

5 managers of DMRJ are PPVA in liquidation. At the time

6 these papers were filed, we did not have access to --

7 the clients did not have access to Platinum's own

8 servers let alone have any discovery from Beachwood

9 (phon) in connection with this matter.

10 The few emails, the reason that we have had

11 emails in this dispute before that when we didn't have

12 access is because there was a dispute in the Implant

13 science's case where an Implant science's search term

14 was run and so we got a lot of emails but not most and

15 not emails surrounding the master guarantee.

16 THE COURT: The reason I was asking about the

17 emails is that usually something like this would be

18 confirmed in communications but the defendant makes a

19 very good point, and that is that the emails, unless

20 they constitute a novation do not nullify the existing

21 agreements and they don't modify the existing

22 agreements.

23 The March 21st guarantee that you are relying

24 on does not reference the side letter and certainly

25 leaves open its enforcement pursuant to Paragraph 23.

26 It makes it very clear that the remedies are not

DS

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1 Proceedings

2 exclusive.

3 MR. GLUCK: That was a boiler plate

4 provision.

5 THE COURT: Excuse me, it's part of the

6 contract.

7 MR. GLUCK: That's true but we have a Kennedy

8 affidavit. We have the affidavit that for these

9 purposes must be taken as true, that the very same

10 officer who has been credited in this Court with having

11 the ability to bind PPVA explain to him that the intent

12 of that master guarantee, which is a much more formal

13 document, on the same subject matter, which is part of

14 the test, concerning the same rights was intended to

15 supersede and to turn back to the standard here.

16 THE COURT: We're not going to modify the

17 terms of the March 21st agreement. You basically want

18 to nullify Paragraph 23. Not going to happen. Your

19 motion is granted with regard to that but you still

20 have a defense here. You still have a claim, rather.

21 MR. HOLINSTAT: If I may, Your Honor, I am

22 happy to address the consideration point?

23 THE COURT: I think we have talked about it

24 enough.

25 MR. GLUCK: Your Honor, may I refer the Court

26 to First Department?

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1 Proceedings

2 THE COURT: It's granted in part. Thank you

3 very much, folks. Get your answer in. Thank you.

4 * * * *

5 It is hereby certified that the foregoing is a true and accurate transcript of the stenographic

6 record.

7

8

9 DEBRA SMITH,
Official Court Reporter

10

11 SO ORDERED
JSC 12/11/18

12

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15 CHARLES E. RAMOS

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DS

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Exhibit B

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ERRATA SHEET

Caption: *DMRJ Group LLC v. B Asset Manager, LP, et al.*, Index No. 655181/2017

Argument Date: July 17, 2018

PAGE	LINE	CORRECTION	REASON
2	10	Change "collective with" to "collectively"	Transcription Error
2	16	Add "the" before "sale"	Transcription Error
2	24	Add "a" before "March 2016 guarantee"	Transcription Error
4	8	Add "the" before "amount"	Transcription Error
4	25	Change "in investment" to "an investment"	Transcription Error
4	26	Add "the" before sale	Transcription Error
5	11	Add a comma after "allocation"	Transcription Error
5	12	Add "a" before "default"	Transcription Error
5	25	Delete ", so," after "Your Honor"	Transcription Error
7	6	Delete the phrase "that is"	Transcription Error
7	15	Change "note" to "point"	Clarification
8	2	Change "report" to "purport"	Transcription Error
12	3	Change "to" to "and"	Transcription Error
12	4	Delete the word "in"	Transcription Error
13	5	Add "and" before "superseding"	Transcription Error
13	5	Add "arguments" after "superseding"	Transcription Error
13	7	Change "to his" to "who is"	Transcription Error
13	17	Change the period between "DMRJ" and "because" to a space	Transcription Error

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PAGE	LINE	CORRECTION	REASON
14	3	Change "article" to "articles"	Transcription Error
14	24	Delete "no,"	Transcription Error
15	23	Add the word "me" after "satisfied"	Clarification
17	8	Delete the word "at"	Transcription Error

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 ------------------------------x
MARTIN TROTT, as Joint
3 Official Liquidators and
Foreign Representatives of
4 Platinum Partners Value
Arbitrage Fund L.P. (In
5 Official Liquidation), ET AL.,

6 Plaintiffs,

7 v. 18 Civ. 10936 (JSR)

8 PLATINUM MANAGEMENT (NY) LLC,
ET AL.,
9
Defendants.
10
------------------------------x
11 New York, N.Y.
March 7, 2019
12 10:30 a.m.

13 Before:

14 HON. JED S. RAKOFF,

15 District Judge

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1 happened. So the fact that they have poured good money after
2 bad and afterwards it turned out that without their knowledge
3 some allegedly engaged in at fraud and gave them the money
4 back, they were net losers here, your Honor. They haven't made
5 money on this. They made minimal money. They have not been
6 enriched, let alone unjustly enriched. They barely got back
7 their investment. I don't consider that to be -- they have
8 nothing alleged in the complaint that they had nothing to do
9 with the underlying fraud.
10 THE COURT: All right. Thank you so much. Let's move
11 on to the next group.
12 MR. BROWNLEE: So, your Honor, I believe the next
13 group, my notes are a little sketchers, what we believe as the
14 Beechwood entities. And I believe what we have here are five
15 of them have moved to dismiss. It's B Asset Manager, BAM II,
16 BBLN, BBLN-Pedco, BHLN-Pedco, Beechwood Capital Group LLC, and
17 the Beechwood Trusts 7 through 14.
18 So let me start with, these are entities that we have
19 alleged that the Beechwood defendants used to further their
20 fraud. I think the Court is aware of our position with regard
21 to Beechwood in general, that it was inherently a corrupt
22 entity, it was formed and used to facilitate the frauds going
23 on at Platinum and later on its own and so, therefore, if these
24 entities that were created to help facilitate the fraud, we
25 believe, we certainly satisfy.

1 THE COURT: Let me see, because I do think we have to
2 look at them perhaps, individually.
3 MR. BROWNLEE: Yes.
4 THE COURT: As near as I can make out, as was alluded
5 to yesterday, the only specific allegation in the complaint
6 about BBLN-PEDCO Corp. and BHLN-PEDCO Corp. is in paragraph 202
7 to the effect that they are special-purpose vehicles that at
8 all relevant times were managed by BAM administrative and
9 administered in New York, New York. So I wonder if that's
10 enough for any claim.
11 MR. BROWNLEE: Our view is that these entities were
12 used as part of the PEDCO transaction, and that because of
13 that, because their inherent relationship to Beechwood, that
14 that satisfies it. We will concede to the Court that we've had
15 stronger arguments today than we do on this one, but that's the
16 nature of it this and that's one of the reasons as liquidators
17 we do rely in part on some of the relaxed pleadings standards,
18 we just haven't had access to those records of those entities
19 as of yet. We know that they're certainly around that. We
20 know that they are being used for transactions that we have
21 alleged were fraudulent. So I think that's where we are on
22 those two entities.
23 THE COURT: There was an argument made yesterday with
24 respect to B Asset Manager II, BAM II, that it was only
25 referenced individually once in the complaint, but my

