UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PLATINUM-BEECHWOOD LITIGATION.	Civil Action No. 18-cv-6658 (JSR)
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation), Plaintiffs, - against - PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	Civil Action No. 18-cv-10936 (JSR)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
MOVING DEFENDANTS' SECOND ROUND OF MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

The SAC alleges in great detail each of the Moving Defendants' involvement and complicity in the various transactions that comprise the First and Second Schemes and Security Lock Up[1], the benefit they received from those transactions, the detriment caused to PPVA, and the lack of any benefit to PPVA.

In its April 11, 2019 Decision (the "**April 2019 Decision**"), this court considered and rejected motions to dismiss filed by 36 defendants, holding, among other things, that the First Amended Complaint sufficiently pleaded claims under Fed. R. Civ. P. 8 and 9(b), and that group pleading was appropriate as to corporate insiders that owned and controlled Platinum Management and its Beechwood alter ego. The Court should likewise should reject the Moving Defendants'[2] motions here.

First, the claims at issue in the case are asserted against persons and entities who were fiduciaries of PPVA, persons who exercised management and control over PPVA and its assets and/or were alter egos of such insiders. As such, neither the Second Circuit's *Wagoner* prudential standing rule nor the *in pari delicto* defense under New York law apply to bar the claims asserted by Plaintiffs in this case. As such, to the extent certain of the Moving Defendants rely on

[1] All capitalized terms not defined herein shall have the meaning prescribed to them in Plaintiffs' Second Amended Complaint ("**SAC**").

[2] As of the date of this filing, Motions to Dismiss or Joinders ("**Motions to Dismiss**") have been filed as part of the second round by the following Defendants in response to the Second Amended Complaint (collectively, "**Movants**" or "**Moving Defendants**"): David Bodner (Dkt. No. 322); Kevin Cassidy and Michael Nordlicht (Dkt. No. 324); Murray Huberfeld (Dkt. No. 330); Estate of Uri Landesman (Dkt. No. 300); 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 (collectively, the "**Beechwood Movants**") (Dkt. No. 307); Michael Katz (Dkt. No. 309); Seth Gerszberg (Dkt. No. 334); and Daniel Saks (Dkt. No. 349).

Wagoner/in pari delicto as a basis for dismissal of the claims against them, that reliance simply is misplaced. So too, the SAC makes it clear that this is the rare case where the adverse interest exception prevents the application of *Wagoner/in pari delicto.* The Moving Defendants favored their own interests over those of PPVA, and the inevitable outcome of the series of non-commercial transactions comprising the First and Second Schemes and the Security Lock Up was the implosion of PPVA, which entered liquidation purportedly holding assets under management of $800 million but actually had a negative NAV of $400 million.

Second, it is clear that the SAC, like the First Amended Complaint, contains detailed facts connecting each defendant to the claims at issue here. Yet, Moving Defendants Bodner, Huberfeld, Estate of Landesman, Saks, Katz, Cassidy and Michael Nordlicht, here seek dismissal of the SAC on virtually the same grounds that were considered and rejected by the Court in its April 11 Decision. As there no new facts or intervening change in the law has occurred, this Court should reject these Moving Defendants' attempts at a second bite at the apple by rearguing what is now law of the case, and deny their motions in their entirety.

Finally, as will be discussed in detail below, it is clear that Plaintiffs have alleged sufficient facts to support the claims it has against the Moving Defendants that were not previously subject to challenge. For all of these reasons, all of the motions to dismiss should be denied.

APPLICABLE LEGAL STANDARD

The standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is well-settled and not in dispute. "The court must accept the well-pleaded factual allegations in the complaint as true." *In re Livent, Inc. Noteholders Sec. Litig.,* 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001) (citing *Grandon v. Merrill Lynch & Co.,* 147 F.3d 184, 188 (2d Cir. 1998)). In addition, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face,'" and claims based upon fraudulent conduct must be "stated with

particularity." *In re Refco Sec. Litig.*, 759 F. Supp. 2d 301, 315 (S.D.N.Y. 2010) (Rakoff, J.) (citing Fed. R. Civ. P. 9(b)) ("**Refco I**"); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009) (setting forth pleading requirements under Rule 8). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 120 (2d Cir. 2013) (internal quotation marks omitted).

Fraud claims require allegations sufficient to create a plausible inference of fraudulent intent and to provide "fair notice of the plaintiff's claim and the factual ground upon which it is based." *Refco I*, 759 F. Supp. 2d at 315. Fraudulent intent may be alleged generally, Fed. R. Civ. P. 9(b), and "may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Id.* (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

This Court's April 11 Decision (Dkt. 290 at 22) denied motions to dismiss the First Amended Complaint in which the Defendants argued that Plaintiffs relied on group pleading, holding that "[t]he group pleading doctrine allows particular statements or omissions to be attributed to individual defendants even when the exact source of those statements is unknown" where the complaint "allege[s] facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs" (citing *Anwar v. Fairfield Greenwich, Ltd*, 728 F. Supp. 2d 372, 405 (S.D.N.Y. 2010) and *In re Alstrom SA*, 406 F. Supp. 2d 433, 449 (S.D.N.Y. 2005)). S*ee also In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 262-64 (S.D.N.Y. 2011) (applying group pleading doctrine to common law claims). This Court also has held that Rule 9(b) is satisfied

where the complaint's allegations "inform each defendant of the nature of his alleged participation in the fraud." *Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 388 (S.D.N.Y. 2016) (citation omitted).

Application of the foregoing standards requires dismissal of each of the pending motions to dismiss the SAC.

ARGUMENT

I. PLAINTIFFS HAVE STANDING UNDER *WAGONER* AND PLAINTIFFS' CLAIMS ARE NOT BARRED BY *IN PARI DELICTO*

The Beechwood Movants, Huberfeld Family Foundation, Michael Nordlicht, Kevin Cassidy, Michael Katz and Daniel Saks each argue that the prudential rule established by the Second Circuit in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991) ("**Wagoner**") deprives the JOLs of standing to pursue the claims at issue here and/or that such claims are barred by the common law affirmative defense of *in pari delicto*. *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010) ("**Kirschner**"). As such, these Defendants argue that the complaint should be dismissed as to them.

Defendants are wrong. Neither the *Wagoner* prudential standing rule nor *in pari delicto* under New York law apply to claims, such as those asserted by Plaintiffs in this case, against insiders, including persons and entities who were fiduciaries, who exercised management and control over PPVA and its assets and/or were alter egos of such insiders. Given that each of the Moving Defendants who seeks dismissal based on *Wagoner/in pari delicto* qualifies as an insider or an alter ego of an insider (as detailed below), this Court need not look any further for a basis to deny their motions. In any case, it also is clear that the actions taken by the Platinum Defendants outlined in the SAC were undertaken for the benefit of other parties and to the **detriment** of PPVA. Under these circumstances, the adverse interest exception also applies here and their motions should be denied.

A. <u>As a Matter of Law, *Wagoner* and *In Pari Delicto* Do Not Apply to Claims against Insiders and Alter Egos of Insiders</u>

It is black letter law in New York that corporate insiders cannot rely upon the *in pari delicto* defense. *Teras Int'l Corp. v. Gimbel*, No. 13–cv–6788–VEC, 2014 WL 7177972, at *10 (S.D.N.Y. Dec. 17, 2014). Corporate insiders are denied the *in pari delicto* defense because "it would be absurd to allow a wrongdoing insider to rely on the imputation of his own conduct to the corporation as a defense." *In re Refco Inc. Sec. Litig.*, No. 07-md-1902 (JSR), 2010 WL 6549830, at *15 (S.D.N.Y. Dec. 6, 2010), *aff'd in part*, 779 F. Supp. 2d 372 (S.D.N.Y. 2011). Courts have reasoned that "[t]he rationale for the insider exception to the *in pari delicto* doctrine stems from the agency principles upon which the doctrine is premised; a corporate insider, whose wrongdoing is typically imputed to the corporation, should not be permitted to use that wrongdoing as a shield to prevent the corporation from recovering against him." *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 124 n.26 (Bankr. S.D.N.Y. 2011).

The insider exception is not limited to fiduciaries such as officers and directors of a corporation; it includes corporate insiders with some level of control over the company's affairs. *See In re Refco Sec. Litig*., 892 F. Supp. 2d 534, 536-537 (S.D.N.Y. 2012); *see also In re FKF3, LLC*, No. 13 Civ. 3601 (JCM), 2018 WL 5292131, at * 7-9 (S.D.N.Y. Oct. 24, 2018) (refusing to provide *in pari delicto* jury instruction for claims against defendants later held to be alter egos of bankrupt company).

The "control" analysis for purposes of *Wagoner/in pari delicto* focuses not on what fraudulent conduct the defendant committed, if any, but solely on whether the defendant had enough control over the debtor to give him or her an opportunity to engage in that bad conduct. *In re PHS Grp., Inc.*, 581 B.R. 16, 32 (E.D.N.Y. 2018). "Control is to be determined by an examination of the facts and particularly whether or not the facts indicate an opportunity to self-

deal or exert more control over the Debtor's affairs than is available to other creditors." *Id.* (*quoting In re ABC Elec. Serv., Inc.*, 190 B.R. 672, 675 (Bankr. M.D. Fla. 1995)).

An employee's title alone will not dictate his/her status as an insider for *Wagoner/in pari delicto* purposes. *See In re Glob. Aviation Holdings, Inc.*, 478 B.R. 142, 148 (Bankr. E.D.N.Y. 2012). "Just as an individual's formal title and position in a company should not determine their insider status, so too, a person's deliberate divesting of any formal title and position in a company should not, without closer inspection, dictate that he be deemed a third party, non-insider." *In re PHS Group*, 581 B.R. at 32. An insider's status, i.e., *control*, should be determined "based on the totality of the circumstances, including the degree of an individual's involvement in a debtor's affairs." *In re Borders Grp., Inc.*, 453 B.R. 459, 469 (Bankr. S.D.N.Y. 2011).

A third party may be deemed an insider when he executes "actual management of the Debtor's affairs" to afford him "an opportunity to self-deal." *In re 455 CPW Assoc.,* No. 99-5068, 2000 WL 1340569, at *5 (2d Cir. Sept. 14, 2000) (finding an insider as one who has a sufficiently close relationship to the Debtor that his conduct is subject to closer scrutiny).

Indeed, the Beechwood Entities are the ultimate form of corporate insiders, with common ownership and management as Platinum Management and ultimately causing and executing nearly all of the wrongful acts alleged in the First and Second Scheme. So too, the individual Beechwood Defendants are insiders to the exact same extent as Platinum's nominal management.

Moreover, the *Wagoner/in pari delicto* doctrines also do not deprive Plaintiffs of standing to bring an alter ego claim, as the facts necessary to find alter ego liability would necessarily require the defendant to be an insider. *See, Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993); *see generally Ross v. Bolton*, 904 F.2d 819, 824 (2d Cir. 1990); *In re Alper Holdings USA, Inc.*, 398 B.R. 736, 760 (S.D.N.Y. 2008) (*in pari delicto* defense does not apply

where the essential element of the claim is that the defendant forced the claimant to act for the benefit of the alter ego [shareholder] through domination and control) (citing *Kalb*).

B. Each of the Moving Defendants that has Raised *Wagoner/In Pari Delicto* Is an Insider or an Alter Ego of an Insider

Plaintiffs allege specific facts in the SAC showing how each of the Beechwood Movants, the Huberfeld Family Foundation, Michael Nordlicht, Kevin Cassidy and Michael Katz used their positions of authority, influence and control to cause PPVA to engage in non-commercial transactions to inflate NAV and eventually loot PPVA. The facts underlying the claims against these Defendants hinge on their status as insiders of Platinum Management. This is particularly true as to the Beechwood Movants. Indeed, the only claims that the Beechwood Movants did not move to dismiss are Plaintiffs' alter ego claims, which means that for purposes of this motion a *prima facie* alter ego relationship between Platinum and Beechwood may be presumed, such that *in pari delicto* is simply not applicable to Platinum and Beechwood insiders. The following is a non-exhaustive summary of the allegations set forth against the Moving Defendants, which demonstrate their insider status:

- **Beechwood Entities**[3] -- The Second Amended Complaint includes detailed allegations of how the Beechwood Entities are alter egos of Platinum Management, the general partner and investment manager of PPVA, and are thus insiders. The Beechwood Entities were conceived of and functioned as the alter ego of Platinum Management for the wrongful purpose of implementing the First and Second Schemes, and Beechwood and PPVA's assets were commingled to an incredible degree at remarkable levels of value. The Beechwood Entities are the purported "counterparties" to the non-commercial, insider transactions detailed in the Second Amended Complaint, by which Platinum Management was able to artificially inflate PPVA's NAV and eventually transfer or encumber PPVA's assets for the benefit of Beechwood and to the detriment of PPVA, all while Platinum Management and Beechwood were beneficially owned by the same persons. The

[3] For purposes of this Opposition Brief, Beechwood Entities includes: 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.

majority ownership in and ultimate control of Beechwood was in fact held by Nordlicht, Huberfeld, Bodner and Levy, who also owned and controlled Platinum Management. The Platinum Defendants established Beechwood while working out of Platinum Management's offices, using its own counsel to create the Beechwood reinsurance company structure. Beechwood's investment professionals were simply a revolving door of Platinum Management personnel, including Nordlicht, Huberfeld, Bodner, Levy, Saks, Manela, Ottensoser, Steinberg, Beren, Rakower and others, many of whom worked at Platinum Management at the same time they also worked at or exercised control over the Beechwood Entities. It would be hard to state a more clear cut case for application of the alter ego doctrine. (SAC ¶¶ 344-399).