1 understanding, correct me if I'm wrong, is that the complaint
2 puts it together with BAM I.
3 MR. BROWNLEE: That's correct.
4 THE COURT: And it does collectively make other
5 allegations with respect to it.
6 MR. BROWNLEE: That's correct. And I think that the
7 clear shot on what we call BAM I, BAM II, is the Nordlicht side
8 letter, 74.
9 So this is the Exhibit 74, your Honor.
10 THE COURT: Go ahead.
11 MR. BROWNLEE: This is what we referred to as the
12 Nordlicht side letter. We are January of 16, things are really
13 starting to crumble at this point. They've got this debt out
14 there for Golden Gate. And so Mr. Nordlicht signs this letter,
15 Mark Feuer signs it as well.
16 And basically what he says is all the sale of the
17 Implant Sciences, which was an entity that was held by PPVA at
18 that time, had some value, if that were to be sold, all of that
19 is to go to BAM and to BAMLP. And so here we are, this is in
20 our view a clear dissipation of assets of PPVA, in favor of
21 Golden Gate and he's directing that the funds be held by this
22 very entity BAM.
23 Now, BAM I, BAM II, it's a little unclear, but we
24 think that we've pled appropriately that we have kind of
25 combine them in one pleading as well because of the confusion

1 but that Mr. Nordlicht and Mr. Feuer were directing that those
2 resources go to that entity, and we think that's sufficient.
3 THE COURT: With respect to Beechwood Capital, your
4 adversary says that the complaint largely just says things like
5 it's a New York limited liability company and so forth, it
6 doesn't make the necessary allegations to tie them into
7 liability for any of the claims.
8 What about that?
9 MR. BROWNLEE: What we have there is that this is an
10 entity that has the same address as Mark Feuer. Mark Feuer is
11 the a signatory to the Nordlicht side letter. He was
12 essentially the front man that we've alleged that Mr. Nordlicht
13 installed Mr. Levy into Beechwood. There is some kind of an
14 NDA where levy is participating for Beechwood Capital. So,
15 again, we just think that there is sufficient evidence around
16 this and the allegation with regard to who controls it, if he's
17 at the same address, that's who would be control it and we know
18 Mr. Feuer participated in the Nordlicht side letter. So,
19 again, these are groups, these are entities that are created by
20 Beechwood.
21 We also have pled an alter ego theory. And we think
22 that these are satisfied the alter ego. I've read the Court's
23 *Uzan* opinion from 2010 that laid out those requirements and we
24 believe, with particularly the control of these entities, we've
25 been able to pled under the alter ego theory, Beechwood Capital

1 would survive.

2 THE COURT: I was going to say, the last one I wanted

3 to ask about was Beechwood Trust Nos. 4 through 14.

4 MR. BROWNLEE: This is owned and controlled by

5 Nordlicht, Bodner, Mr. Huberfeld, Mr. Levy through their

6 families. And it's our pleadings that the children of them

7 were beneficiaries of this. There's some allegations of

8 concealment, and again, we think, certainly under an alter ego

9 when the Beechwood entities are -- and Beechwood defendants and

10 Platinum defendants are creating these entities. We think that

11 we've pled sufficiently to keep them in the case at this point,

12 if not directly under the alter ego.

13 THE COURT: Let me hear from counsel for the Beechwood

14 entities.

15 MR. LAUER: Your Honor, I think there's a fundamental

16 distinction between counsel's characterizations, which is

17 largely what we've heard today and in the complaint and facts.

18 Everything in here in this case is a 9(b) count. There are no

19 facts that in any way, identify anything culpable by any of

20 these Beechwood entities 7 through 14, regardless of who may

21 have owned them. There is absolutely no fact at all saying

22 this entity was involved in this particular culpable

23 transaction, this entity was used to secret assets, nothing.

24 This is counsel coming in, credible counsel coming in and

25 basically extrapolating and saying, we've identified X or Y and

1 therefore, but these are 9(b) counts.

2 Your Honor, if I may, just one, I would not be doing

3 justice to my other client if I didn't say this, Exhibit 31 is

4 not a substitute for 9(b) particularized facts. This case that

5 they brought, whether it's Beechwood 7 through 14 or Bodner or

6 anyone else, the case basically is false valuations that they

7 say should have precipitated action or liquidation in 2013.

8 In order to hold anyone here, whether it's Beechwood 7

9 through 14 or David Bodner or anyone else, the Federal Rules of

10 Civil Procedure in these 9(b) counts require them to connect

11 Bodner and the others with false valuations. They haven't done

12 that and therefore this complaint is deficient and should be

13 dismissed.

14 THE COURT: Was there anyone who wanted to be heard on

15 the other Beechwood entities?

16 AUDIENCE MEMBER: (Inaudible) Mr. Lipsius who

17 represented those Beechwood entities is in Chicago today.

18 THE COURT: Yes, that's right. With permission. I

19 will pay that special attention to your brief or his brief.

20 Anyone else want to be heard on the Beechwood aspects?

21 Let's go back to plaintiffs' counsel.

22 MR. BROWNLEE: I believe next, your Honor, is Murray

23 Huberfeld, am I correct?

24 THE COURT: Yes.

25 MR. BROWNLEE: So Mr. Huberfeld was a founder and

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	18-cv-06658 (JSR)
TROTT, et al., Plaintiffs, -v- PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	18-cv-10936 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF THE BEECHWOOD PARTIES' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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The Beechwood Parties[1] respectfully submit this memorandum of law in support of the Beechwood Individuals' and Beechwood Entities' motion to dismiss the Second Amended Complaint (the "Complaint") by Martin Trott and Christopher Smith, as Joint Official Liquidators (the "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) (collectively, "PPVA"), for failure to state a claim for which relief can be granted under Federal Rules of Civil Procedure 9(b) and 12(b)(6).

The Beechwood Individuals and Illumin move to dismiss the Complaint in its entirety, and the Beechwood Entities move to dismiss all causes of action but the alter ego allegations against them.

PRELIMINARY STATEMENT

This entire lawsuit is flawed from the outset. The central premise of the Liquidators' sprawling Complaint is that PPVA's *own* former officers, directors, principals, and owners perpetrated a massive fraud involving the fund. The Complaint not only makes those accusations against the individuals who previously controlled PPVA, but goes so far as to sue them for fraud and racketeering, claiming that they falsely inflated the value of the fund's assets and breached other duties. The other defendants named in the action—including the Beechwood

[1] The Beechwood Parties are a group of related entities and officers. Namely, they are Beechwood Capital Group, LLC ("BCG"), B Asset Manager LP ("BAM"), B Asset Manager II LP (BAM II), Beechwood Re Investments, LLC ("BRILLC"), Beechwood Re Holdings, Inc. ("BRE Holdings"), Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd. ("BRE"), Beechwood Bermuda International Ltd. ("BBIL"), BAM Administrative Services, LLC ("BAM Admin"), Illumin Capital Management LP ("Illumin"), BBLN-PEDCO Corp., and BHLN-PEDCO Corp. (together, with BBLN-PEDCO Corp., the "PEDCO Entities") (collectively, the "Beechwood Entities"), and officers and former officers of those entities, Mark Feuer, Scott Taylor, and Dhruv Narain (collectively, the "Beechwood Individuals"). This Court previously dismissed BCG and the PEDCO Entities from this case (Dkt. Nos. 276 & 290).

Parties—are being sued only in a secondary capacity, on the theory that they aided and abetted PPVA's principals in carrying out those various torts. The misconduct of PPVA's principals is the primary focus of the action.

The Liquidators' theory of the case runs headlong into the Second Circuit's *Wagoner* rule and the doctrine of *in pari delicto*. Under the *Wagoner* rule, a plaintiff lacks standing to sue third parties for misconduct for which the plaintiff is equally responsible. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991). Here, the principal wrongdoers are alleged to be PPVA's officers, whose conduct is imputed to PPVA. The Liquidators, who stand in the shoes of PPVA, cannot now sue third-party lenders who allegedly helped PPVA harm itself.