- **Scott Taylor and Mark Feuer** – Taylor, Feuer and David Levy founded Beechwood together with Nordlicht, Bodner and Huberfeld. Taylor, Feuer and Levy were the original public face of Beechwood, and Taylor and Feuer remained with Beechwood at all relevant times. Taylor and Feuer (through trusts) owned common stock in Beechwood and had managerial authority over Platinum Management's Beechwood alter ego. From 2013 through 2016, Taylor and Feuer were directly involved in the day-to-day conduct that comprised the First and Second Schemes. Taylor and Feuer, along with Nordlicht, Levy, Huberfeld and Bodner, developed a scheme to create Beechwood as a way to generate capital in a new business venture that they could use for their personal benefit to, among other things, allocate to themselves an ever increasing share of PPVA assets. From within Platinum Management's Beechwood alter ego, they orchestrated non-commercial transactions, such as the Golden Gate Note Purchase, the Black Elk Scheme, the Montsant transactions, the Nordlicht Side Letter, the March 2016 Restructuring and the Agera Transactions. Feuer himself signed the Nordlicht Side Letter, one of the most brazen examples of looting of PPVA in connection with the Second Scheme, as a witness. Taylor worked directly with David Levy and Platinum Management's counsel to create the Beechwood structure. (SAC at ¶¶ 28, 193-203, 347, 377-383).

- **Dhruv Narain** – Narain became a senior executive with the Beechwood Entities no later than January 2016, and was instrumental in the execution of certain transactions comprising the Second Scheme, including the March 2016 PPVA Restructuring (including execution of the Master Guaranty), the 2016 Montsant Transaction, matters involving PEDEVCO during 2016, and the Agera Transactions. Narain was one of the primary persons who orchestrated the terms of the March 2016 Transaction and the Agera Transactions, and exerted control over PPVA and its subsidiaries in connection therewith. Narain was aware of the true value of Agera, having obtained third party valuation reports about that company. Narain worked with other insiders to transfer ownership and control of Agera to the Beechwood Entities. Narain held ownership interests and control in certain of the Beechwood Entities. Narain is the signatory on several of the transaction documents used to "paper" the Second Scheme, including the agreements comprising the Agera Transactions. (SAC ¶¶ 205-208, 388, 433, 606, 631, 646).

- **Illumin Capital Management LP** – Illumin is owned and controlled by Dhruv Narain, who joined Beechwood in January 2016. Illumin acted as an investment advisor to Beechwood during the course of the Second Scheme, overseeing and implementing the Agera Transactions, including the January 2017 transaction by which Beechwood transferred to PPVA's subsidiary a collection of worthless debt interests in exchange for $34 million worth of Class C membership interests in AGH Parent. Illumin exerted influence and control over the Beechwood Entities and substantially assisted with the looting and stripping of PPVA's assets. (SAC ¶ 222, 663-669)

- **Huberfeld Family Foundation** – As discussed in detail below, the Huberfeld Family Foundation is the alter ego of both Murray Huberfeld, the co-founder of Platinum, and Platinum Management, PPVA's general partner and investment manager. The SAC alleges that: (1) the "Foundation and Platinum Management have overlapping ownership, management and control;" (2) the Foundation "was operated by Platinum Management from the same offices;" and (3) "ultimate decision making for both Platinum Management and the … Foundation rested, in part, with Huberfeld." Huberfeld "is the president, director and official signatory for the Foundation," the "day-to-day administration of the Foundation was handled by the Platinum Defendants and other Platinum Management employees from the offices of Platinum Management," and that Huberfeld controlled the Foundation. The Foundation listed its address as 152 West 57th Street, the same address as Platinum Management. Huberfeld, as President of the Foundation, approved millions of dollars of "loans" made to businesses, not charitable organizations, that were insiders or affiliated investors and friends of Huberfeld and other principals of Platinum Management. The mere approval of these "loans," standing alone, demonstrates that Huberfeld dominated and controlled the Foundation. The SAC further alleges that "at the direction of Murray Huberfeld and Platinum Management, the Huberfeld Family Foundation was one of the Preferred Investors of the BEOF Funds in connection with the siphoning of nearly $100 million in funds out of Black Elk in connection with the Renaissance sale, all the while allowing PPVA and its subsidiaries to face the consequences in the form of substantial creditor claims and the total devaluation of the Black Elk bonds that would be repurchased by PPVA via Montsant." The Black Elk Scheme, as described in the SAC, was a fraud by Platinum Management and Huberfeld "that harmed PPVA and benefitted the Huberfeld Family Foundation." (SAC ¶ 145-157, 175, 1032-1040).

- **Kevin Cassidy** – After Cassidy's release from prison in connection with the collapse of the Nordlicht-affiliated Optionable, Inc., Nordlicht, Bodner and Huberfeld installed Cassidy as the managing director of Agera Energy, a subsidiary of PPVA by virtue of the convertible Agera Note. Cassidy had knowledge of certain Second Scheme Transactions and exerted control over PPVA's Agera subsidiary in connection with the Agera Transactions. Cassidy worked with Platinum Management and the other insiders to transfer ownership and control of Agera to the Beechwood Entities. Cassidy was installed at Agera although having no prior experience in the energy sector. Cassidy and his counsel worked with Platinum

insiders to create the mechanism by which 8% of the Agera purchase price was paid to an entity set up by Cassidy to avoid having taxes withheld from such payment. Michael Nordlicht and Kevin Cassidy actively participated in the "negotiation" and closing of the Agera Transactions, with actual knowledge of the deflated sale price and that Beechwood would be paid substantial fees from the closing. (SAC at ¶¶ 129-133, 208, 616-618, 632, 635-636); *In re Alper Holdings USA, Inc.*, 398 B.R. 736, 760 (S.D.N.Y. 2008) (barring application of the in pari delicto defense to dispute between parent and subsidiary, and their officers and managers) (citing *Kalb v. Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130 132-133 (2d Cir. 1993)).

- **Michael Nordlicht** – Mark Nordlicht installed his nephew Michael Nordlicht as in-house counsel for Agera. Prior to the Agera Transactions, Michael Nordlicht held a 95.01% indirect equity interest in Agera Energy. Michael Nordlicht participated in and helped facilitate the closing of the Agera Transactions, to the detriment of PPVA. Michael Nordlicht did not pay anything for the equity he held in Agera Holdings. According to his LinkedIn profile, he graduated from Georgetown University Law Center in 2012 and then he worked a few months as a law clerk for the Public Defender's office in Baltimore, Maryland. He also was an associate attorney for about eight months at the Maryland Attorney General's office in the Department of Public Safety and Correctional Services. In or about late 2013, Nordlicht installed his nephew as the general counsel of Agera Energy, despite the fact that he appears to have had no prior experience in private practice or in the energy sector. Michael Nordlicht worked with Platinum Management and the other insiders to transfer ownership and control of Agera to the Beechwood Entities. Michael Nordlicht and Kevin Cassidy actively participated in the "negotiation" and closing of the Agera Transactions, with actual knowledge of the deflated sale price and that Beechwood would be paid substantial fees from the closing. (SAC ¶¶ 121-122, 616-618, 622-626); *Alper*, 398 B.R. at 760.

- **Michael Katz** – Katz is the grandson of Marcos Katz, a significant investor in PPVA. In 2015, Marcos Katz sought to redeem his investment in PPVA but there was not sufficient funds to honor this request. Instead, Nordlicht, Huberfeld, Bodner and Fuchs offered Marcos Katz the opportunity to exchange his investment in PPVA for an interest in Platinum Management and certain other consideration. As part of the proposed deal, Marcos Katz was offered the opportunity to appoint a representative to oversee his interests. Michael Katz, Marcos Katz's grandson, began taking an active role at Platinum Management beginning in or about January 2016. Michael Katz knew Nordlicht, Levy, Huberfeld, Bodner and Fuchs before he began representing his grandfather's interests in 2016. In fact, Katz and Levy previously had invested in an energy company that was merged into Agera in 2014, during the startup phase of that business. By March 2016, Katz began formally advising Platinum Management in connection with the Second Scheme, and, in particular, the Agera Transactions. In March 2016, Katz conspired with Nordlicht, Levy and other Platinum Defendants to develop the plan to transfer PPVA's interest in Agera Energy to an "insider." Katz had knowledge of certain Second Scheme Transactions and exerted control over PPVA and its subsidiaries in connection with such Second Scheme Transactions. In March 2016, Nordlicht introduced Katz as

an advisor to Platinum Management to oversee the final stages of the Second Scheme. (SAC ¶¶ 124-128, 607-610).

- **Daniel Saks** – Beginning in March 2014, Saks was a portfolio/investment manager with oversight and control over numerous PPVA investments. During his tenure with Platinum Management, he was marketed as the co-CIO of Platinum Partners, along with Mark Nordlicht. Saks became responsible for overseeing and managing PPVA's bio/pharma investments in companies including Advaxis Inc., Angiolight, Inc., Echo Therapeutics Inc., FluoroPharma, Navidea Biopharmaceuticals Inc., NewCardio Inc., Urigen Pharmaceuticals Inc., and Vistagen Therapeutics Inc., and previously was involved with overseeing the investment in Golden Gate Oil. During 2014, Saks began working for Platinum Management's Beechwood alter ego, eventually serving as Chief Investment Officer and then President of B Asset Manager LP during and after 2015. Daniel Saks replaced David Levy in his executive position at Beechwood. Saks used his position of control to execute or negotiate various transactions at the heart of the First and Second Schemes, including the January 2015 Montsant Loan, various refinancings of Golden Gate Oil and transactions in connection with the Black Elk Scheme. (SAC ¶¶ 12(xii), 188-192, Pl. Ex. 7-10).

The foregoing detailed allegations in the SAC clearly show that each of the Moving Defendants exerted sufficient control to be deemed insiders, and that *Wagoner/in pari delicto* therefore does not apply to Plaintiffs' claims against them.

C. While the Court Need Not Reach the Issue on the Motions Presented, the Adverse Interest Exception also Applies to this Case

Even if these Moving Defendants were not insiders, Plaintiffs would still have standing to bring their claims as the adverse interest exception applies to the tortious conduct alleged in the SAC.

It is well settled that the *in pari delicto* fails and the conduct of an entity's agent will not be imputed to the entity when the agent at issue is acting in his or her own interests and adversely to the interests of the entity. *See, e.g., Center v. Hampton Affiliates*, 488 N.E.2d 828, 829-830 (N.Y. 1985) (stating rule); *Kirschner*, 938 N.E.2d at 951. The exception exists "where the corporation is actually the victim of a scheme undertaken by the agent to benefit himself or a third party personally, which is therefore entirely opposed (i.e., 'adverse') to the corporation's own

interests." *Kirschner*, 938 N.E.2d at 952. The adverse interest exception applies to cases involving looting and embezzlement, "where the insider's misconduct benefits only himself or a third party; i.e., where the fraud is committed against a corporation rather than on its behalf." *Id.* at 952.

From the Black Elk Scheme, whereby PPVA subordinated its own bonds for the benefit of the BEOF Funds, rendering them worthless, to buying back those worthless bonds at full price from Beechwood, to the Second Scheme, where all of PPVA's remaining $300 million in assets were looted, stripped and encumbered by Defendants, this case represents one of the rare "looting and embezzlement" circumstances where the adverse interest exception to *in pari delicto* applies.

Under this exception, a manager's misconduct will not be imputed to a corporation when the manager is defrauding the corporation in concert with a third party – there can be no presumption that the manager has disclosed all material facts to the corporation, as disclosure would defeat the fraud. *Hampton Affiliates*, 488 N.E.2d at 829-830.

The determinative factor is whether the agent's actions provided a benefit to the corporation. Only the short term benefit or detriment is relevant, and "not any detriment . . . resulting from the unmasking of the fraud." *Kirschner*, 15 N.Y.3d at 460, 466-69 (internal citations and quotations omitted).

Here, the consistent theme of the SAC is that, at every juncture, the Defendants favored their own interests over those of PPVA, and that the inevitable outcome of the series of non-commercial transactions comprising the First and Second Schemes was the implosion of PPVA, which entered liquidation purportedly holding assets under management of $800 million but actually had a negative NAV of $400 million.

Solely by way of example, it cannot be credibly claimed that PPVA received ***<u>any</u>*** benefit from the Nordlicht Side Letter, a three paragraph document by which the Platinum and Beechwood

Defendants caused PPVA and its affiliates to guarantee worthless Golden Gate Oil debt for nothing in return. That same Golden Gate Oil debt had been "sold" to Beechwood previously, but with a put option whereby Beechwood could reverse the transaction at any time. Due to this, PPVA or its subsidiaries made all interest payments to Beechwood under the Golden Gate Oil Loan. Both the original Golden Gate Oil loan sale transaction to Beechwood and the Nordlicht Side Letter were executed with full knowledge that Golden Gate Oil had no ability to pay its debt obligations, and that PPVA would be the only source of payment to Beechwood. (SAC ¶¶ 568-583).[4] By itself, the one-page Nordlicht Side Letter purported to "strip" PPVA and its subsidiaries of more than $30 million dollars of its remaining assets.

The adverse interest exception applies to Plaintiffs' claims. Plaintiffs have properly pled facts detailing the transactions comprising the First and Second Schemes. Taken together, these transactions enabled Defendants to loot PPVA's assets, and provided no benefit to PPVA in the form of increased liquidity, the ability to pay redemptions, or an actual increase in the value of its assets.

The SAC alleges in excruciating detail each of the Moving Defendants' involvement in the various transactions that comprise the First and Second Scheme, the benefit they received from those transactions, the detriment caused to PPVA, and the lack of any benefit to PPVA. Taking Plaintiffs' allegations as true, which is required at the dismissal stage, the adverse interest exception applies and the Moving Defendants cannot rely on *in pari delicto* to avoid liability for the wrongful acts set forth in the SAC.

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[4] *See also DMRJ v. BAM*, No. 655181-2017 (N.Y. Sup. Ct. N.Y. Cty.) (Dkt. 37 Ex. A), wherein a motion to dismiss a declaratory complaint by a subsidiary of PPVA that the Nordlicht Side Letter was unenforceable because not even a *peppercorn* of consideration was received was denied as the *total* absence of consideration was properly pled and no consideration is stated on the face of the three paragraph document.