The other doctrine fatal to the Complaint is *in pari delicto*. Like the *Wagoner* rule, the *in pari delicto* doctrine prevents plaintiffs from recovering for misconduct in which they, or the entity they represent, participated equally. *See Picard v. HSBC Bank PLC*, 454 B.R. 25, 37 (S.D.N.Y. 2011) (Rakoff, J.), *amended*, *In re Bernard L. Madoff Inv. Sec. LLC*, 2011 WL 3477177 (S.D.N.Y. Aug. 8, 2011), *aff'd*, 721 F.3d 54 (2d Cir. 2013). Rather than serving as a bar to standing, it is an affirmative defense that can be applied even at the pleading stage, where, as here, its applicability is clear from the face of the complaint. *See id.*

The Complaint is defective for other reasons as well.

First, the Private Securities Litigation Reform Act ("PSLRA") amendment to the civil RICO statute bars recovery for claims predicated on conduct that could form the basis of a securities-fraud claim. Because all of the alleged predicate acts underlying the civil RICO claim against the Beechwood Parties rest on exactly that kind of conduct, the entire civil RICO claim must be dismissed.

Second, the claims for aiding and abetting and conspiracy to commit fraud or breach of fiduciary duty flunk Rule 9(b)'s heightened pleading standard. Although the Complaint runs on for over one thousand paragraphs, its allegations are in many cases either conclusory, irrelevant, or not probative of the underlying claims—sometimes all three simultaneously. Nor can the Complaint plausibly show justifiable reliance by PPVA on its own officers' misstatements. While the Liquidator appears to assert that various PPVA funds were misled, they do not explain who was misled or how they relied on the Platinum officers. Nor can they. The knowledge of Platinum's top management, including both of PPVA's co-chief investment officers, is imputed to PPVA. This imputation is fatal to the Liquidators' aiding and abetting claims because the Liquidators repeatedly allege that these same agents were "involved in every aspect of" the purported schemes. These failures underscore just how desperate the Liquidators are to blame *anyone else* for the fraud that is directly traceable to the party they represent, PPVA.

Third, the claim for unjust enrichment fails because all of the alleged conduct is covered by valid contracts and because the Complaint does not specify how each Beechwood Party allegedly benefitted from the purported misconduct.

Finally, the Liquidators' Second Amended Complaint includes claims against BCG and the PEDCO Entities, which have already been dismissed from this case. Because the Liquidators' have not added any new allegations against BCG and because the only new allegation against the PEDCO Entities is identical to what the Liquidators' previously presented to this Court, the claims against those entities should be dismissed again, with prejudice.

BACKGROUND

A. The Parties

This case is one of several actions pending in this Court arising out of the failure of Platinum Partners, formerly a highly regarded and successful hedge-fund manager, whose principals are now subject to various civil and criminal proceedings.[2] (*See* SAC ¶¶ 299-300.)

The Liquidators bring this suit on behalf of PPVA, one of Platinum's flagship hedge funds. (*Id.* ¶ 2.) PPVA was founded in 2003 by Murray Huberfeld, Mark Nordlicht, and David Bodner. (*Id.* ¶¶ 12, 41, 226.) David Levy and Mark Nordlicht, at various times, served as co-chief investment officers of the PPVA funds. (*Id.* ¶¶ 12, 42, 50.) From the outside looking in, PPVA appeared to be a wild success: During the time period at the heart of this Complaint (2012 to 2015), PPVA reported annualized returns between 7.15% and 11.6% and a net asset value of nearly $1 billion. (*Id.* ¶¶ 1, 29.) By 2016, PPVA reported that its cumulative return from inception was nearly 700%. (*Id.* ¶ 260.) Mark Nordlicht, Murray Huberfeld, David Levy, and other officers and employees of Platinum (collectively, the "Platinum Defendants")[3] are all named as defendants in this action. (*Id.* ¶ 3.)

Distinct from Platinum, the Beechwood Entities are a group of reinsurance companies and asset managers that were formed in 2013. (*Id.* ¶¶ 8, 28, 357.) Mark Feuer was the CEO and Scott Taylor was the President of these companies. (*Id.* ¶ 386.) Dhruv Narain, beginning in 2016, was a senior executive of BAM. (*Id.* ¶ 388.) Over time, Beechwood became one of PPVA's largest creditors. (*Id.* ¶¶ 303-04.)

[2] Factual allegations in the Complaint are taken as true solely for purposes of this motion.

[3] The Liquidators define the term "Beechwood Defendants" as a sprawling list that includes not just the Beechwood Entities and Individuals, but also individuals like Nordlicht and Huberfeld. For the purposes of this motion, the term Beechwood Parties is limited to individuals and entities that do not overlap with the "Platinum Defendants."

B. The Collapse of Platinum Partners

In June 2016, news reports first broke about a potential fraud scandal involving Platinum and its principals. That month, Huberfeld was arrested in connection with the misappropriation of PPVA funds to bribe a pension official in exchange for investing in PPVA. (*Id.* ¶¶ 13, 70-71, 280.) In December 2016, Nordlicht, Levy, and other Platinum-related individuals were charged with securities fraud by the U.S. Attorney's Office for the Eastern District of New York and the Securities and Exchange Commission. (*Id.* ¶¶ 299-300.) Among other things, the government accused them of engaging in a scheme to defraud investors and prospective investors in Platinum-managed funds through the overvaluation of assets and the concealment of severe cash-flow problems at Platinum's signature funds. (*See generally id.* Ex. 25.)

Shortly after Huberfeld's arrest in June 2016, PPVA was placed into liquidation. (*Id.* ¶¶ 15-16.) Two and a half years later, PPVA's Joint Official Liquidators, appointed by the Grand Court of the Cayman Islands, brought this action against the Beechwood Parties and dozens of other defendants. Although the government has been investigating Platinum's activities since at least early 2016, none of the Beechwood Parties has been indicted for any conduct or sued by any governmental agency in connection with PPVA's alleged fraud.

C. PPVA's Claims Against the Beechwood Parties

At its core, the Complaint describes a large-scale, Ponzi-like scheme designed to prop up PPVA's net asset value and keep the fund afloat. (*See id.* Ex. 25 ¶ 6.) The Liquidators maintain that PPVA's investment portfolio was concentrated in illiquid positions (*id.* ¶¶ 20, 26, 307, 319); that this lack of liquidity created problems when investors sought to redeem their investments from the PPVA funds (*id.* ¶ 321); and that, to deal with this problem, the Platinum Defendants relied upon money from new investors to pay redemptions (*id.* ¶ 322). The Liquidators allege

that PPVA should have been liquidated in 2013, but that as a result of the Platinum Defendants' alleged misconduct, the funds were able to survive for three additional years. (*Id.* ¶ 24.)

The Liquidators allege that the Beechwood Parties assisted the Platinum Defendants in two schemes to defraud, which they call the "First Scheme" and the "Second Scheme." In the First Scheme, which supposedly ran for less than two years, from 2013 to 2015, the Liquidators allege that the Platinum Defendants and the Beechwood Parties caused PPVA to engage in a series of "non-commercial transactions" designed to inflate the net value ascribed to PPVA's assets and to keep Platinum's Ponzi-like scheme alive. (*Id.* ¶ 9.) At the same time, the Liquidators allege that the "non-commercial transactions" comprising the First Scheme prioritized the interests of the Beechwood Entities over the interests of PPVA and enabled Platinum insiders to take proceeds from the sale of PPVA's largest investment, Black Elk. (*Id.*)

As part of the First Scheme, the Liquidators allege that the Platinum Defendants, with help from certain Beechwood Defendants, developed a scheme to "cash out" their investment in Black Elk. (*Id.* ¶¶ 440-515.) Black Elk was an oil and gas company in which PPVA owned a majority of the common equity, as well as preferred equity, and a significant portion of Black Elk bonds. (*Id.* ¶¶ 441-44, 450.) The Liquidators allege that the Platinum Defendants failed to disclose an interest in $72 million in bonds that they controlled ahead of a consent solicitation process designed to permit Black Elk to divert the proceeds from the sale of its assets from the bondholders to a class of preferred equity, which Platinum largely owned. (*Id.* ¶¶ 450, 480, 497, 714.) As a result of this omission, the Liquidators allege, the Platinum Defendants were able to use $98 million from the Black Elk asset sale to pay off preferred equity holders, including PPVA. (*Id.* ¶ 503, Ex. 25 ¶¶ 77-80.) PPVA received $47 million of the proceeds from the

Black Elk scheme (*Id.* ¶ 504), although a portion of this money was subsequently transferred to preferred investors of another Platinum fund. (*Id.* ¶ 505.)

The Second Scheme, which supposedly ran for less than one year, from late 2015 to June 2016, allegedly arose from the Platinum Defendants' desperate attempt to secure liquidity for PPVA. (*Id.* ¶¶ 10-11, 570, 690, 716-17.) In doing so, the Liquidators alleges that the Platinum Defendants, along with other, unidentified defendants, transferred or encumbered "all or nearly all" of PPVA's remaining assets for the benefit of the Beechwood Defendants, unidentified "insiders," and PPCO. (*Id.* ¶ 10.) The Complaint identifies "significant wrongful acts" as part of the Second Scheme, including Platinum's use of a company called Montsant to hide Beechwood's encumbrance of PPVA assets (*id.* ¶¶ 556-67); a side letter by Mark Nordlicht agreeing to use the proceeds of the sale of an asset to pay unrecoverable debt owed to Beechwood (*id.* ¶¶ 568-83); Platinum's March 2016 restructuring of PPVA (*id.* ¶¶ 584-606); a "Security Lockup" where "select redeeming investors and creditors of PPVA" were granted security interests and liens on all assets of PPVA (*id.* ¶¶ 11, 673-762); and the sale of Agera to Beechwood and SHIP. (*Id.* ¶¶ 607-672.)[4]

The Liquidators bring five counts against the Beechwood Parties, for (i) aiding and abetting the Platinum Defendants' breaches of their fiduciary duties; (ii) aiding and abetting the Platinum Defendants' fraud; (iii) unjust enrichment at the expense of PPVA; (iv) conspiracy to engage in tortious conduct against PPVA; and (v) participating in a RICO scheme that injured PPVA. (*Id.* ¶¶ 846-868, 938-47, 960-85.) Though pleaded as "alternative allegations for relief," not a cause of action, the Liquidators also allege that each of the Beechwood Entities was an alter ego of Platinum Management. (*Id.* ¶¶ 986-1000.) Finally, the Liquidators seek to invalidate two

[4] Allegations concerning the "Security Lockup" do not appear to involve the Beechwood Parties.

agreements that PPVA entered into with certain of the Beechwood Parties on the grounds that those agreements are void and unenforceable as contrary to public policy. (*Id.* ¶¶ 1013-28.)

APPLICABLE LEGAL STANDARD

To survive a motion to dismiss, a complaint must satisfy Rule 8(a) by stating a claim for relief that is plausible on its face. Fed. R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* at 678 (citation omitted). Furthermore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

The Liquidators' claims based on allegedly fraudulent conduct (*e.g.*, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and civil RICO) must also be pled with specificity under Rule 9(b). Fed. R. Civ. P. 9(b) ("In alleging fraud . . ., a party must state with particularity the circumstances constituting [the] fraud . . . ."). To satisfy the specificity requirement, the Liquidator must "(1) specify the statements that [it] contends [are] fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). Moreover, it is well-settled that a party does not comply with Rule 9(b) when it makes allegations against a group of defendants generally instead of pleading the specifics of a fraud claim against each defendant individually. *Id.*

ARGUMENT

I. THE LIQUIDATORS' COMMON LAW TORT CLAIMS, CIVIL RICO CLAIMS, AND DECLARATORY JUDGMENT CLAIMS ARE BARRED BY THE *WAGONER* RULE AND THE DOCTRINE OF *IN PARI DELICTO*

The Liquidators' aiding and abetting, unjust enrichment, civil conspiracy, civil RICO, and declaratory judgment actions (which are premised on a theory of fraudulent inducement) all

fail under the Second Circuit's *Wagoner* rule and the doctrine of *in pari delicto*. These two related theories are rooted in the simple concept that where parties are alleged to have engaged in equally wrongful conduct, one may not recover from the other. *In re Lehr Constr. Corp.*, 551 B.R. 732, 738 (S.D.N.Y. 2016) (quoting *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010)), *aff'd*, 666 F. App'x 66 (2d Cir. 2016). The central premise of the Liquidators' Complaint is that PPVA's own principals were involved in and orchestrated the misconduct for which PPVA is now suing, with the Beechwood Parties playing only a supporting role. Under *Wagoner* and the *in pari delicto* doctrine, this lawsuit cannot proceed.

A. UNDER THE *WAGONER* RULE, THE LIQUIDATORS LACK STANDING TO PURSUE THEIR CLAIMS AGAINST THE BEECHWOOD PARTIES

The *Wagoner* rule provides that, under New York law, a bankruptcy trustee may only "assert claims held by the bankrupt corporation itself," and lacks standing to assert "[a] claim against a third party for defrauding a corporation with the cooperation of management" on behalf of "the guilty corporation." *Wagoner*, 944 F.2d at 118, 120. The rule "derives from the fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation." *In re Grumman Olson Indus., Inc.*, 329 B.R. 411, 423 (Bankr. S.D.N.Y. 2005) (internal marks and citations omitted). "[M]anagement's misconduct is imputed to the corporation, and because [the] trustee stands in the shoes of the corporation, the *Wagoner* rule bars a trustee from suing to recover for a wrong that he himself essentially took part in." *Id.* at 423-24 (citations omitted).

While the *Wagoner* case itself addressed the claims of a Chapter 11 trustee, the rule applies equally to a liquidator who similarly stands in the shoes of the creditors. *See Bullmore v. Ernst & Young Cayman Islands*, 861 N.Y.S.2d 578, 581 (Sup. Ct. N.Y. Cty. 2008) (applying *Wagoner* Rule to claims brought by joint official liquidators of Cayman Islands hedge fund); *cf.*

Cobalt Multifamily Inv'rs I, LLC v. Shapiro, 857 F. Supp. 2d 419, 440 (S.D.N.Y. 2012) (applying *Wagoner* Rule to claims brought by court-appointed receiver).

Where a complaint's allegations demonstrate that a trustee or liquidator lacks standing to sue under the *Wagoner* Rule, the complaint should be dismissed on a Rule 12 motion. Because *Wagoner* is framed as a rule of standing, it should be resolved at the earliest opportunity. *Wagoner*, 944 F.2d at 117. Courts accordingly have not hesitated to apply *Wagoner* to dismiss deficient claims on their pleadings. *See, e.g.*, *Picard*, 454 B.R. at 37.