II. THE RICO CAUSE OF ACTION STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED

A. Plaintiffs' RICO Claims Are Not Subject to the PSLRA

The Beechwood Movants and Saks seek dismissal of the RICO claims asserted against them on the ground that such claims are predicated on securities fraud and thus are barred by the Private Securities Litigation Reform Act (the "**PSLRA**") amendment to the Civil RICO statute, 18 U.S.C. § 1964(c). (Dkt. No. 328.) Notably, Saks is named as both a Beechwood Defendant and a Platinum Defendant in the SAC. The Beechwood Movants and Saks misunderstand the parameters of the PSLRA securities fraud exception as well as the basis of the Plaintiffs' RICO claims. Further, the racketeering scheme continued for a period of over two years. As a result, their motion should be denied.[5]

i. Applicable Legal Standard

"RICO is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497 (1985). The Civil RICO statute created a private right of action by "[any] person injured in his business or property by reason of a violation of § 1962." *Id.* at 495. "If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering

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[5] The Platinum and Beechwood Defendants (with the exception of Bernard Fuchs who only challenged the alleged group pleading) previously moved to dismiss the RICO claims in the First Amended Complaint. (Dkt No. 290 at 37-40 & n.9) The Court denied these motions. (*Id.* at 51). In the current round of motions to dismiss, the Beechwood Movants and Saks move to dismiss on PSLRA grounds. While other Defendants seek to join all other Defendants' motions, only the Platinum and Beechwood Defendants are charged with Civil RICO, so the other Defendants logically cannot join in the motion. Defendant David Bodner is a Platinum Defendant, but he expressly does not seek to dismiss any charges related to his alleged misstatements of PPVA's net asset value. (Dkt No. 321)("[D]efendant David Bodner . . . hereby moves this Court . . . for an order dismissing the Second Amended Complaint . . . to the extent it charges Bodner with conduct other than the alleged misstatements of PPVA's net asset value ("NAV") in accordance with this Court's Opinion dated April 11, 2019 . . . .") Defendant Murray Huberfeld adopts Defendant Bodner's motion to dismiss, as well as other moving defendants on the same or similar grounds. (Dkt No. 330). As Defendant Bodner does not challenge any allegations or theories related to the misstatement of the value of the NAV, Defendant Huberfeld similarly makes no such challenge.

activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1962(c)." *Id.* To state a claim under 1962(c), a plaintiff must allege a defendant's "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001) (quoting *Sedima,* 473 U.S. at 496).

Section 1962(1) defines "racketeering activity" as certain criminal acts under state and federal law including mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343). *See* 18 U.S.C. § 1961(1)(B). The statute requires a plaintiff to plead at least two predicate acts to constitute a pattern of racketeering. *Id.* at § 1961(5). "A complaint alleging mail and wire fraud must show (1) the existence of a scheme to defraud, (2) defendant's knowing and intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme." *S.Q.K.F.C., Inc. v. Bel Atl. TriCon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996).

The Beechwood Movants and Saks only challenge the Plaintiffs' RICO claims on one ground: that they fail to meet the racketeering activity element because the predicate offenses alleged in the Second Amended Complaint are barred by the PSLRA. Section 107 of the PSLRA precludes a plaintiff only from "rely[ing] upon any conduct that would have been actionable as fraud *in the purchase or sale of securities* to establish a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). By necessity, the converse is also true: conduct that is not "actionable" as securities fraud may be alleged as the factual basis for predicate acts supporting a RICO claims. *See Kayne v. Ho*, 2012 WL 12878753, at *34-36 (C.D. Cal. Sept. 6, 2012) ("[T]he PSLRA does not bar reliance on all predicate acts pertaining to securities, only reliance on those acts that would have been actionable by some party."); *Monterey Bay Military Hous., LLC v. Ambac Assurance Corp.,* No. 17-cv-04492-BLF, 2018 WL 3439372, at *8 (N.D. Cal. July 17, 2018) ("Defendants

have not cited, and the Court has not discovered, any case applying the PSLRA bar absent a determination that the conduct underlying the RICO claims would have been actionable as securities fraud. To the contrary, the cases make clear that "the PSLRA does not bar reliance on all predicate acts pertaining to securities, only reliance on those acts that would have been actionable by some party." (citation omitted)).

Properly read as a whole, Plaintiffs' RICO claims do not rely on any conduct that is actionable as securities fraud. Actionable securities fraud requires a defendant to have, at a minimum: "(1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Boock*, No. 09 Civ. 8261, 2011 U.S. Dist. LEXIS 95363, 2011 WL 3792819, at *21 (S.D.N.Y. Aug. 25, 2011). The "in connection with" requirement is critical; conduct unrelated to the purchase or sale of securities cannot give rise to actionable securities fraud, and consequently, cannot support the application of the PSLRA bar. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277, n.11 (2d Cir. 2011) (noting the proposition that a court must ask "not whether a plaintiff can state a claim under a non-securities related predicate act, but whether the allegations that form the basis of [the non-securities-related] predicate act occur 'in connection with' securities fraud'") (quoting *Sell v. Zions First Nat'l Bank*, No. CV-05-0684, 2006 WL 322469, at *10 (D. Ariz. Feb. 9, 2006)); *Bald Eagle Area Sch. Dist. v. Keystone Fin.*, 189 F.3d 321, 329-30 (3d Cir. 1999) (asking whether the alleged conduct "undertaken to keep a securities fraud Ponzi scheme alive" was conduct "undertaken in connection with the purchase and sale of securities" such that the PSLRA bar applied).

To occur "in connection with" a purchase or sale of a security, the fraudulent misrepresentation or omission must be "material to a decision by one or more individuals (other

than the fraudster) to buy or to sell a covered security." *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1066 (2014) (internal quotation marks omitted); *Leykin v. AT&T Corp.*, 423 F. Supp. 2d. 229, 241 (S.D.N.Y. 2006) (finding that for the PSLRA to apply, "the fraud itself must be integral to the purchase and sale of the securities in question"). "Conduct that is merely incidental or tangentially related to the sale of securities will not meet [this] standard." *Id.*

By the same token, the SAC alleges a closed-ended scheme, that is, one comprising a "series of related predicates extending over a substantial period of time." *H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 242 (1989). The requisite period of time to find closed-ended continuity is at least two years. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2d Cir. 2004). The scheme at issue extends far longer.

ii. The RICO Allegations in the Second Amended Complaint – the First and Second Schemes

The Civil RICO claims in the SAC are premised on the Platinum Defendants' and the Beechwood Defendants' coordinated and continuous scheme to first overvalue, and then strip PPVA of its assets. These defendants executed their scheme by repeatedly misrepresenting PPVA's true NAV, and, when it became clear PPVA was no longer viable, by transferring or encumbering its assets for the benefit of insiders and to the detriment of PPVA. These fraudulent transfers and encumbrances, occurring throughout the First and Second Schemes, were made without adequate consideration and injured PPVA.

The SAC contains over 1,000 well-pled allegations, nearly all of which detail the ways in which the Platinum and Beechwood Defendants engaged in a corrupt agreement to carry out the First and Second Schemes and the predicate acts taken by each of them in furtherance of these schemes. The SAC contains details of actions by each defendant in furtherance of the conspiracy

and explains how those acts enabled the conspiracy to proceed. It also explains how the conspiracy damaged PPVA.

As set forth in the SAC, for the First Scheme, during "the period from 2012 through 2015, the Platinum Defendants reported that PPVA 'experienced' annualized returns of between a maximum of 11.6% and a minimum of 7.15%, and reported that the net value of its assets under management for PPVA had increased steadily from $688 million until they reached $789 million as of October 1, 2015, *awarding themselves partnership distributions, fees and other compensation based on these results*." (SAC, ¶ 29; *see* SAC, ¶¶ 259-261). However, the reported NAV was, in fact, overinflated as a result of incidents occurring at the fund's two largest investments:

> Given the impact that the Black Elk and Golden Gate Oil business losses would have had on PPVA's NAV if reported accurately, PPVA should have been liquidated in 2013. Indeed, forty percent of PPVA's total portfolio was worth far less than reported.

(SAC, ¶ 24; *see* ¶¶ 313-343). "In order to justify charging PPVA for increasing partnership distributions and other fees, the Platinum Defendants had to keep up the pretense that PPVA's NAV was steadily increasing." (SAC, ¶ 344). Thus, "Nordlicht, Huberfeld, Levy and Bodner, together with Feuer and Taylor, developed a scheme to create Beechwood as a way to generate capital in a new business venture that they could use for their personal benefit to, among other things, *allocate to themselves an ever increasing share of PPVA assets*." (SAC, ¶ 347 (emphasis added))

"As a result of Defendants' actions, *hundreds of millions of dollars were diverted from PPVA*, PPVA's remaining assets lost value or were purportedly encumbered, and tort and contract claims crystalized against PPVA – all under circumstances where master funds like PPVA are supposed to hold zero or minimal debt." (SAC, ¶ 24; *see* ¶ 262 (emphasis added)).

"Immediately after the Beechwood Entities gained access to the first reinsurance trust assets, the Platinum Defendants and the individual Beechwood Defendants caused PPVA to enter into numerous non-commercial transactions with the Beechwood Entities and, in some cases, to co-invest with the Beechwood Entities in third-party companies." (SAC, ¶ 400). "The prices at which assets/loans were bought and sold *were used to support the Platinum Defendants' valuations of the relevant equity*, debt or investment." (SAC, ¶ 401 (emphasis added)).

However, "[t]hese were not real market transactions in which prices are established as a result of arm's-length negotiations." (SAC, ¶ 402). "In some cases the First Scheme Transactions *were used to justify ever-increasing valuations of the underlying assets as reported by Platinum Management*." (SAC, ¶ 405 (emphasis added)). "Platinum Defendants used First Scheme Transactions in which significant loans were extended/purchased or investments made by a "third party," *i.e*., the Beechwood Entities, *as evidence of the validity of the Platinum Defendants' "estimate" as to the true enterprise value* of the underlying company." (SAC, ¶ 408 (emphasis added)). These were not transactions "in connection with securities" from the vantage of PPVA – this was the looting of PPVA by PPVA's own general partner and its alter ego Beechwood.

After the First Scheme began to fall apart and became unsustainable, the Platinum and Beechwood Defendants conspired to commence the Second Scheme, "engaging in an intentional scheme to transfer or encumber nearly all of the Remaining PPVA Assets to or for the benefit of the Platinum Defendants, the Beechwood Defendants, PPCO and select insiders of the Platinum Defendants, and to the detriment of PPVA." (SAC, ¶ 552). "On June 8, 2016, the United States Attorney's Office for the Southern District of New York filed criminal charges against Huberfeld in connection with a bribery scheme by which Huberfeld used PPVA funds to pay kickbacks to a New York City Correction Officer's Union official." (SAC, ¶ 280). In May 2018, Huberfeld pled

guilty to one count of conspiracy to commit wire fraud related to the bribery of the Correction Officers Benevolent Association official for the benefit of obtaining additional investments in the PPVA and increasing its value. (SAC, Ex. 1). This, in turn, would increase the management fees received by the Platinum Defendants.

"On June 14, 2016, Nordlicht announced on an investor call that Platinum Management had decided that PPVA *would stop taking in new investors* and all PPVA investments would be unwound and liquidated." (SAC, ¶ 281). However, up to the day PPVA filed its winding up petition in the Grand Court of the Cayman Islands, the Defendants continued to enter into agreements, including amending promissory notes to strip PPVA of its assets. (*See, e.g.,* SAC, ¶ 760).

During the course of the First and Second Schemes, each of the Platinum Defendants engaged in an effort to misrepresent PPVA's NAV, misdirect the proceeds of the Black Elk sale, and transfer or encumber the last, good assets of PPVA via direct, consideration-less asset transfers or guarantees, preferential security interests and liens, an intentionally wrongful "restructuring" and "sale" of PPVA's most valuable remaining asset (Agera), which had been valued in excess of $300 million, for less than $60 million in instantly dissipated cash and other, near worthless consideration, all while stating outwardly to PPVA and its administrator, SS&C, that the NAV of PPVA was approximately $800 million (when in fact the NAV was negative $400 million).

To execute the First and Second Schemes, "[e]ach of the Platinum Defendants and Beechwood Defendants, *through the association-in-fact enterprise*, engaged in two or more acts constituting indictable offenses under 18 U.S.C. Sections 1341 and 1343 in that they devised or intended to devise a scheme or artifice to defraud PPVA, and to obtain money and property from PPVA, through false pretenses, representations, and promises." (SAC, ¶ 977 (emphasis added)).

"To execute their scheme or artifice, the Platinum Defendants and Beechwood Defendants caused delivery of various documents and things by the U.S. mails or by private or commercial interstate carriers, or received such therefrom and transmitted or caused to be transmitted by means of wire communications in interstate or foreign commerce various writings, signs, and signals." (SAC, ¶ 977).

iii. <u>The Predicate Offenses were not Actionable Securities Fraud and Continued for A Period Longer than Two Years</u>

None of the predicate acts of wire fraud or mail fraud detailed in the Second Amended Complaint give rise to actionable securities fraud. Further, the closed-ended scheme continued for more than two years. As a result, the Beechwood Defendants' motion to dismiss the RICO claims should be denied.

Predicate acts are detailed in the Second Amended Complaint and include wiring funds and communications that planned, carried out, and hid the actions comprising the First Scheme, which inflated the NAV to allow the Platinum defendants to receive unearned management fees. It also involved communications and a letter that planned, carried out, and hid the Second Scheme, which stripped PPVA of its assets to benefit of the Platinum and Beechwood Defendants.[6]

None of these acts were "in connection with" a purchase or sale of a security, as none of the fraudulent misrepresentations or omissions were "material to a decision by one or more individuals (other than the fraudster) to buy or to sell a covered security." *Chadbourne & Parke LLP*, 134 S. Ct. at 1066. The fraudulent misrepresentations or omissions were, instead, relevant

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[6] In addition, Defendant Huberfeld's guilty plea and conviction to one count of conspiracy to commit wire fraud also counts as a predicate offense. While it was related to attempting to obtain additional outside investors, the PSLRA's bar "does not apply to an action against any person that is criminally convicted in connection with the fraud." 18 U.S.C. § 1964(c). Here, PPVA was a victim of Huberfeld's fraud detailed in his indictment and conviction, as Huberfeld stole $60,000 from PPVA to bribe the official, so Huberfeld's wire fraud conviction further serves as a predicate act.

to inflating the NAV in order for the Platinum Defendants to fraudulently enrich themselves through unearned management fees. Similarly, the stripping of PPVA's assets in the Second Scheme was run by and benefited the Platinum and Beechwood Defendants, and was never material to a decision by any individuals (other than the fraudsters) to buy or sell a covered security. In sum, the Plaintiff in this case is PPVA – a partnership – and the relevant conduct did not concern the buying or selling of securities, but the looting of the partnership by that partnership's general partner, Platinum Management, its alter ego, Beechwood and the persons who were insiders of and controlled those entities, including Saks.

This position is entirely consistent with the Court's April 22, 2019 decision in the *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.* Action ("**SHIP Action**"). In the SHIP Action, SHIP argued that a RICO enterprise existed with certain of the Beechwood Defendants, and the "object of the criminal enterprise was to entice SHIP to part with its money." No. 18-cv-6658 (JSR), Opinion dated Apr. 22, 2019, at *21-22 (S.D.N.Y. Apr. 22, 2019). The Court concluded that the participants obtained the funds from SHIP precisely for the purpose of acquiring the securities, and the fraud coincided with the securities transactions, so the PSLRA applied. *Id.* at *22. The Court found that it was similar to the situation in *Picard v. Kohn*, where the allegation was that multiple defendants were "attracting investors to supposed diversified investment funds that, in reality, did nothing more than feed money into Madoff Securities." *Id.* (quoting *Picard v. Kohn*, 907 F. Supp. Ed 392, 396 (S.D.N.Y. 2012)). The Court concluded that "SHIP's 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." *Id.* at *23.

In reaching its decision, the Court contrasted SHIP's allegations against factual situations in which the PSLRA would not apply. The Court, importantly, noted that "[t]he only allegations

to which this [PSLRA] bar arguably does not apply are the allegations that defendants misrepresented the market value of SHIP's assets in connection with defendants' regular withdrawal of performance fees." *Id.* at *24. While these allegations in the SHIP Action were sufficient predicates, the complaint only alleged that the defendants' withdrawals took place over only 22 months, which is less than the two years required, so they were ultimately found to be an insufficient period to establish a pattern. *Id.*

While SHIP's RICO claims were based on the use of funds it invested to purchase securities, Plaintiffs' RICO claims in this case are based on (1) the Platinum Defendants misrepresenting the value of PPVA's assets, so as to inflate PPVA's NAV and take excessive fees during the First Scheme; and (2) after the First Scheme started to collapse, the Platinum and Beechwood Defendants engaging in the Second Scheme, stripping PPVA of its assets for their personal gain.

Actions such as those constituting the First Scheme were recognized by the Court in the SHIP Action as *not* being prohibited by the PSLRA as the basis for a RICO claim. As discussed above, the misrepresentations concerning PPVA's NAV made during the First Scheme continued for a period of over two years, continuing from a period of at least 2012 through 2015. Similarly, the Second Scheme was not "in connection with" a purchase or sale of a security, as none of the fraudulent misrepresentations or omissions were "material to a decision by one or more individuals (other than the fraudster) to buy or to sell a covered security." The assets stripped from PPVA were not funds being sought from investors for the purchase of securities. They were existing assets of PPVA that the Platinum and Beechwood Defendants stripped to benefit themselves after they realized the First Scheme could not continue.

As the predicate acts are not actionable securities fraud, and continued for a period of over two years, the PSLRA bar does not apply. As a result, the RICO claims in the Second Amended Complaint are sufficiently pled, and the Beechwood Movants and Saks' motion to dismiss the RICO claims as to them should be denied.

B. **The Plaintiffs' RICO Claim Sufficiently Pleads Predicate Offenses Against Defendant Estate of Uri Landesman**

Defendant Estate of Uri Landesman argues that the Plaintiffs failed to plead any predicate acts supporting a RICO claims against it individually, instead improperly relying on group pleadings. (Dkt No. 299). Defendant Landesman further argues that the racketeering schemes and predicate offenses described do not constitute wire or mail fraud. As these arguments are an untimely attempt for reconsideration of the Court's April 2019 Decision denying the same arguments made in the first round of motions to dismiss, it should similarly be rejected here.

i. **The Group Pleading and Particularity Arguments Previously Raised in the First Round of Motions to Dismiss**

In his Motion to Dismiss the First Amended Complaint, Defendant David Bodner argued that:

> Likewise, the Seventeenth Count, for civil racketeering, fails to allege with requisite particularity that Bodner engaged in predicate acts of mail fraud and wire fraud sufficient to constitute a pattern of racketeering activity. *See Lundy v. Catholic Health Sys. Of Long Island, Inc.*, 711 F.3d 106, 119 (2d Cir. 2013). *The FAC refers to various emails in an effort to support predicate RICO acts, but Bodner is not the author or recipient of a single one of these emails.* (FAC ¶ 962). The FAC fails to allege any facts that show that Bodner directed any of these communications. The conclusory declaration that "[e]ach of these communications [was] by or on behalf of the Platinum Defendants and Beechwood Defendants" (FAC ¶ 962) *fails to identify Bodner's involvement in any predicate fraudulent conduct, and the FAC alleges no facts that show that Bodner had any fraudulent intent in connection with these alleged acts.* The RICO count must be dismissed as to Bodner.

(Dkt. No. 183 at 6 (emphasis added)) Defendant Estate of Uri Landesman filed a Motion to Dismiss the First Amended Complaint, adopting Defendant Bodner's Motion, including his RICO argument, and separately arguing that:

> The allegations against the Estate of Uri Landesman ("Landesman"), which is alleged to be one of the Platinum Defendants as defined in the First Amended Complaint, *rely entirely on impermissible group pleading that fails to satisfy the standards of Federal Rules of Civil Procedure 8 and 9(b).* Indeed, the FAC *fails to allege any facts against Landesman* and instead relies entirely on vague allegations of "sourcing investment opportunities, meeting with and marketing to important investors and developing investment and business strategy." (FAC ¶ 60.)

(Dkt. No. 207 (emphasis added)).

In their opposition to the motions, Plaintiffs explained that the First Amended Complaint includes specific allegations tying Defendant Landesman to the RICO scheme:

> With regard to Landesman, the Amended Complaint alleges, inter alia, that he was an owner of and the President of Platinum Management and that he was responsible for attracting investment, deploying investment capital and stating the purported NAV to the PPVA partnership. It alleges that he was a member of the risk and valuation committees, and *so was directly responsible for evaluating and determining the value of PPVA's assets and investments and communicating same.* In spite of his direct knowledge of PPVA's liquidity issues and the Platinum Defendants' misrepresentation of PPVA's NAV, he routinely misrepresented PPVA's financial condition. Am. Compl. ¶¶ 12(ii), 55-66.
>
> . . .
>
> The Amended Complaint properly pleads with the requisite particularity the RICO Movants' participation in the unlawful enterprise. For all of these reasons, the RICO Movants' motion to dismiss the RICO claim as to them should be denied.

(Dkt No. 222 at 33-34 (emphasis added)).

ii. The Court Denied the Group Pleading and Particularity Arguments Previously Raised in the First Round of Motions to Dismiss

The Court's April 2019 Decision denied Defendant Landesman's RICO group pleading and "particularity" arguments, finding that Plaintiffs sufficiently pled mail and wire fraud factual predicates:

> Uri Landesman is a Platinum Defendant but not a Beechwood Defendant. . . . The FAC alleges that the Platinum and Beechwood Defendants worked closely to orchestrate both the First and Second Schemes.
>
> . . .
>
> The following excerpts from the FAC highlight some of the relevant allegations against each of the moving Platinum and Beechwood Defendants:
>
> [Landesman] held the title President of Platinum Management. Together with [Mark] Nordlicht, he served as co-chief investment officer of PPVA, *responsible for all trading, asset allocation and risk management on behalf of PPVA*, and was a member of both the valuation and risk commit tees. Landesman was a member of Platinum Management and *remained involved in developing strategy for managing PPVA's liquidity issues and seeking out new investors even after his resignation in 2015.*
>
> . . .
>
> Bodner filed the primary motion to dismiss on behalf of the Platinum and Beechwood Defendants, and the other moving defendants have either joined Bodner's motion or incorporated Bodner's arguments by reference in their own motions. *All defendants argue, as a threshold matter, that the FAC impermissibly lumps them together and fails to meet even Rule 8's notice pleading requirements, let alone the heightened Rule 9(b) standard that applies to the FAC's fraud-based claims.*
>
> . . .
>
> Each of the Platinum Defendants, [] is alleged to have been a high-level corporate insider, and it is therefore appropriate to charge them with the misstatements of PPVA's NAV. They are not a random assortment of low-level functionaries. *Instead, they are precisely the kind of "narrowly defined group of highly ranked officers or*

directors" that the group pleading doctrine contemplates. Elliott Assocs., 141 F. Supp. 2d at 354.

Finally, with respect to Landesman, the FAC alleges that:(1) he was President of Platinum Management and co-CIO of PPVA, *id.* ¶ 56; (2) he "shared responsibility with [Mark] Nordlicht for all trading, asset allocation and risk management on behalf of PPVA," *id.* ¶ 57; (3) he "was a member of the risk committee, and in that capacity was responsible for assessing the risks associated with PPVA's investments, which was a significant factor in determining value," *id.* ¶ 58; (4) he was also a member of the valuation committee and "was responsible for assessing the actual value of PPVA's investments and reporting such values so that PPVA's NAV could be accurately determined and any fees and other charges accurately calculated," *id.* ¶ 59; (5) he "was involved with sourcing investment opportunities, meeting with and marketing to important investors and developing investment and business strategy for PPVA and its investments," *id.* ¶ 60; and (6) he "was responsible for marketing PPVA on behalf of Platinum Management, and making representations concerning PPVA's NAV and the status of its various investments," *id.* ¶ 63.

The Court *concludes based on the foregoing that the FAC "allege[s] facts indicating that [each] defendant was a corporate insider, with direct involvement in day-to-day affairs, at" Platinum Management. In re Alstom SA*, 406 F. Supp. 2d at 449. Even Bodner's memorandum - which the other moving defendants join or incorporate - *explicitly concedes that Landesman, Levy, and Ottensoser had day-to-day roles at Platinum Management.* Bodner MTD 8.

. . .

Here, plaintiffs have alleged myriad facts that give rise to a strong *inference of fraudulent intent for each of the moving Platinum Defendants.*

. . .

Landesman is alleged to have been an owner of Platinum Management, co-CIO of PPVA, a member of the risk and valuation committees, and one of the people responsible "for all trading, asset allocation and risk management on behalf of PPVA." *Id.* ¶¶ 56-61. . . .

> These facts are only a portion of those alleged in the FAC, but they *are sufficient by themselves to "give rise to a strong inference of fraudulent intent." Shields*, 25 F.3d at 1128. Moreover, since there is *no dispute that PPVA justifiably relied on Platinum Management's misstatements of its NAV, or that PPVA was damaged by the payment of inflated performance fees, plaintiffs have stated a claim for fraud against the Platinum Defendants. . . .*
>
> Furthermore, *because the moving defendants' arguments for dismissing plaintiffs' RICO claim essentially mirror their arguments for dismissing plaintiffs' fraud claim, see Bodner MTD 13, the Court denied the Platinum Defendants' motions to dismiss the Seventeenth Count as well.*

(Dkt No. 290 at 37-51 (emphasis added)).

iii. <u>Defendant Landesman Merely Reiterates the Group Pleading and Particularity Arguments that Were Previously Rejected, and Should Be Rejected a Second Time</u>

Defendant Landesman reiterates the same arguments it already made, which were considered and rejected by the Court in its April 2019 Decision. The Court should again deny these arguments for the same reason. Landesman, the President of Platinum Management, was a high-level corporate insider with direct involvement in day-to-day affairs, and so it is appropriate to charge Landesman with the misstatements of PPVA's NAV. Landesman is alleged to have been an owner of Platinum Management, co-CIO of PPVA, a member of the risk and valuation committees, and one of the people responsible for all trading, asset allocation and risk management on behalf of PPVA.

As set forth in the SAC, "[e]ach of the Platinum Defendants and Beechwood Defendants, **through the association-in-fact enterprise**, engaged in two or more acts constituting indictable offenses under 18 U.S.C. Sections 1341 and 1343 in that they devised or intended to devise a scheme or artifice to defraud PPVA, and to obtain money and property from PPVA, through false pretenses, representations, and promises." (SAC, ¶ 977 (emphasis added)).

"An association of individuals can be an enterprise if it is formed for the purpose of engaging in any type of illicit activity . . . and it need not have any existence apart from the predicate acts committed by its employees and/or associates." *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 305 (S.D.N.Y. Feb. 19, 2010) (more than "parallel conduct required"). An "association-in-fact" enterprise is "'a group of persons associated together for a common purpose by engaging in a course of conduct' which is 'proved by evidence of ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *De Silva v. North-Shore-Long Island Jewish Health Sys., Inc.*, 770 F. Supp. 2d 497, 528 (E.D.N.Y. 2011) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

In analyzing whether a plaintiff has sufficiently pled an association-in-fact enterprise, courts "look to the 'hierarchy, organization, and activities' of the association to determine whether 'its members functioned as a unit.'" *First Capital Asset Mgmt. v. Satinwood*, 385 F.3d 159, 174-75 (2d Cir. 2004). An enterprise must have (1) a common purpose, (2) "relationships among those associated with the enterprise" and (3) enough longevity "to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009).