Dismissal is required here. Plaintiffs have sued and alleged fraud against virtually everyone who controlled or had any meaningful position in PPVA's operations, and affirmatively alleged that PPVA's own officers and directors were aware of, and indeed, orchestrated the very fraudulent conduct for which Plaintiffs are seeking to hold the Beechwood Parties responsible. (*See, e.g.*, SAC ¶¶ 12, 48, 54, 73.) The Complaint even touts the fact that the Platinum principals have been sued by the SEC and criminally indicted in the Eastern District of New York for the same underlying conduct. (SAC ¶¶ 299-300.) Thus, from the face of the Complaint, the Liquidators' claims against the Beechwood Parties fall squarely within the *Wagoner* rule. *See Wagoner*, 944 F.2d at 118.

The Liquidators cannot escape this result with conclusory allegations that PPVA's agents were purportedly acting to "enrich themselves." New York recognizes a narrow "adverse interest" exception to the *Wagoner* Rule and the *in pari delicto* doctrine, but that exception does not apply here. *In re 1031 Tax Grp., LLC*, 420 B.R. 178, 199 (Bankr. S.D.N.Y. 2009) (*Wagoner*); *Kirschner*, 938 N.E.2d at 952 (*in pari delicto*). "To come within the exception, the agent must have *totally abandoned* his principal's interests and be acting entirely for his own or another's purposes." *Kirschner*, 938 N.E.2d at 952 (quoting *Ctr. v. Hampton Affiliates, Inc.*, 488

N.E.2d 828, 830 (N.Y. 1985) (emphasis added)). Where the agent's alleged misconduct "enables the business to survive—to attract investors and customers and raise funds for corporate purposes—this test is not met." *Id.* at 953.

Courts addressing facts similar to those alleged by the Liquidators routinely decline to apply the adverse interest exception. *See New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 41 N.Y.S.3d 1, 10 (1st Dep't 2016) (adverse interest exception inapplicable where alleged conduct of funds' management "enabled the funds to continue to survive and to attract investors"); *Concord Capital Mgmt., LLC v. Bank of Am.*, N.A., 958 N.Y.S.2d 93, 93 (1st Dep't 2013) (adverse interest exception inapplicable where the alleged scheme "brought millions of dollars into plaintiffs' coffers and allowed plaintiffs to survive for a few years.").

The same reasoning applies in this case. The Liquidators affirmatively allege that PPVA benefited from the Platinum managers' wrongful conduct. Among other things, they maintain that PPVA was facing a liquidity crises, which created problems when investors sought to redeem their investments from the PPVA funds. (SAC ¶¶ 20, 26, 307, 319, 321.) The Liquidators allege that, to deal with this problem, the Platinum Defendants relied upon money from new investors to pay redemptions. (*Id.* ¶ 322.) This required them to maintain the pretense that PPVA's net asset value was increasing. (*See, e.g.*, *id.* ¶ 344.) According to the Liquidators, these schemes succeeded in this regard, allowing PPVA to survive and attract new investors: PPVA should have been liquidated in 2013, but because of the Platinum Defendants' alleged misconduct, the funds were able to survive for three additional years. (*Id.* ¶¶ 15, 24.)

The allegations in the SEC Complaint, which the Liquidators attach to the Complaint and incorporate by reference, also make clear that PPVA was the intended beneficiary of its agents' purported misconduct. (*See, e.g.*, *id.* Ex. 25 ¶ 6 ("[I]n 2014-15, PPVA's liquidity crisis

worsened, and Platinum Management resorted to other schemes *to keep the fund afloat*.") (emphasis added)); *id.* ("[T]he real purpose [of PPVA's] high-interest borrowing was to ease the fund's liquidity constraints"); *id*. ¶¶ 77-79 (PPVA used its power over Black Elk to "plunder its assets for the benefit of PPVA and its affiliates"); *id*. ¶ 80 ([T]he Platinum parties . . . devised a scheme to amend the note indenture to authorize that proceeds [from an asset sale] be paid to holders of Black Elk Class E preferred shareholders, *mostly PPVA*.") (emphasis added); *id*. ¶ 132 (alleging that PPVA's financial condition . . . was so perilous that, contrary to abandoning PPVA, Platinum's principals were making "loans to allow PPVA to meet certain of its financial obligations."); *id.* ¶ 174 (alleging that PPVA received $37 million in proceeds from the Agera transaction).) Thus, far from "totally abandoning" PPVA's interests, the Complaint alleges that the conduct of the Platinum's principals sustained the funds. Under these circumstances, any suggestion that the Platinum principals' conduct was wholly adverse to PPVA is insupportable, and the adverse interest exception should be rejected.

B. THE LIQUIDATORS' CLAIMS AGAINST THE BEECHWOOD PARTIES ARE ALSO BARRED BY THE *IN PARI DELICTO* DOCTRINE

Even assuming the Liquidators had standing to bring these claims against the Beechwood Parties, their claims would still be barred by the doctrine of *in pari delicto.* "New York law defines the *in pari delicto* defense extremely broadly . . . and the New York Court of Appeals has held that even though it is an affirmative defense, 'in pari delicto may be resolved on the pleadings . . . in an appropriate case.'" *Picard*, 454 B.R. at 37 (quoting *Kirschner*, 938 N.E.2d 941, 958–59, 946 n.3). The Second Circuit has held that "[e]arly resolution is appropriate where (as here) the outcome is plain on the face of the pleadings." *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d at 65.

That is the situation presented by this lawsuit. *In pari delicto* is triggered by the Liquidators' own well-pled allegations that PPVA (through its agents) acted wrongfully. Because the Complaint is replete with allegations of wrongdoing against PPVA's own principals, *in pari delicto* clearly bars Plaintiffs' recovery. Indeed, because this outcome is plain from the face of the Complaint, the Court can (and should) apply it now. *See In re Lehr*, 551 B.R. at 737.

Whether the Court applies the *Wagoner* rule or the *in pari delicto* defense, the outcome is the same: The Court should dismiss the Liquidators' aiding and abetting, unjust enrichment, civil conspiracy, civil RICO, and declaratory judgment actions as against the Beechwood Parties. *See Picard*, 454 B.R. at 37 (noting the complaint so obviously pled wrongdoing that it did not matter whether the court applied the *Wagoner* rule or the *in pari delicto* doctrine).

II. THE LIQUIDATORS' CIVIL RICO CLAIM (COUNT 17) IS PREDICATED ON SECURITIES FRAUD AND BARRED BY THE PSLRA

As set forth above, the Liquidators' civil RICO claim is barred by the *Wagoner* Rule and the doctrine of *in pari delicto*. *Republic of Iraq v. ABB AG*, 768 F.3d 145, 162 (2d Cir. 2014) (affirming district court's dismissal of civil RICO claims on the basis of *in pari delicto*). However, even if that were not the case, the Court should dismiss the Liquidators' civil RICO claim for an independent reason: It is barred by the PSLRA.

The Liquidators' civil RICO claim is expressly based on a purported securities fraud, which cannot serve as a predicate act for civil RICO claims. The PSLRA bars any civil RICO action predicated on the purchase or sale of securities. 18 U.S.C. § 1964(c). This prohibition is broad. "[I]f the alleged conduct could form the basis of a securities fraud claim against any party – be it against, or on behalf of, the plaintiff, defendants or a non-party – it may not be fashioned as a civil RICO claim." *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 644 (S.D.N.Y. 2017). The Supreme Court has held that this provision should be interpreted

"not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (citation omitted); *see also Boudinot v. Shrader*, 2012 WL 489215, at *5 (S.D.N.Y. Feb. 15, 2012), *aff'd in part*, 863 F.3d 162 (2d Cir. 2017).