A person is liable under Section 1962(c) if he or she "conduct[ed] or "participate[d] . . . in the conduct of the enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). This standard, often referred to as the "operation or management test," requires each defendant to have had "some part in directing the enterprise's affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). The "operation or management" test is a "low hurdle" at the pleading stage. *Maersk, Inc. v. Neewra, Inc.*, 687 F. Supp. 2d 300, 335 (S.D.N.Y. 2009). "RICO liability is not limited to those with primary responsibility for the enterprise's affairs." *Id.* at 335 (quoting *United States v. Diaz*, 176 F.3d 52, 93 (2d Cir. 1999)). Instead, a defendant "must have some part

in directing the enterprise's affairs." *Palatkevich v. Choupak*, No. 12 Civ. 1681 (CM), 2014 WL 1509236, at *45 (S.D.N.Y. Jan. 24, 2014) (alternations omitted) (quoting *Reves*, 507 U.S. at 179).

As discussed above, the Court has already considered and rejected Defendant Landesman's arguments. Even if this was not the case, which it is, the SAC's allegations satisfy the association-in-fact test. The SAC details the part each Defendant played in operating the enterprise. The Platinum Defendants, as executives and decision makers for Platinum Management, had at all times knowledge of the falsity of these statements, which were material and made on a continuing and ongoing basis. The Platinum Defendants caused PPVA to pay Platinum Management unearned distributions, fees and other amounts as a result of the artificially inflated NAV, to the significant detriment of PPVA. Further, the Platinum Defendants misrepresented the nature of various transactions that they caused PPVA and its subsidiaries to enter into with Beechwood, PPCO, the Preferred Investors of the BEOF Funds and other insiders, which resulted in the loss of PPVA's assets and hundreds of millions of dollars in creditor claims.

As a result, the RICO claim in the SAC is sufficiently pled as to Defendant Landesman.

C. The Plaintiffs' RICO Claim Sufficiently Pled Predicate Offenses Against Defendants Narain and Saks

As part of its broader Motion to Dismiss the RICO claim on PSLRA grounds, discussed above, Defendant Narain argues briefly that there is a lack of particularity tying the RICO scheme to him. (Dkt No. 328 at 15). Saks makes a similar argument in his motion to dismiss as to Plaintiffs' RICO claims, which should be denied for the reasons set forth above.

In particular, Narain argues that because he joined the RICO scheme late, Plaintiffs cannot satisfy the two year requirement as to him individually. The SAC alleges that "Narain became a senior executive at BAM [] and the Beechwood Entities [] no later than January 2016, and was instrumental in the execution of certain transactions comprising the Second Scheme, including the

March 2016 PPVA Restructuring (including execution of the Master Guaranty), the 2016 Montsant Transaction, matters involving PEDEVCO during 2016, and the Agera Transactions." (SAC, ¶ 205). As a result, Narain was clearly in a similar high-level executive role, and consistent with the Court's April 2019 Decision, is liable for all foreseeable acts of the conspiracy.

Similarly, Saks argues that he left the RICO scheme early, and thus Plaintiffs cannot satisfy the two year requirement as to him individually. The SAC alleges that Saks was a portfolio/investment manager with oversight and control over numerous PPVA investments. In particular, Saks became responsible for overseeing and managing PPVA's bio/pharma investments in companies including Advaxis Inc., Angiolight, Inc., Echo Therapeutics Inc., FluoroPharma, Navidea Biopharmaceuticals Inc., NewCardio Inc., Urigen Pharmaceuticals Inc., and Vistagen Therapeutics Inc., and previously was involved with overseeing the investment in Golden Gate Oil. During 2014, Saks began working for the Beechwood Entities, eventually serving as Chief Investment Officer and then President of B Asset Manager LP during and after 2015. SAC at ¶ 12(xii). Saks was marketed as the co-CIO of Platinum Partners and served on Platinum Management's valuation committee. *See* Pl. Exs. 7-10. Saks served a critical role at both Platinum and Beechwood, and consistent with the Court's April 2019 Decision, is liable for all foreseeable acts of the conspiracy.

Under the circumstances, the Court should deny all motions to dismiss the RICO claims, including the motions by Narain and Saks.

III. THE SECOND AMENDED COMPLAINT IS SUFFICIENTLY PLED AGAINST ALL OF THE MOVING DEFENDANTS

A. Bodner and Huberfeld Should Not Be Permitted to Renew Arguments Previously Rejected by this Court's Previous Opinion

The Court's April 2019 Decision considered the first round of motions to dismiss filed by certain Defendants, including Bodner and Huberfeld [Dkt. 290].[7] As the Court noted, Bodner's initial motion to dismiss, and the joinder thereto by Huberfeld and others, alleged grounds for dismissal broader than an objection to group pleading, and instead moved to dismiss all claims filed against them on various particularized grounds. April 2019 Decision at n. 9.

Although the April 2019 Decision denied the motions by Bodner and Huberfeld alleging that the First Amended Complaint failed to satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b), and further held that the group pleading doctrine applied to each of those defendants and to the claims asserted against them,[8] Bodner and Huberfeld again move to dismiss the SAC on the ground that Plaintiffs failed to satisfy Rule 9(b). This time around, Bodner and Huberfeld attempt to distinguish between allegations concerning the inflation of PPVA's "NAV", which they acknowledge are sufficiently pled, from those related to the various fraudulent "transactions" with Beechwood. As to the latter, Bodner and Huberfeld argue that Plaintiffs have not alleged sufficient facts to establish that they had a role in carrying out those transactions or that they otherwise benefitted from them, and thus any claims based on those transactions must be dismissed as to those defendants.

Stated another way, Bodner and Huberfeld would have this court find that the SAC contains allegations sufficient to state a claim based on the inflation of PPVA's NAV, but would have the Court dismiss any claims against them relating to very transactions that give rise to such inflated

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[7] The April 2019 Decision also sets forth the legal standards for claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, constructive fraud, aiding and abetting fraud, unjust enrichment and civil conspiracy, which the Plaintiffs incorporate as if set forth herein. April 2019 Decision at 23-28.

[8] The only claim that the Court dismissed as to Bodner and Huberfeld was the Count for Unjust Enrichment, on the ground that the Court found that Plaintiffs had abandoned that claim.

NAV. This makes no sense and should be rejected categorically. The proposition is even more specious under circumstances where Bodner and Huberfeld own Beechwood, inherently elected Beechwood's "management" and thereby had control over all of Beechwood's actions and transactions.

Reduced to their essence, it is clear that Bodner's motion and Huberfeld's joinder are nothing more than an attempt to reargue their prior motions to challenge the use of "group pleading," which motions the Court already has considered and denied. As this Court held:

> Each of the Platinum Defendants, [] is alleged to have been a high-level corporate insider, and it is therefore appropriate to charge them with the misstatements of PPVA's NAV. They are not a random assortment of low-level functionaries. *Instead, they are precisely the kind of "narrowly defined group of highly ranked officers or directors" that the group pleading doctrine contemplates. Elliott Assocs.*, 141 F. Supp. 2d at 354. (pp. 45-46) . . .
>
> The Court *concludes based on the foregoing that the FAC "allege[s] facts indicating that [each] defendant was a corporate insider, with direct involvement in day-to-day affairs, at" Platinum Management. In re Alstom SA*, 406 F. Supp. 2d at 449. Even Bodner's memorandum - which the other moving defendants join or incorporate - explicitly concedes that Landesman, Levy, and Ottensoser had day-to-day roles at Platinum Management. Bodner MTD 8. *And Bodner and Huberfeld cannot distinguish themselves from their fellow Platinum Defendants simply because the FAC fails to "identify any title or position" that they held. Id. To the contrary, plaintiffs concede that Bodner and Huberfeld did not have official titles at PPVA, but they contend that the Platinum co-founders "covertly conducted Platinum's day-to-day business by way of a 'secretary' who would relay their directives to the other Defendants," and they argue that Bodner and Huberfeld were "among the primary decision makers overseeing PPVA." Opp. 10. At least at the pleading stage, this is enough to charge Bodner and Huberfeld with Platinum Management's misstatements. . . .*
>
> Here, plaintiffs have alleged myriad facts that give rise to a strong inference of fraudulent intent for each of the moving Platinum Defendants. Bodner and Huberfeld, for example, are alleged to be founders and owners of Platinum Management who stood to benefit from the inflation of PPVA's NAV. They are also alleged to be founders and owners of the Beechwood Entities, which were created for the express purpose of "provid[ing]

> Platinum Management with transaction partners that could be used to justify PPVA's inflated NAV." . . .
>
> These facts are only a portion of those alleged in the FAC, but they *are sufficient by themselves to "give rise to a strong inference of fraudulent intent." Shields*, 25 F.3d at 1128. Moreover, since there is *no dispute that PPVA justifiably relied on Platinum Management's misstatements of its NAV, or that PPVA was damaged by the payment of inflated performance fees, plaintiffs have stated a claim for fraud against the Platinum Defendants. . . .*

April 2019 Decision at 45-51 (emphasis added).

Accordingly, this Court already has held that the group pleading doctrine applies to Bodner and Huberfeld. It is clear that the SAC sufficiently alleges facts tying Huberfeld and Bodner to the transactions challenged in the current motions. Indeed, the Court already has held that Bodner and Huberfeld were corporate insiders with day-to-day control over Platinum Management, and the facts alleged by Plaintiffs give rise to a strong inference of fraudulent intent. *Id*. In any case, the "transactions" challenged by Bodner and Huberfeld here are among the very events that comprise the First and Second Scheme and created the circumstances under which defendants could fraudulently inflate PPVA's NAV.

Bodner and Huberfeld's attempt to take a second bite at the apple by arguing for dismissal of Plaintiff's "non-NAV claims" thus fails because there are no separate "transaction" claims that are not subject to this Court's April 2019 Decision and neither Bodner nor Huberfeld has come forward with any new facts or law that would merit reconsideration of that decision. *In re Bisys Secs. Litig.*, 496 F. Supp. 2d 384, 386-87 (S.D.N.Y. 2007) (Rakoff, J.) (applying law of the case doctrine because "it is manifest that there has neither been an intervening change of controlling law, nor a documented need to correct a clear error or prevent a manifest injustice"). As such, Bodner and Huberfeld's renewed motions to dismiss should be denied in their entirety.

B. <u>Plaintiffs Sufficiently Plead Claims against Daniel Saks</u>

The SAC adds Daniel Saks as a Platinum Defendant as well as maintaining his previous designation as a Beechwood Defendant, due to, *inter alia*, his position as an executive for Platinum Management throughout 2014 and his direct involvement in the Black Elk Scheme. While this Court's April 2019 Opinion permitted Saks to move further on more particularized grounds, his second motion to dismiss, similar to Bodner and Huberfeld, largely seeks to re-litigate arguments already decided by this Court. As this Court held:

> Based on the foregoing allegations, however, *the Court can reasonably infer that Saks knowingly participated in the Platinum Defendants' tortious conduct*. Not only does the FAC allege that Saks moved from a portfolio management position at Platinum Management to become CIO and President of BAM - which, as noted, is alleged to have played a central role in defendants' misconduct, see, e.g., FAC ~~ 364, 391 - but it also alleges that he helped orchestrate the transaction in which Montsant paid millions of dollars for Black Elk senior secured notes of dubious value, id. ~ 177. Specifically, Saks executed the agreement under which Montsant pledged collateral to secure the loan from SHIP that it used to purchase the notes. ECF No. 159, Ex. 64. And, as discussed above, the encumbrance of Montsant's assets was one of the key mechanisms through which defendants benefitted the Beechwood Entities while overstating PPVA's NAV. See FAC ~~ 543-49. Accordingly, while Saks is not prejudiced from hereafter moving to dismiss the remaining claims in the FAC on more particularized grounds, *the Court rejects his broad-brush argument that no wrongdoing or knowledge of wrongdoing has been attributed to him.*

April 2019 Opinion at pp. 56-57.

Saks attempts to argue around this Court's holding that the Plaintiffs' have properly alleged that Saks knowingly participated in tortious conduct. He should not be allowed to do so. Saks was an executive for both Platinum Management and various Beechwood entities, with direct knowledge of Platinum financial condition and the First and Second Schemes.

Beginning in March 2014, Saks was a portfolio/investment manager with oversight and control over numerous PPVA investments. During his tenure with Platinum Management, he was marketed as the co-CIO of Platinum Partners, along with Mark Nordlicht. Saks became responsible for overseeing and managing PPVA's bio/pharma investments in companies including Advaxis

Inc., Angiolight, Inc., Echo Therapeutics Inc., FluoroPharma, Navidea Biopharmaceuticals Inc., NewCardio Inc., Urigen Pharmaceuticals Inc., and Vistagen Therapeutics Inc., and previously was involved with overseeing the investment in Golden Gate Oil. During 2014, Saks began working for Platinum Management's Beechwood alter ego, eventually serving as Chief Investment Officer and then President of B Asset Manager LP during and after 2015. Daniel Saks replaced David Levy in his executive position at Beechwood. Saks used his position of control to execute or negotiate various transactions at the heart of the First and Second Schemes, including the January 2015 Montsant Loan, various refinancings of Golden Gate Oil, transactions in connection with the Black Elk Scheme and the overvaluation of PPVA's NAV. (SAC ¶¶ 12(xii), 188-192, Pl. Ex. 7-10).

Saks was a critical and controlling person at Platinum Management during 2014 and at Beechwood throughout 2015, and was directly involved in several of the transactions comprising the First and Second Schemes. The allegations against Saks clearly are sufficient to plead claims for fraud, breach of fiduciary duty, civil conspiracy, civil RICO, as well as secondary liability claims due to his tortious acts while working with Beechwood. Accordingly, Daniel Saks's motion to dismiss should be denied in its entirety.

C. <u>Plaintiffs Sufficiently Pled Claims against the Beechwood Movants</u>

The SAC also properly pleads aiding and abetting fraud, aiding and abetting breach of fiduciary duty, civil conspiracy and unjust enrichment claims against the Beechwood Movants, who each provided substantial assistance to the Platinum Defendants and were unjustly enriched by the First and Second Schemes (SAC at Counts 7-8, 14 and 16).[9]

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[9] The Beechwood Movants and Saks set forth certain arguments that fail to take into account that Plaintiffs are permitted to plead claims in the alternative or that may be seen as duplicative. *Thieriot v. Jaspan Schlesinger Hoffman, LLP*, No. 07-cv-5315 (DRH) (AKT), 2016 WL 6088302, at *5 (E.D.N.Y. Oct. 18, 2016). Thus, Plaintiffs are permitted to bring separate claims for civil

This Court has already held that group pleading is appropriate for the individual Beechwood Defendants and has denied Saks' motion to dismiss on particularized grounds, stating that "the Court can reasonably infer that Saks knowingly participated in the Platinum Defendants' tortious conduct." April 2019 Decision at 43, 56-57. The SAC contains even more detail as to the substantial assistance provided to the Platinum Defendants by Taylor, Feuer and Narain. Taylor, Feuer and David Levy founded Beechwood together with Nordlicht, Bodner and Huberfeld. Taylor and Feuer were the public face of Beechwood, and Taylor and Feuer remained with Beechwood at all relevant times. Taylor and Feuer (through trusts) owned common stock in Beechwood and had managerial authority over Platinum Management's Beechwood alter ego. From 2013 through 2016, Taylor and Feuer were directly involved in the day-to-day conduct that comprised the First and Second Schemes. At all times, they had actual knowledge of the common ownership and control of Platinum Management and Beechwood and directly participated in the transactions comprising the First and Second Schemes.

For example, Feuer signed the Nordlicht Side Letter, one of the most brazen examples of looting of PPVA in connection with the Second Scheme, as a witness. Taylor worked directly with David Levy and Platinum Management's counsel to create the Beechwood structure. Taylor and Feuer, along with Nordlicht, Levy, Huberfeld and Bodner, developed a scheme to create Beechwood as a way to generate capital in a new business venture that they could use for their personal benefit to, among other things, allocate to themselves an ever increasing share of PPVA assets. From within Platinum Management's Beechwood alter ego, they orchestrated non-commercial transactions, such as the Golden Gate Note Purchase, the Black Elk Scheme, the

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conspiracy, and the unjust enrichment claim against the Beechwood Movants, pled in the alternative, is due to Plaintiffs seeking to invalidate certain Second Scheme transactions.

Nordlicht Side Letter, the March 2016 Restructuring and the Agera Transactions. SAC at ¶¶ 28, 193-203, 347, 377-383.

Narain became a senior executive with the Beechwood Entities no later than January 2016, and was instrumental in the execution of certain transactions comprising the Second Scheme, including the March 2016 PPVA Restructuring (including execution of the Master Guaranty), the 2016 Montsant Transaction, matters involving PEDEVCO during 2016, and the Agera Transactions. Narain was one of the primary persons who orchestrated the terms of the March 2016 Restructuring and the Agera Transactions, and exerted control over PPVA and its subsidiaries in connection therewith. Narain was aware of the true value of Agera, having obtained third party valuation reports about that company. Narain worked with other insiders to transfer ownership and control of Agera to the Beechwood Entities. Narain held ownership interests and control in certain of the Beechwood Entities. Narain is the signatory on several of the transaction documents used to "paper" the Second Scheme, including the agreements comprising the Agera Transactions. SAC ¶¶ 205-208, 388, 433, 606, 631, 646.

The Beechwood Entities, all of which are alter egos of Platinum Management, were created by the Platinum and Beechwood Defendants to carry out the fraudulent acts of the First and Second Schemes. The Beechwood Entities are named Defendants in this action because they are signatories to or designated agents of Beechwood for various transactions discussed in detail in the SAC. The Court has already held that the First Amended Complaint sufficiently pleads claims against "BAM" (defined in the SAC as B Asset Manager I LP and B Asset Manager II LP). April 2019 Decision at 36-37.

BAM Administrative, as an administrative agent for Beechwood insurance trusts and the Beechwood Reinsurance Companies, was a party to the GGO Note Purchase Agreement, certain

agreements in connection with the March 2016 Restructuring (including the Master Guaranty), the assignment of Implant Sciences debt from PPVA's subsidiary to Beechwood and the 2015 Montsant Loan, (SAC ¶ 217, 418, 436-439, 526, 594).

Illumin is owned and controlled by Dhruv Narain, who joined Beechwood in January 2016. Illumin acted as an investment advisor to Beechwood during the course of the Second Scheme, overseeing and implementing the Agera Transactions, including the PGS assignment, by which Beechwood transferred to PPVA's subsidiary a collection of worthless debt interests in exchange for PGS' interest in AGH Parent. (SAC ¶ 222, 663-669).

The SAC provides extensive detail regarding how these Beechwood Entities were created as the alter ego of Platinum Management, with common ownership among Nordlicht, Huberfeld, Bodner and Levy, the sharing of common offices, and a revolving door of employees being shared and used for a common fraudulent purpose. SAC at ¶ 344-399. The Beechwood Reinsurance Companies (defined in the SAC as Beechwood Re Ltd. and Beechwood Bermuda International Ltd.) are foreign-domiciled reinsurance companies, formed at the behest of the Platinum and Beechwood Defendants, with 70% of ownership residing with Nordlicht, Huberfeld, Bodner and Levy. (SAC at ¶ 215-216). Beechwood Re Investments, LLC is a limited liability company used by Nordlicht, Bodner, Huberfeld and Levy to purchase majority ownership in Beechwood. (SAC ¶ 212). By way of the Beechwood investment structure, Beechwood Re Holdings, Inc. holds all common stock in the Beechwood Reinsurance Companies. (SAC at ¶ 213). Accordingly, the Beechwood Movants' motion to dismiss should be denied.

D. <u>The Plaintiffs Sufficiently Pled their Aiding and Abetting Claim against Michael Katz</u>

Count 11 of the SAC asserts a claim for aiding and abetting breach of fiduciary duty against Michael Katz. Katz argues that the SAC does not provide facts sufficient to show that he

knowingly provided substantial assistance to the Platinum Defendants, and thus does not plead the elements of a claim for aiding and abetting breach of fiduciary duty against him.

To the contrary, the SAC contains detailed allegations that Katz, an insider of Platinum Management, was brought onto the Platinum team in connection with a deal with his grandfather, Marcos Katz, a significant investor in PPVA. In 2015, as part of a proposed deal offered by Platinum Management to persuade Marcos Katz not to redeem his Platinum investment, Marcos Katz was offered the opportunity to appoint a representative to oversee his interests. Michael Katz, Marcos Katz's grandson, was selected for that role. Michael Katz began taking an active role at Platinum Management beginning in or about January 2016, where he gained knowledge and information concerning PPVA's financial condition. Michael Katz knew Nordlicht, Levy, Huberfeld, Bodner and Fuchs before he began representing his grandfather's interests in 2016. In fact, Katz and Levy previously had invested in an energy company that was merged into Agera in 2014, during the startup phase of that business. SAC at ¶¶ 123-128.

By March 2016, Katz began formally advising Platinum Management in connection with the Second Scheme, and, in particular, the Agera Transactions. He conspired with Nordlicht, Levy and other Platinum Defendants to develop the plan to transfer PPVA's interest in Agera Energy to an "insider." Indeed, the email attached to the Katz Affidavit, submitted in support of his motion, ***only confirms that he originated the idea of selling Agera to an insider*** with no market test at a price to be set by the players (Katz among them) rather than negotiated at arm's length and without regard to the company's actual value. *See* Katz Aff. at Exhibit A. The SAC further alleges that he had actual knowledge of PPVA's financial condition, and provided substantial assistance to the closing of the Agera Transactions. Katz's tortious acts resulted in significant damage to PPVA,

as they resulted in the dissipation of one of PPVA's remaining valuable assets the day following the arrest of Murray Huberfeld. SAC at ¶¶ 124-128, 607-610, 631.

These allegations clearly are sufficient to plead a claim for aiding and abetting breach of fiduciary duty. Accordingly, Michael Katz's motion to dismiss should be denied in its entirety.

E. Plaintiffs Have Stated Claims against Seth Gerszberg

Count 13 and 14 of the SAC asserts claims for aiding and abetting breach of fiduciary duty and unjust enrichment against Seth Gerszberg ("**Gerszberg**").

Beginning at the latest by about late December 2015/early January 2016, Gerszberg served as an advisor to Platinum Management in connection with various PPVA investment positions and negotiations with PPVA's creditors. Gerszberg orchestrated and executed certain of the transactions and transfers that comprise the Second Scheme, particularly the purported encumbrance of the debt position in Implant Sciences Corporation as well as the outflow of substantially all of PPVA's cash on hand immediately following the Agera Transactions. Gerszberg had knowledge of certain Second Scheme Transactions and exerted control over PPVA and its subsidiaries in connection with such Second Scheme Transactions. SAC at ¶ 134.

As discussed in detail in the SAC, Gerszberg had a prior lending relationship with PPVA's subsidiary. In or before January 2016, after his clothing apparel business crumbled, Gerszberg began assisting the Platinum Defendants in an advisory capacity. SAC at 726-742. From January 1, 2016 until the commencement of the Cayman Liquidation, Gerszberg advised the Platinum Defendants with respect to PPVA's investments and provided substantial assistance in the formulation and execution of the Second Scheme. At this time, Gerszberg was provided with information concerning PPVA's financial condition, its ongoing liquidity issues, liabilities and the misrepresentation of its NAV by the Platinum Defendants. Gerszberg also substantially assisted the Platinum Defendants with certain of the transactions comprising the Security Lockup. SAC at

¶ 743-745. One such transaction was the Forbearance and Security Agreement, which purportedly granted companies owned and managed by Gerszberg's family members a security interest in a note issued by Implant Sciences in favor of a PPVA subsidiary. SAC at ¶ 746-750. In addition, the Platinum Defendants conspired with Gerszberg to effectuate the transfer of $15 million from the Agera proceeds to a Gerszberg-controlled entity for no consideration. SAC at ¶ 751-762.

Gerszberg's motion to dismiss raises a number of misleading and premature arguments. First, Gerszberg is incorrect that the unjust enrichment claim against him, which is pled in the alternative, is barred due to the existence of a contract. The SAC alleges the contemporaneous transfers of $15 million in funds directly from PPVA to Gerszberg. The fact that the Platinum Defendants and Gerszberg attempted to "paper" over their tortious acts and the true nature of the transaction is consistent with the pattern set forth in the SAC. Second, Gerszberg's claim that the inclusion of a jury trial waiver in the Spectrum30 Note somehow requires his dismissal from this case is both nonsensical and inapposite. Gerszberg is unable to point to a single case where a jury waiver (which Plaintiffs disagree is applicable) somehow results in a release of liability or dismissal, and, in any case, Gerszberg himself is not a party to that note so it has no bearing on any liability he might have in this case.

Third, Gerszberg argues that Plaintiffs have not sufficiently pled a claim for aiding and abetting breach of fiduciary duty. The SAC, however, alleges that Gerszberg had detailed knowledge of PPVA's financial condition starting in January 2016 and thereafter substantially assisted the Platinum Defendants with the Security Lockup. Among other things, the SAC alleges that Gerszberg worked with the Platinum Defendants to provide subsidiary-level encumbrances on certain of PPVA's remaining valuable assets to his cousins, and conspired with the Platinum Defendants to obtain control of $15 million of the proceeds from the sale of Agera for his own use.

These facts clearly are sufficient to allege an aiding and abetting breach of fiduciary duty claim. Accordingly, Gerszberg's motion to dismiss should be denied in its entirety.

IV. PLAINTIFFS HAVE SUFFICIENTLY PLEADED CLAIMS AGAINST THE HUBERFELD FAMILY FOUNDATION

A. The Huberfeld Family Foundation is the Alter Ego of Huberfeld and Platinum Management

Count 22 of the SAC (¶¶ 1029-1041) asserts a claim for alter ego against the Huberfeld Family Foundation (the "**Foundation**") with respect to Counts One through Six of the SAC. This claim, through a "reverse veil piercing," seeks to hold the Foundation liable as an alter ego of Defendants Huberfeld and Platinum Management.

The Foundation argues that Count 22 fails to state a claim because: (1) Plaintiffs cannot assert a reverse veil piercing claim against the Foundation and (2) "Plaintiffs' failure to plead non-conclusory facts with particularity establishing the required elements to pierce the corporate veil." *See* Foundation Mem., p. 19. These arguments misstate the Rule 12(b)(6) pleading standard, ignore the detailed allegations of the SAC, which must be accepted as true, and ignore the rule that all reasonable inferences must be drawn in Plaintiffs' favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 88 (2d Cir. 2007).[10]

When bringing a claim for "'reverse piercing of the corporate veil,' the plaintiff seeks to hold the corporation liable for the actions of its shareholder or someone who controls the entity." 1 Fletcher Cyc. Corp. § 41.70 (2018). New York law recognizes reverse veil piercing.[11] *See, e.g., Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997); *LiButti v. United*

[10] The "duty of a court is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Hogan v. Fischer*, 738 F.3d 509, 514 (2d Cir. 2013).

[11] New York law applies because the Foundation is a New York nonprofit company. *See Fletcher v. Altex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995).