Still, in their own articulation of the predicate acts for civil RICO, the Liquidators appear to rely exclusively on allegations relating to transactions involving the purchase or sale of securities, including heavy reliance on the alleged Black Elk Scheme (SAC ¶¶ 978), which forms the core of the securities-fraud claims brought by the SEC and the criminal charges filed against the Platinum principals. (*See id.* ¶¶ 299-300.) Indeed, almost *every single one* of the alleged predicate acts appears to involve some type of securities transaction, whether it is an investment, a loan, a pledge, or an express offer to purchase a security. (*Id.* ¶ 978.) This conduct falls squarely within the PSLRA's exclusion. 18 U.S.C. § 1964(c). *See Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.* ("SHIP Action"), No. 18-cv-6658 (JSR), Opinion dated Apr. 22, 2019, at *23-24 (S.D.N.Y. Apr. 22, 2019) (concluding that "SHIP's [civil RICO] allegations are barred by the RICO Amendment insofar as the gravamen of SHIP's mail and wire fraud claims is that Beechwood funneled SHIP's assets to Platinum").

The civil RICO claim also fails because it is too narrow in number of victims, time, and purpose to constitute a continuous pattern of racketeering. In order to adequately plead the existence of a RICO pattern, the Liquidators must allege facts giving rise to an inference of either "closed-ended" or "open-ended" continuity. *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240–41 (1989). The former refers to a "closed period of repeated conduct," while the latter refers to "past conduct that by its nature projects into the future with a threat of repetition." *Id.* Here, the Liquidators have not adequately alleged either.

In essence, the Liquidators identify a conspiracy limited to PPVA with the singular purpose "to defraud PPVA, and to obtain money and property from PPVA, through false pretenses, representations, and promises." (SAC ¶ 977.) That accusation identifies a single victim (PPVA) over a period of just over two years—shorter than the "kind of broad-based unlawful activity that RICO was design[ed] to address." *Feirstein v. Nanbar Realty Corp.*, 963 F. Supp. 254, 260 (S.D.N.Y. 1997) (four predicate acts over a three-year period did not satisfy the continuity factor to establish a RICO claim); *Lefkowitz v. Bank of N.Y.*, 2003 WL 22480049 (S.D.N.Y. Oct. 31, 2003) (no closed-ended continuity where complaint alleged that small number of parties engaged in activities with a narrow purpose to defraud directed at one to three victims), *rev'd in part on other grounds*, 528 F.3d 102 (2d Cir. 2007).

The civil RICO claim is even more obviously deficient against Narain, who did not join Beechwood until 2016 and Illumin, which was not formed until December 2016. Only two of the alleged predicate acts occurred in 2016, and those events were separated by less than a year. (SAC ¶ 978.) Where the "alleged predicate acts attributed to [a particular defendant] . . . do not extend over a sufficiently long period of time to satisfy the requirements of closed-ended continuity," a district court should "properly dismiss[]" the substantive RICO claims as well as any related claims alleging conspiracy or improper investment of RICO proceeds. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181–82 (2d Cir. 2004) (affirming dismissal of the RICO claims because predicate acts which spanned fewer than two years are always insufficient for a closed-end pattern).

III. THE LIQUIDATORS' AIDING AND ABETTING CLAIMS (COUNTS 7 AND 8) SHOULD BE DISMISSED

The Liquidators assert two duplicative aiding and abetting claims against the Beechwood Parties. First, the Liquidators allege that "the Platinum Defendants breached their fiduciary

duties to PPVA by their actions in connection with the First and Second Schemes." (SAC ¶ 848.) They allege that the Beechwood Parties aided and abetted the Platinum Defendants' breach by participating in various transactions with PPVA that helped further the schemes. (*Id.* ¶ 452.) Second, the Liquidators allege that the Beechwood Parties aided and abetted the same schemes by participating in the same series of transactions with PPVA. (*Id.* ¶ 863.) On either of the bases set forth in Point I—the *Wagoner* Rule or the *in pari delicto* doctrine—the Liquidators' aiding and abetting claims should be dismissed. But even if the Liquidators could avoid dismissal on those grounds, their aiding and abetting claims should be dismissed for failure to state a claim under Rule 12(b)(6) and 9(b).

A. THE COMPLAINT FAILS TO STATE A CLAIM FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege: (1) a breach of fiduciary obligations to another; (2) that the aider and abettor knowingly induced or participated in the breach; and (3) that the plaintiff suffered damages as a result of the breach. *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 345 (2d Cir. 2018). "With respect to the second requirement, although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty. And a person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator." *Id.* Under New York law, "[s]ubstantial assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001).

Here, the Complaint is most obviously deficient with respect to the substantial assistance element. The Complaint includes the conclusory allegation that the "Beechwood Defendants

substantially assisted and participated in the Platinum Defendants' breaches of their fiduciary obligations in connection with the First and Second Schemes" by engaging in various transactions with PPVA. (SAC ¶ 852.) As set forth in the Complaint, these transactions allegedly related to Golden Gate Oil LLC, PEDEVCO Corp., Implant Sciences Corp., Black Elk Energy Offshore Operations LLC, Montsant Partners LLC, Northstar Offshore Group LLC, and Agera Energy LLC. (*Id.* ¶¶ 413-23, 424-35, 436-39, 440-515, 516-28, 529-50, 556-67, 568-83, 584-606, 607-72.) But the Complaint does not allege that BRILLC, BRE Holdings, BRE, BBIL, or Illumin had involvement with, let alone provided substantial assistance to, these transactions.

Indeed, for a number of these Beechwood Entities, the only allegations against them concern the identities of their owners or the type of common stock that they owned, but nothing concerning any proximate involvement with these transactions. (*See, e.g.*, SAC ¶¶ 213, 220, 374-77 (BRE Holdings); *id.* ¶¶ 212, 215, 220, 383-85 (BRILLC); *id.* ¶¶ 216, 220, 375-77 (BBIL)). The only allegations against BRE, for example, other than those relating to ownership (*id.* ¶¶ 215-16, 220, 374), are that Levy executed its due diligence documents, Levy emailed a draft BRE term sheet to Nordlicht, and Taylor referred to BRE in an email. (*Id.* ¶¶ 362-63, 65.) None of these allegations relate to any of the transactions identified in connection with the First and Second Scheme. Finally, as to Illumin, the Complaint alleges in a wholly conclusory fashion that it led the marketing and negotiation of and directed various transfers in connection with the Agera sale. (*Id.* ¶¶ 209, 625, 641, 654, 657.)[5]

[5] Some of the Liquidators' allegations are both conclusory and factually impossible. For example, the Complaint erroneously accuses Illumin of directing AGH Parent to deliver a letter to PGS indicating its intent to exercise certain redemption rights in October 2016. (FAC ¶ 654.) In fact, Illumin did not exist until December 2016.