States, 107 F.3d 110, 119 (2d Cir. 1997) (holding that reverse piercing occurs when the assets of the corporate entity are used to satisfy the debts of the controlling alter ego); *Liberty Synergistics, Inc. v. Microflo Ltd.*, 50 F. Supp. 3d 267, 297 (E.D.N.Y. 2014). Moreover, veil piercing applies to nonprofit corporations such as the Foundation. *See* 1 Fletcher Cyc. Corp. § 41.75 (2018) ("The alter ego theory applies to all corporations, including nonprofit corporations."); *United States v. Emor*, 850 F. Supp. 2d 176, 206-208 (D.D.C. 2012); *CH v. RH*, 18 Misc. 3d 268, 276 (Supr. Ct. Nassau Cty. 2007).

To sustain this claim, the plaintiff must allege that "the owner exercised domination over the corporation and that the domination was used to commit a fraud or wrong." *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. and Trade Servs., Inc.,* 295 F. Supp. 2d 366, 379 (S.D.N.Y. 2004). The guiding principle on an alter ego analysis is that "liability is imposed when doing so would achieve an equitable result." *William Wrigley Jr. v. Waters*, 890 F.2d 594, 601 (2d Cir. 1989). No definitive rule governs when courts will pierce the corporate veil, because the decision "in a given instance will necessarily depend on the attendant facts and equities." *Morris v. N.Y. State Dep't of Taxation & Fin*., 623 N.E.2d 1157, 1160 (N.Y. 1993). Moreover, legitimate activities do not insulate a company from alter ego claims. *See Shantou Real Lingerie Mfg. Co., Ltd. v. Native Grp, Int'l, Ltd.*, 14-cv-10246 (RWL), 2018 WL 1738334, at *8 (S.D.N.Y. Mar. 14, 2018) ("Shantou is not required to show that Native conducted no legitimate business in order for the Court to find that Mr. Nissim was Native's alter ego.") (citation omitted).

The SAC (¶¶ 1035, 1038-1039) alleges that: (1) the "Foundation and Platinum Management have overlapping ownership, management and control;" (2) the Foundation "was operated by Platinum Management from the same offices;" and (3) "ultimate decision making for both Platinum Management and the … Foundation rested, in part, with Huberfeld." However,

many of the traditional factors used to pierce the corporate veil do not apply because of the unique facts of this action and because the Foundation is a nonprofit corporation. As a result, the courts should focus on the control the officer and director (Huberfeld) exercised over the entity (the Foundation), and the actions such officer took that show his disregard of the corporate entity.[12] *See Sec. Inv't Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 323-324 (Bankr. S.D.N.Y. 1999); *Emor*, 850 F. Supp. 2d at 207 ("[H]e, [Emor], possessed unchecked authority to make use of its [corporation's] funds as he saw fit and he exercised ultimate power over all its corporate decisionmaking.").

As shown below, the SAC contains extensive allegations regarding the connections between the Foundation, Huberfeld and Platinum Management, Huberfeld's domination and control of the Foundation, and the use by Huberfeld and Platinum Management of the Foundation for their illicit and fraudulent purposes, and to benefit Platinum Management insiders or related persons within the Platinum Management circle. SAC, ¶¶ 137-175, ¶¶ 1029-1041.[13] These detailed allegations clearly state a "plausible claim" for reverse veil piercing of the Foundation.

i. <u>Huberfeld's Domination and Control of the Foundation</u>

The SAC alleges that Huberfeld "is the president, director and official signatory for the Foundation," the "day-to-day administration of the Foundation was handled by the Platinum Defendants and other Platinum Management employees from the offices of Platinum

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[12] Notably, this Court's April 2019 Opinion held that "plaintiffs have plausibly alleged that each of the moving Platinum Defendants [including Huberfeld] created such a [fiduciary] relationship [with PPVA]" and that "Bodner and Huberfeld are alleged to be founders of PPVA, and to have been 'involved in the management and operation of PPVA' to such an extent that their 'approval was required for all significant business, investment and personnel decisions.'" Dkt. 290 at 52-53.

[13] For example, the Foundation lent millions of dollars to Hutton Ventures LLC, which, on information and belief, provided a $7.5 million mortgage to a property owned by Defendant Mark Nordlicht. SAC, ¶¶ 151-152.

Management," and that Huberfeld controlled the Foundation. SAC, ¶¶ 145-147, ¶¶ 1032-1040. The Foundation listed its address as 152 West 57th Street, the same address as Platinum Management. SAC, ¶¶ 146-147, Pl. Ex. 104. In addition, Huberfeld, as President of the Foundation, approved millions of dollars of "loans" made to businesses, not charitable organizations, and to insiders or affiliated investors and friends of Huberfeld and other principals of Platinum Management. SAC, ¶¶ 148-157, ¶¶ 173-174. His approval of these "loans" demonstrates that Huberfeld dominated and controlled the Foundation. SAC, ¶¶ 148-175.

ii. Huberfeld's Improper and Fraudulent Use of The Foundation

A) The Black Elk Transaction

The SAC (¶ 1032) alleges that "at the direction of Murray Huberfeld and Platinum Management, the Huberfeld Family Foundation was one of the Preferred Investors of the BEOF Funds in connection with the siphoning of nearly $100 million in funds out of Black Elk in connection with the Renaissance sale, all the while allowing PPVA and its subsidiaries to face the consequences in the form of substantial creditor claims and the total devaluation of the Black Elk bonds that would be repurchased by PPVA via Montsant." The Renaissance sale described in the SAC was a fraud by Platinum Management and Huberfeld "that harmed PPVA and benefitted the Huberfeld Family Foundation." SAC, ¶ 1040.

This Court's April 2019 Decision stated that "the most significant First Scheme transaction described in the FAC is the Black Elk Scheme." Dkt. 290 at 11. This Court sustained Plaintiffs' claims against the Platinum Defendants, including Huberfeld, for breach of fiduciary duty, fraud, constructive fraud, aiding and abetting a breach of fiduciary duties, aiding and abetting fraud, civil conspiracy and RICO. *Id.* at 48-55. Moreover, in sustaining Plaintiffs' claim for unjust enrichment against many Defendants arising out of the Black Elk Scheme, this Court held (*id.* at 33):

> Here, plaintiffs have plausibly alleged that millions of dollars were transferred to the Preferred Investors at the expense of PPVA, both because the proceeds of the Renaissance Sale should have gone to senior secured note holders instead of preferred equity, and because $36 million was transferred directly from PPVA to the BEOF Funds. Moreover, the Preferred Investors cannot raise a group pleading defense because the FAC contains a table detailing the specific distributions that each of the Preferred Investors received from the BEOF Funds. FAC ¶ 493.

Given Platinum Management's critical role in the fraud relating to the Black Elk Scheme, Huberfeld's role in soliciting the Preferred Investors of the BEOF Funds, and that the Foundation was one of the Preferred Investors of the BEOF Funds in connection with the siphoning of nearly $100 million in funds out of Black Elk in connection with the Renaissance Sale, the allegations relating to the Black Elk Scheme in the SAC sufficiently allege that Huberfeld and Platinum Management's domination of the Foundation was used to commit a fraud. Thus, the Plaintiffs have sufficiently alleged a plausible claim for a reverse veil piercing alter ego claim against the Foundation. *See In re Bernard Madoff Inv. Sec. LLC*, 583 B.R. 829, 848-849 (Bankr. S.D.N.Y. 2018) (trustee stated plausible claim to pierce corporate veil).

B) Huberfeld's Approval of Millions of Dollars of "Loans" By the Foundation

The SAC alleges that "Platinum Defendants Nordlicht, Levy, Landesman and Bodner invested in the Huberfeld family Foundation, regularly transferring cash and assets fraudulently acquired through the course of the First and Second Schemes." SAC, ¶¶ 158-163.[14] The SAC (¶ 144) also alleges that the Foundation "was used as a repository for assets of the Platinum Defendants and their friends and family during the course of the First and Second Schemes" and

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[14] Uri and Deborah Landesman, Mark Nordlicht and Dahlia Kalter, his wife, and the Huberfeld-Bodner Family Foundation were listed among the substantial "contributors" to the Foundation during 2012-2014, with "contributions" of $400,000, $933,333 and $187,000, respectively. SAC, ¶¶ 159-161.

that these "contributions" were "used by the Huberfeld Family Foundation to provide loans to Platinum insiders." Moreover, the SAC lists various transactions between the Foundation and Platinum Management insiders or related parties that, at the very least, raise serious "red flags" concerning the Foundation's use as a charitable foundation. SAC, ¶¶ 148-175.

The Foundation's Certificate of Incorporation (Pl. Ex. 1) states that it is formed "(a) *To benefit religious, scientific, literary, educational, or other charitable organizations and to further religious, scientific, literary, educational, or other charitable purpose*s" and "(c) To use, expend, transfer, deed over, *distribute, and disburse all or any part of the monies, funds, and other properties received by the Corporation for the purposes referred to in subdivision (a) hereof*." (Emphasis added). The Certificate of Incorporation also states that "[i]n furtherance of its corporate purposes, the Corporation shall have all the powers enumerated in Section 202 of the Not-For-Profit Corporation Law."[15]

Notwithstanding that monies received by the Foundation were to be used for "charitable purposes," Huberfeld, for himself and on behalf of Platinum Management, each year made millions of dollars of "loans" to business entities, almost none of which had anything to do with "charitable purposes." Indeed, the Foundation's Form 990's for the years 2012-2017 (Pl. Ex. 2) list "Notes/Loans" in the "original amounts" ranging from $10.403,768 to $23,642,836, of which the "balance" on such "Notes/Loans" range from $4,114,968 in 2012 to $17,588,584 in 2017.[16]

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[15] The Foundation's Certificate of Incorporation and Foundation's Form 990 Tax Returns can be considered on this motion because the Court may take judicial notice of these publicly filed documents and because they relate to facts that are referenced in the SAC. *See Envtl. Servs. v. Recycle Green Servs.*, 7 F. Supp. 3d 260, 270 (E.D.N.Y. 2014).

[16] The Foundation attempts to make much of its charitable contributions totaling over $11 million during the period 2012-2016. *See* Foundation Mem., p. 5. However, these charitable contributions pale in comparison to the "loans." For example, in 2017, the "contributions" totaled "748,050" while the balance due on the "loans" was $17,588,584. *See* Pl. Ex. 2. Moreover, as noted, these

More specifically, during the period 2012-2017, the Foundation made "loans" totaling $10,019,730 to the following persons or entities: $6.5 million to the Aaron Elbogen Irrevocable Trust; $1,825,000 to Moshe Oratz; $1,369,730 to the Huberfeld Bodner Family Foundation; and $325,000 to the Fuchs Family Foundation. *See* Pl. Ex. 2; SAC, ¶¶ 148-149, 153-158, 173-174.

The SAC alleges that "the Elbogens and their various entities are long term investors in various funds managed by the Platinum Defendants," that "Moshe Oratz is a colleague of Platinum insider Aaron Elbogen that pleaded guilty to criminal charges in connection with a racketeering conspiracy," and that "on information and belief," Mr. Oratz used these loans from the Foundation to "pay fines and other restitution owed by Oratz." SAC, ¶¶ 172, 154-156. Defendant Bodner is another founder and owner of Platinum Management and an owner of the Beechwood Entities; Defendant Fuchs was a principal of Platinum Management who was involved in planning significant investments and transactions, including Black Elk. SAC, ¶¶ 12 (iv), 12 (v); Pl. Ex. 11. In conjunction with a contemplated investment by a Platinum-affiliated fund, the Foundation also provided a bridge loan to the predecessors of Agera Energy, with an interest rate of 23% compounding daily. *See* Pl. Ex. 3. Two weeks after providing this bridge loan, the Foundation invested the loan proceeds with the same Platinum-affiliated fund. *See* Pl. Ex. 4. In April 2016, Nordlicht claimed a tax break based on contributions made by the Foundation because the contributions were in fact repayment of loans. *See* Pl. Ex. 5.

In sum, the detailed allegations of the SAC, together with the documents annexed thereto, and documents submitted on this motion, show that Huberfeld dominated and controlled the Foundation and that such domination was used to commit a fraud or wrong. *See McBeth v. Porges*,

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charitable contributions do not insulate the Foundation from an alter ego claim. *See Shantou Real Lingerie Mfg. Co., Ltd,* 2018 WL 1738334, at *8.

171 F. Supp. 3d 216, 233-234 (S.D.N.Y. 2016) (plaintiffs stated plausible claim for reverse veil piercing); *Merino v. Beverage Plus Am. Corp.*, 10 Civ. 0706 (JSR), 2011 WL 3739030, at *5-6 (S.D.N.Y. Apr. 12, 2011).[17] Accepting the SAC's well pleaded allegations as true and construing the SAC in the light most favorable to Plaintiffs, Count 22 of the SAC states a claim for reverse veil piercing of the Foundation that "is plausible on its face." *See Iqbal*, 556 U.S. at 678.[18]

B. The Plaintiffs Have Standing and Have Sufficiently Pled Additional Claims against the Huberfeld Family Foundation

The SAC likewise alleges aiding and abetting fraud and breach of fiduciary duty claims against the Foundation, along with a claim for unjust enrichment in connection with its receipt of the fraudulent proceeds from the Renaissance Sale/Black Elk Scheme.

At root, Plaintiffs allege that the Foundation, the alter ego of Platinum Management and Murray Huberfeld (who knew that Black Elk was overvalued), was granted an interest in an "unaffiliated" fund labeled *Black Elk Opportunities* by Platinum Management. By way of Huberfeld, its principal and controlling person, the Foundation knew the Platinum Defendants had fiduciary duties to PPVA, and knowingly participated and executed the wrongful "opportunity" – a scheme orchestrated at the expense of PPVA.

The SAC includes detailed allegations as to the substantial assistance the Huberfeld Family

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[17] The Foundation's argument that the Foundation was formed in 1998, well before the fraud, is of no moment. *See NetJets Aviation, Inc. v. LHC Commc'ns, LLC,* 537 F.3d 168, 178 (2d Cir. 2008) ("[W]e note that the plaintiff need not prove that the corporation was created with fraud or unfairness. It is sufficient to prove that it was so used."); *Goya Foods, Inc. v. Unanue*, 233 F.3d 38, 44 (1st Cir. 2000) ("Nevertheless, even if Kalif Trading's origin is not tainted by fraud, New York law still permits veil piercing where the corporate vehicle is being used to inflict 'wrongful or inequitable consequences.").