Bare allegations such as these fail to satisfy Rule 9(b)'s heightened requirement to plead with particularity their knowing participation in the Platinum Defendants' breaches of fiduciary duty or fraud. *See Kaufman v. Cohen*, 760 N.Y.S.2d 157, 169–70 (1st Dep't 2003) (that one defendant with a fiduciary duty was alleged to have a beneficial interest in other entity defendants merely showed constructive knowledge, "an insufficient basis for aider and abettor liability"); *see also Glob. Minerals & Metals Corp. v. Holme*, 824 N.Y.S.2d 210, 216–217 (1st Dep't 2006) (dismissing aiding and abetting claim where complaint alleged simply that wife knew her husband was a shareholder of a corporation, but did not plead additional facts that would have shown the key element of actual knowledge of his breach). Accordingly, the aiding and abetting breach of fiduciary duty claims should be dismissed as to these entities.

B. THE COMPLAINT FAILS TO STATE A CLAIM FOR AIDING AND ABETTING FRAUD

To establish a claim for aiding and abetting fraud, the Liquidators must plead specific facts supporting "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud," *Ritchie Capital Mgmt., L.L.C. v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 338 (S.D.N.Y. 2015) (quotation omitted), *aff'd*, 821 F.3d 349 (2d Cir. 2016), and in federal court such facts must be pled in compliance with the Rule 9(b) standard. For the reasons discussed in Section A, the Liquidators cannot satisfy the substantial assistance requirement here.

As for the existence of the underlying fraud, the Complaint fails to plead facts establishing PPVA's justifiable reliance on any material misrepresentation or actionable omission by the Platinum Defendants, an essential element of any fraud claim. *See Eurycleia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976, 979 (N.Y. 2009).

As explained in Point I above, addressing the *Wagoner* Rule and the doctrine of *in pari delicto*, the knowledge of Platinum's top management is imputed to PPVA. This is fatal to the

PPVA's aiding and abetting claims because the Liquidators allege that PPVA's own agents were involved in "every aspect of the First and Second Schemes." (*See, e.g.*, SAC ¶¶ 12, 48, 54, 73.) Indeed, the Liquidators, standing in the shoes of PPVA, cannot assert claims against the Beechwood Parties for aiding and abetting PPVA in deceiving *itself*. *See In re AlphaStar Ins. Grp. Ltd.*, 383 B.R. 231, 267 (Bankr. S.D.N.Y. 2008) ("[The plaintiff] could not have relied to its detriment on its own misleading financial statements.").

Notably, while the Liquidators appear to assert that PPVA was misled (SAC ¶ 810), they do not explain who at PPVA was misled or how the fund could possibly have relied on any of the alleged misstatements. PPVA is a limited partnership with no employees of its own, only officers. (*Id.* ¶ 38.) The only officers at PPVA whom the Liquidators identify in the Complaint are Nordlicht (co-chief investment officer of PPVA); Uri Landesman (co-chief investment officer of PPVA); Levy (co-chief investment officer of PPVA); David Steinberg (co-chief risk officer of PPVA); and Joseph Sanfilippo (chief financial officer for PPVA), all of whom the Liquidator has accused of fraud. (*Id.* ¶ 12.) Because the Liquidators fail to allege to whom any purported misrepresentations were made, their claims for aiding and abetting fraud should be dismissed. *Sazerac Co. v. Falk*, 861 F. Supp. 253, 260 (S.D.N.Y. 1994) (no justifiable reliance where complaint failed to identify "when or to whom" alleged misrepresentations were made.)[6]

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[6] If the Liquidators maintain that PPVA's limited partners were misled by purported misstatements by PPVA's officers, then the Liquidators are effectively acknowledging that they lack standing to bring this case. *Wagoner*, 944 F.2d at 118 ("It is well settled that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself.")

IV. THE CIVIL CONSPIRACY CLAIM (COUNT 16) IS DUPLICATIVE OF THE AIDING AND ABETTING CLAIMS

The Liquidators' civil conspiracy claim should be dismissed as duplicative of their aiding and abetting claims. Both causes of action seek to hold the Beechwood Parties secondarily liable for primary torts committed by other defendants, and are therefore duplicative. *In re Allou Distribs., Inc.*, 446 B.R. 32, 60–61 (Bankr. E.D.N.Y. 2011) (collecting cases holding that conspiracy and aiding and abetting claims are duplicative); *Briarpatch Ltd. LP v. Phx. Pictures, Inc.*, 312 F. App'x 433, 434 (2d Cir. 2009) (noting that a claim for conspiracy to breach fiduciary duty is duplicative of an aiding and abetting claim); *Fox Paine & Co. v. Hous. Cas. Co.*, 59 N.Y.S.3d 759, 761 (2d Dep't 2017) (holding that a civil conspiracy claim is duplicative of a claim for aiding and abetting fraud); *Kew Gardens Hills Apartment Owners, Inc. v. Horing Welikson & Rosen, P.C.*, 828 N.Y.S.2d 98, 101 (2d Dep't 2006) (holding that a civil conspiracy claim is duplicative of a claim for aiding and abetting a breach of fiduciary duty).

Even if the Court declines to dismiss the civil conspiracy claims as duplicative, it should find them insufficient under Rule 9(b). Because the Liquidators rely on the same allegations for both civil conspiracy and aiding and abetting, the analysis of the Complaint's failure to meet Rule 9(b)'s heightened pleading standard applies here in equal force. *See* Point III, above.

V. THE UNJUST ENRICHMENT CLAIM (COUNT 14) SHOULD BE DISMISSED

The Liquidators' unjust enrichment claim fails for two independent reasons. First, it is long settled that an unjust enrichment claim cannot stand where an express agreement governs the rights at issue. *SCM Grp., Inc. v. McKinsey & Co.*, 2011 WL 1197523, at *6 (S.D.N.Y. Mar. 28, 2011) ("Where, as here, it is undisputed that an express and valid contract governs the right at issue, unjust enrichment claims are precluded"); *see also SmartStream Techs., Inc. v. Chambadal*, 2018 WL 1870488, at *7 (S.D.N.Y. Apr. 16, 2018) ("It is well settled that 'the

existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter.'") (citation omitted). This is true for both signatories and non-signatories alike. *Vitale v. Steinberg*, 764 N.Y.S.2d 236, 239 (1st Dep't 2003). Here, the Liquidators' unjust enrichment claim is limited to the Second Scheme (SAC ¶¶ 939-40), and each one of the alleged bad acts underlying the claim is connected to a structured agreement, be it the Montsant Assignment Agreement, the Nordlicht Side Letter, the Master Guaranty, or the Agera deal documents. (*See id.* ¶¶ 566, 574, 593, 647.) Accordingly, the Court should dismiss the alternative unjust enrichment claims.

Second, as this Court has noted, merely alleging a general, non-specific benefit is insufficient to plead an unjust enrichment claim. *Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 533 (S.D.N.Y. 2018) (allegations that parties were "enriched" were "entirely conclusory" and "not entitled to be assumed true"); *see also Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352–53 (S.D.N.Y. 2018) (dismissing unjust enrichment claim because complaint failed to plead specific facts showing how any single defendant might have profited from the alleged scheme or how the money was diverted to them). In the SHIP Action, this Court explained that "[r]elief for unjust enrichment is 'available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff.'" 345 F. Supp. 3d at 532 (quoting *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012)). Here, the Liquidators allege that the Beechwood Parties got the "benefit of" these purported schemes. (*See, e.g.*, SAC ¶¶ 943, 945.) But the Complaint contains no well-pled allegations concerning how the Beechwood Individuals were supposedly "enriched" by the First or Second Scheme. Indeed, such allegations are contradicted by the Liquidators

acknowledgment that the Beechwood Parties have largely been left holding the bag for the alleged Platinum fraud. (*See id*. ¶ 304 ("The aggregate amount of proofs of debt filed in the Cayman Liquidation by parties affiliated with Beechwood is $79,146,350.64.").)

VI. THE LIQUIDATORS' DECLARATORY JUDGMENT CLAIMS (COUNTS 20-21) SHOULD BE DISMISSED

The Liquidators bring declaratory judgment claims concerning two documents, a January 13, 2016 Pledge Agreement signed by Mark Nordlicht (the "January Pledge" or, as PPVA refers to it, the "Nordlicht Side Letter"), and a Master Guaranty Agreement, dated March 21, 2016 (the "Master Guaranty"), claiming that each is void and unenforceable. Mark Nordlicht signed the January Pledge on behalf of PPVA, PPCO, and "each of their affiliates," pledging to use the proceeds from the sale Implant Sciences to BAM as repayment for all indebtedness owed to BAM in connection with a loan to a company called Golden Gate Oil, which BAM had purchased from a PPVA subsidiary. (SAC ¶¶ 568-83, Ex. 74.) The Master Guaranty was an agreement between BAM Admin, PPVA, Golden Gate Oil, and Montsant, which provided BAM Admin with a guaranty from PPVA of amounts owed by Golden Gate Oil and Montsant. (*Id.* ¶¶ 584-606, Ex. 78.)

The Liquidators' declaratory judgment claims fail for two reasons. First, the Liquidators appear to base their claims that the January Pledge and Master Guaranty are void and unenforceable on an inadequately pled theory that PPVA was fraudulently induced to enter into them. The Complaint, however, does not state a claim for fraudulent inducement because it does not plead the elements of the claim with particularity. Under New York law, to state a claim for fraudulent inducement, a plaintiff must plead "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Dexia SA/NV v. Deutsche Bank AG*, 2013 WL 98063, at *3 (S.D.N.Y. Jan. 4, 2013) (Rakoff, J.)

(quoting *Eurycleia Partners*, 910 N.E.2d at 979). Rule 9(b)'s heightened pleading standard applies. *Id.* at *4. The Complaint fails to meet this standard. It does not identify the material misrepresentation, who made it, or to whom it was made; nor can it allege that PPVA's management justifiably relied on any misrepresentation, because it alleges elsewhere that those same agents were the driving force behind the alleged fraud. (*See, e.g.*, SAC ¶¶ 48, 54, 73) (alleging that Nordlicht, Huberfeld, and Levy were "involved in every aspect of the First and Second Schemes"). It is therefore impossible for fraudulent inducement to serve as a basis for voiding the January Pledge and the March 21, 2016 Master Guaranty Agreement (the "Master Guaranty"), and both claims should be dismissed on that basis alone.

Second, it is astonishing that the Liquidators have come to this Court arguing that the January Pledge is void for lack of consideration. That argument is the subject of a declaratory judgment action filed over a year ago by PPVA's wholly-owned subsidiary, DMRJ, in New York State Court. Exactly like here, that complaint sought a judgment declaring the January Pledge void and unenforceable. It set forth three bases to do so: (1) that Mark Nordlicht lacked authority to bind DMRJ to the agreement; (2) that the Master Guaranty superseded the January Pledge; and (3) that the January Pledge was void for lack of consideration. Defendants moved to dismiss on all three grounds, and after briefing and oral argument, Justice Ramos granted Defendants' motion as to two of them (allowing only the lack of consideration basis to proceed). *DMRJ Group LLC v. B Asset Manager & BAM Administrative Services, LLC*, No. 655181/2017, Transcript of Oral Argument and Decision, dated July 17, 2018 (Sup. Ct. N.Y. Cty. decided Dec. 11, 2018) attached hereto as Exhibit 1 to the Declaration of Ira Lipsius. The parties are still actively litigating that case. By raising the same arguments before this Court, it is clear that the Liquidators are seeking a second bite at the apple.

Even more outrageous, the Liquidators are arguing contradictory positions to the ones they took in state court. Plaintiffs' argument to Justice Ramos that the January Pledge was unenforceable because it was superseded by the Master Guaranty necessarily depended on the position that the Master Guaranty was valid and enforceable. The Liquidators are now arguing the opposite to this Court. Plainly, the Liquidators were unhappy with the outcome they got in the state court, so they thought they would try their luck here. That is patently improper.

VII. THE LIQUIDATORS' ALTER-EGO ALLEGATIONS AGAINST ILLUMIN (COUNT 18) SHOULD BE DISMISSED

Although the Liquidators include Illumin in their alter-ego allegations in Count Eighteen (SAC ¶¶ 986-1000), those allegations are entirely group-pled and do not support the Liquidators' conclusory claim that Illumin was an alter ego of Platinum. *See Waite v. Schoenbach*, 2010 WL 4456955, at *3 (S.D.N.Y. Oct. 29, 2010) (purely conclusory statement that an entity is an alter ego of another entity is insufficient to survive a motion to dismiss).

VIII. THE LIQUIDATORS' CLAIMS AGAINST BCG AND THE PEDCO ENTITIES SHOULD BE DISMISSED AGAIN

On March 15, 2019, this Court issued a bottom-line order dismissing all claims against BCG and the PEDCO Entities. (ECF No. 276 at 3.) On March 29, 2019, the Liquidators filed a Second Amended Complaint, which "contains causes of actions and parties subject to dismissal in connection in connection with this Court's March 15, 2019." (ECF No. 285 at iii n.1.) According to the Liquidators, "[t]he Second Amended Complaint includes these parties and claims so as to preserve Plaintiffs' rights during the appeal period and prior to this Court's forthcoming opinion." (*Id.*) Because the Liquidators' allegations against BCG and the PEDCO Entities remain largely unchanged, the claims against those entities should be dismissed again.

As to BCG, the Second Amended Complaint includes no new allegations. To the contrary, the Liquidators have subtracted from their complaint, walking back their spurious

allegation concerning a purported transfer from Platinum Management to BCG. This Court has already held that the Liquidators' remaining allegations concerning (1) BCG's corporate form and principal place of business (SAC ¶ 209), (2) advice that was purportedly provided to BCG (*id.* ¶ 358), and (3) and a company called Alpha Re (*id.* ¶ 359) "have no bearing on liability," (ECF No. 290 at 36). Accordingly, all claims against BCG should be dismissed with prejudice.

As to the PEDCO Entities, the Liquidators have added the allegation that they were "tasked with receiving the PEDEVCO investment from PPVA and its subsidiary, and ultimately transferred their interests in PEDEVCO back to PPVA as part of the fraudulent Agera Transactions." (SAC ¶ 218.) This conclusory allegation is essentially what the Liquidators argued in their prior opposition brief, (ECF No. 223 at 14 (stating that the PEDCO Entities were "entities . . . involved directly in the transactions comprising the First and Second Scheme, including for example, the PEDEVCO transactions")), and at oral argument, (Lipsius Aff. Ex. 2 at 37:19-21 ("We know that they are being used for transactions that we have alleged were fraudulent.")). For the same reasons this Court dismissed this claim before, it should do so again, but this time with prejudice.

CONCLUSION

For the foregoing reasons, the Beechwood Parties respectfully request that the Court enter an order dismissing with prejudice all of the claims asserted against each of the Beechwood Individuals, dismissing all but the alter ego claim against each of the Beechwood Entities, and granting the Beechwood Parties such other and further relief as this Court deems just and proper.

Dated: April 22, 2019
Kew Gardens, New York

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