[18] The cases cited by the Foundation are inapposite because the allegations in those complaints were "conclusory, formulaic and insufficient to sustain any claim for alter ego liability." *See, e.g., Taberna Capital Mgmt., LLC v. Dunmore*, No. 08 Civ. 1817 (JSR), 2009 WL 2850685, at *4 (S.D.N.Y. Sept. 2, 2009) (Rakoff, J.).

Foundation provided to the Platinum Defendants in connection with the Black Elk conspiracy, which this Court has agreed is at the heart of the First Scheme, and the knowledge and acts of its principal (Huberfeld) and alter egos (Huberfeld and Platinum Management). The SAC alleges:

- The BEOF Funds were a standalone mechanism by which Platinum Management personnel, their family and friends, and certain preferred investors were offered the opportunity to knowingly invest in Black Elk "outside of the regular funds," (as stated by Huberfeld) to the detriment of PPVA. SAC ¶ 451;

- Collectively, the Preferred Investors of the BEOF Funds, at the direction of Huberfeld and others, purchased $40 million of the Series E preferred equity pursuant to contribution agreements executed between Black Elk and BEOF I during the first quarter of 2013. SAC ¶ 455.

- Black Elk's financial difficulties throughout 2013 were publicly known and, on information and belief, the Preferred Investors of the Black Elk Funds had raised concerns to Huberfeld regarding their investments by early 2014. SAC ¶¶ 458-464, 473.

- The Foundation provided substantial assistance to the Black Elk Scheme, by swapping its Black Elk equity for bonds, in order to rig the consent solicitation vote for the Black Elk Indenture. SAC ¶ 880.

- The Foundation received a total of $1,026,677 in connection with their participation in the Black Elk Scheme. SAC ¶ 506.

The SAC also includes detailed allegations concerning the Foundation's use as a fraudulent tool by Huberfeld and the other Platinum Defendants to enter into transactions with Platinum insiders in furtherance of the First and Second Schemes. SAC ¶¶ 144-163, 473.

The argument raised by the Foundation – that it was only a passive investor with no knowledge of the tortious conduct of the other Defendants – is not credible given that the Foundation was controlled by Huberfeld. The Foundation, by Huberfeld (its President, director and decision-maker), purposefully invested and then rolled over its investment in the BEOF Funds at a time when, by way of Huberfeld, it had actual knowledge of Black Elk's significant financial difficulties in the wake of the Black Elk Explosion. The scheme is clear on its face: PPVA's rights would be subordinated to those of the Foundation, leaving PPVA with significant creditor

claims and the Foundation, rather than PPVA, with the proceeds resulting from the Renaissance Sale. These allegations sufficiently plead claims against the Foundation, as they allege substantial assistance provided to Platinum Defendants and others in execution of the Black Elk Scheme.

The SAC also sufficiently pleads a claim for unjust enrichment against the Foundation. An unjust enrichment claim is available in situations where "circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012); *see Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 532-533 (S.D.N.Y. 2018) (permitting SHIP to amend its unjust enrichment claims against various Beechwood Defendants to include non-conclusory factual allegations).

Here, the factual allegations underlying the unjust enrichment claim against the Foundation are well-pled and non-conclusory. The SAC sets forth in exhaustive detail how the Preferred Investors of the BEOF Funds knowingly entered into transactions outside the structure of PPVA in order to subordinate PPVA and unjustly enrich themselves by way of the Renaissance Sale Proceeds. Am. Comp. ¶¶ 427-502. These factual allegations and others set forth in the Amended Complaint are sufficient to plead a claim for unjust enrichment under New York law.

The Foundation argues that Plaintiffs do not have standing to bring their claims against the Foundation. This argument has no basis in fact or law. The threshold to demonstrate standing consists of three conjunctive elements: (1) injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

<u>First</u>, any settlement agreement entered into by the Foundation and the Black Elk Trustee has no bearing on Plaintiffs' independent claims against the Foundation. <u>Second</u>, Plaintiffs have independent claims against the Foundation. The Foundation attempts to conflate its single tortious

act – participation in the Black Elk Scheme – with a single injury. This is not the case. PPVA was damaged by the Black Elk Scheme, not only in the diversion of the Renaissance Sale Proceeds to the Foundation, but also in the subordination of PPVA's rights, and the significant creditor claims against PPVA that resulted from the Black Elk Scheme. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) (noting "obvious conclusion" single tortious act can create multiple injuries in fact to separate claimants).

V. COUNTS 20 AND 21 STATE CLAIMS FOR DECLARATORY JUDGMENT

Count 20 of the SAC (¶¶ 1013-1017) and Count 21 of the SAC (¶¶ 1021-1028), respectively, assert claims for a declaratory judgment that the Nordlicht Side Letter, dated January 14, 2016 (SAC, Ex. 75), and the Master Guaranty Agreement executed on or about March 21, 2016 (SAC, Ex. 78) are void and unenforceable as against public policy.

The Beechwood Entities move to dismiss these two Counts on two separate grounds: (a) Count 20 and 21 constitute claims for "fraudulent inducement" which are not pled with particularity; and (b) Count 20 is the subject of a declaratory judgment pending in the Supreme Court, New York County and that the "liquidators are seeking a second bite at the apple." These arguments cannot survive scrutiny.

A. Counts 20 and 21 Seek Declaratory Judgments That the Nordlicht Side Letter and the Master Guaranty Agreement Are Contracts That Are Permeated With Fraud and Therefore Are Contrary To Public Policy

It is well settled under New York law that an illegal contract or a contract against public policy will not be enforced. As the New York Court of Appeals stated in *Szerdahelyi v. Harris,* 67 N.Y.2d 42, 48 (1986):

> [i]llegal contracts, or those contrary to public policy, are unenforceable and that the courts will not recognize rights arising from them (*McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 469, 199 N.Y.S.2d 483, 166 N.E.2d 494; *Sternaman v.*

> *Metropolitan Life Ins. Co.*, 170 N.Y. 13, 19, 62 N.E. 763, *rearg. denied* 170 N.Y. 616). The law leaves the parties to such agreements where it finds them (*Hettich v. Hettich*, 304 N.Y. 8, 105 N.E.2d 601; see generally, 21 N.Y. Jur. 2d, Contracts, §§ 147–186).

See also 28 N.Y. Prac., Contract Law § 7:2 (2018) ("A party to a contract cannot ask a court to help him carry out his illegal object ….").

"[A] contract is unenforceable under New York law if the finder of fact concludes that the agreement was made 'with corruption and fraud contemplated as its purpose.'" *CMF Inv., Inc. v. Palmer*, No. 13-CV-475 (VEC), 2014 WL 6604499, at *2 (S.D.N.Y. Nov. 21, 2014) (quoting *Dodge v. Richmond*, 10 A.D.2d 4, 16 (1st Dep't 1960), *aff'd*, 8 N.Y.2d 829 (1960)). "[E]ven where a contract is not itself unlawful, the bargain may still be illegal [and unenforceable] under New York law if it is closely connected with an unlawful act." *Id.* (citation omitted).

The SAC alleges in detail that the Nordlicht Side Letter and the Master Guaranty Agreement were critical parts of the Second Scheme by the Platinum Defendants and the Beechwood Defendants. SAC, ¶¶ 568-606, 1013-1017, 1021-1028 and Ex. 74-81 to the SAC. This Court's April 11, 2019 Decision at pp. 15-16 specifically refers to the Nordlicht Side Letter and the "restructuring" in March 2016 by the Master Guaranty Agreement as examples of the Second Scheme.[19]

By executing the Nordlicht Side Letter, for which "PPVA nor any of its subsidiaries received any consideration whatsoever," and which benefitted "the Beechwood Entities owned by Nordlicht, Huberfeld, Bodner, Levy, Feuer and Taylor, at the expense of PPVA," Nordlicht purported to grant the Beechwood Entities an interest in the proceeds [approximately $37 million]

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[19] This Court's April 2019 Decision also held that Plaintiffs pleaded their claims for, *inter alia*, fraud with particularity. This holding disposes of the Beechwood Entities' assertion that Counts 20 and 21 are not pled with particularity.

of a separate investment [Implant Sciences] held by another PPVA subsidiary [DMRJ Group LLC ("DMRJ")], that otherwise would not have been available to them to pay off the Golden Gate Oil Loan, to the detriment of PPVA." SAC, ¶¶ 578-580. Similarly, the Master Guaranty Agreement did not benefit PPVA. SAC, ¶ 598. As the SAC states:

> 599. Rather, *the Master Guaranty benefitted Beechwood by providing it with additional collateral to secure the non-performing Golden Gate Oil Loan, comprised of a significant portion of PPVA's remaining valuable assets*.
>
> 600. In connection with the Master Guaranty, *several of the transactions entered into during the prior two years among PPVA and its subsidiaries and Beechwood were effectively reversed for Beechwood's benefit and to PPVA's detriment via a $70 million "loan" to PPCO*, by which certain Platinum positions were transferred from certain Beechwood reinsurance trusts to PPCO, which was thought to be solvent (unlike PPVA), and then, in a *classic insider and undervalue transaction, valuable assets of PPVA, then worth in excess of $20-$80 Million, were transferred to PPCO without valuable consideration*. (Emphasis added).

Based on these detailed allegations, the SAC alleges that the Nordlicht Side Letter and the Master Guaranty Agreement are unenforceable because each "document" "constituted a furtherance of the corrupt and fraudulent First and Second Schemes, whereby the Platinum Defendants and Beechwood Defendants siphoned off hundreds of millions of dollars in assets from PPVA for their own benefit" and these "documents" were "permeated with fraud and in violation of applicable law." SAC, ¶¶ 1016-1020, 1022-1028.

In sum, Counts 20 and 21 clearly state plausible claims for a declaratory judgment that the Nordlicht Side Letter and Master Guaranty are unenforceable as "contracts" that are permeated with fraud and thus illegal contracts. *See Weil v. Neary*, 278 U.S. 160, 173–74 (1929) ("illegality of the contract is clear" where contract sought to divide payment of legal fees between trustee and counsel for creditors in circumvention of then-"rule 5" adopted by bankruptcy court to combat

"fraud and disloyalty by agents and trustees"); *CMF Inv.*, Inc., 2014 WL 6604499, at *10 (Stock Purchase Agreement unenforceable, as it was entered into "with the intent to accomplish an illegal purpose"); *R.A.C. Grp., Inc. v. Bd. of Educ. of City of N.Y.*, 21 A.D.3d 243, 248 (2d Dep't 2005).

B. The DMRJ New York State Action Is Not A Bar to This Court's Jurisdiction over Counts 20 and 21

Preliminarily, we note that Plaintiffs, the Platinum Defendants and substantially all of the Beechwood Defendants are not parties in the action entitled *DMRJ Grp. LLC v. B Asset Manager, LP, and BAM Admin. Serv., LLC,* Index No. 655181/2017, pending in the Supreme Court, New York County (the "*DMRJ New York Action*").

Notably, the Beechwood Entities' motion does not ask this Court to abstain from exercising jurisdiction over Counts 20 and 21. As a result, Plaintiffs will not address this issue other than to state that (a) "as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction ....'" *Ambac Assurance Corp. v. U.S. Bank Nat'l Ass'n*, 328 F. Supp. 3d 141, 150 (S.D.N.Y. 2018) (citing *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976)) and (b) "abstention is generally disfavored, and federal courts have a 'virtually unflagging obligation' to exercise their jurisdiction." *Niagara Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 100 (2d Cir. 2012).

Finally, mention must be made of the Beechwood Movants' bald assertion that DMRJ's arguments in the *DMRJ New York Action* show that Plaintiffs have conceded that the Master Guaranty Agreement is an enforceable contract. As one of the grounds to invalidate the Nordlicht Side Letter, DMRJ asserted that the Nordlicht Side Letter was superseded by the Master Guaranty Agreement to which DMRJ is not a party. DMRJ unquestionably has the right to assert claims in the alternative even if such claims are inconsistent. *See* CPLR 3014; *WL Ross & Co. LLC v.*

Storper, 156 A.D.3d 514, 516 (1st Dep't 2017) ("WL Ross can properly plead alternative arguments, as well as take hypothetical or inconsistent positions in asserting its claims.").[20]

The same is true under the Federal Rules of Civil Procedure. *See Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016) ("[P]laintiff is at liberty to plead different theories, even if they are inconsistent with one another, and the court must accept each sufficiently pleaded theory at face value, without regard to its inconsistency with other parts of the complaint."); *Thieriot v. Jaspan Schlesinger Hoffman, LLP*, No. 07-cv-5315 (DRH) (AKT), 2016 WL 6088302, at *5 (E.D.N.Y. Oct. 18, 2016) ("[A] plaintiff is generally permitted to plead and prove his or her case on alternative and sometimes inconsistent theories of liability.").

In any case, the mere fact that DMRJ argues that the March Guaranty superseded the Nordlicht Side Letter does not mean that DMRJ, PPVA or the Plaintiffs agree that the March Guaranty itself is not subject to being avoided as against public policy. In fact, they are.

In short, DMRJ's assertion in the *DMRJ New York Action*, to which the Plaintiffs are not parties, cannot be read as an "admission" by the Plaintiffs in this action that the Master Guaranty Agreement is an enforceable agreement. So much for the Beechwood Entities' assertion that the "liquidators are seeking a second bite at the apple."

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[20] DMRJ has appealed the dismissal of the second and third causes of action in the complaint in the *DMRJ New York Action.* DMRJ's appeal has not yet been perfected.

CONCLUSION

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

Dated: New York, New York
May 13, 2019

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