UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Civil Action No. 1:18-cv-00658
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation), *Plaintiffs*, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-10936

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF DEFENDANT PB INVESTMENT HOLDINGS, LTD.

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PB Investment Holdings, Ltd., as successor-in-interest to Beechwood Bermuda Investment Holdings, Ltd. ("PBIHL"), asks the Court to dismiss the Second Amended Complaint [ECF 285] filed by Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the "Liquidators"). The Second Amended Complaint should be dismissed in its entirety for want of jurisdiction and failure to state a claim under Rules 9(b), 12(b)(2) and 12(b)(6).

PRELIMINARY STATEMENT

The Second Amended Complaint is nothing more than an impermissible group pleading that alleges no plausible claim for relief against PBIHL. The principal theory of the Second Amended Complaint is that PBIHL was intimately aware of, and went along with, the massive fraud that Platinum insiders allegedly perpetrated. (*See generally* Second Am. Compl.).

The Liquidators support this theory with vague and conclusory allegations as they relate to PBIHL. For instance, for the sake of the Second Amended Complaint, the Liquidators collectively refer to PBIHL and other entities as the "Beechwood Defendants" and "Beechwood Entities." (*Id.* ¶¶ 3, 36 & 214). PBIHL is hardly mentioned at all by name in the pleadings.

The Liquidators are certainly aware that they have little to support the claims against PBIHL, so they must expect that group pleading will create enough of an issue for PBIHL to remain a party defendant to this lawsuit. The Court dismissed similarly-situated "Beechwood Defendants" on substantially similar grounds in its April 11, 2019 Opinion [ECF 290]. Nevertheless, dismissal of the Second Amended Complaint is proper for several reasons. For one, the Liquidators' theory runs headlong into the *Wagoner* rule and the doctrine of *in pari delicto*. Each prevents a plaintiff from recovering for misconduct in which it also participated. *See*

Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114 (2d Cir. 1991); *Picard v. HSBC Bank PLC*, 454 B.R. 25, 37 (S.D.N.Y. 2011) (Rakoff, J.), *amended, In re Bernard L. Madoff Inv. Sec. LLC*, ADV. 08-1789 BRL, 2011 WL 3477177 (S.D.N.Y. Aug. 8, 2011), *aff'd*, 721 F.3d 54 (2d Cir. 2013). The Liquidators ask the Court to hold PBIHL liable for aiding and abetting in the massive fraud in which PPVA participated.

For another, the Liquidators' allegations fail to meet the heightened pleading standards for securities and fraud-based claims under Rule 9(b). The body of the Second Amended Complaint is 185 pages, yet at no point in the complaint do the allegations single out PBIHL for any wrongdoing. In every instance the alleged wrongdoing is collectively perpetrated by "Beechwood," the "Beechwood Entities," or the "Beechwood Defendants." Thus, PBIHL and the Court are left to wonder just how exactly PBIHL wronged PPVA, wrongfully benefitted from others' wrongdoing, or otherwise facilitated some sort of harm against PPVA.

The foregoing and additional reasons set forth below should illustrate that the Liquidators have not asserted, nor can they assert, a factually plausible or legally cognizable claim against PBIHL. Therefore, dismissal of the Liquidators' claims against PBIHL is proper.

STATEMENT OF FACTS

I. The Parties.

This litigation is one of several proceedings that arise out of the failure of Platinum Partners, formerly a highly regarded and successful hedge fund management company. Platinum Partners' principals are now subject to several civil and criminal proceedings, including this one.

The Liquidators represent PPVA, one of Platinum Partners' hedge funds. (Second Am. Compl. ¶ 2). PPVA was founded in 2003 by Defendants Murray Huberfeld, Mark Nordlicht, and David Bodner. (*Id.* ¶¶ 12, 41 & 226). Each individual, as well as other officers and employees of

the Platinum companies (collectively, the "Platinum Defendants"), are named defendants in this action. (*Id.* ¶ 3).

Distinct from the Platinum companies, "Beechwood" and the "Beechwood Entities" comprise reinsurance companies, investment management entities, and other entities that were formed in 2013. (*See id.* ¶¶ 8, 28 & 357). Defendants Mark Feuer and Scott Taylor were the respective CEO and President of these companies. (*Id.* ¶ 386). Over time, "Beechwood" became one of PPVA's largest creditors. (*Id.* ¶¶ 303 – 304).

The "Beechwood Defendants" that the Liquidators sue consist of "Mark Nordlicht, David Bodner, Murray Huberfeld, David Levy, Mark Feuer, Scott Taylor, Naftali Manela, David Ottensoser, Daniel Saks, Ezra Beren, Dhruv Narain, Illumin Capital Management LP, and the Beechwood Entities." (*Id.* ¶ 3).

The Liquidators allege that PBIHL, "as successor interest to Beechwood Bermuda Investment Holdings Ltd., is a Beechwood Entity organized under Bermuda law, with its principal place of business in Bermuda." (*Id.* ¶ 214). The Liquidators further allege that Beechwood Bermuda Investment Holdings Ltd. "was a reinsurance company domiciled in Bermuda." (*Id.*). The Liquidators make no further allegations in the Second Amended Complaint that specifically identify PBIHL.

II. The Liquidators' Conclusory Allegations against PBIHL as One of the "Beechwood Defendants" and "Beechwood Entities."

The Second Amended Complaint alleges a large-scale, Ponzi-like scheme that was meant to improve the standing of PPVA. (*See id.* Ex. 25 ¶ 6). The Liquidators contend that PPVA's investment portfolio was concentrated in illiquid positions (*id.* ¶¶ 20, 26, 307, & 319); that this lack of liquidity created problems when the PPVA funds received redemption requests (*id.* ¶ 321); and that, to address this issue, the Platinum Defendants relied upon money from new investors to

cover the redemptions (*id.* ¶ 322). The Liquidators further allege that this deceit allowed the PPVA funds to survive for three years beyond 2013, the year they should have been liquidated if the scheme had not been in place. (*Id.* ¶ 24).

The Liquidators contend that "Beechwood" and the "Beechwood Defendants" assisted the Platinum Defendants with execution of two schemes to defraud PPVA. The "First Scheme" is alleged to have occurred between 2013 and 2015 and entailed the Platinum Defendants and Beechwood/the Beechwood Defendants causing PPVA to participate in certain "non-commercial transactions" that would inflate the net value ascribed to PPVA's assets and keep the Ponzi-like scheme alive. (*Id.* ¶ 9). The Liquidators contend that these transactions prioritized the interests of the "Beechwood Entities" over the interests of PPVA and enabled Platinum insiders to take proceeds from the sale of PPVA's largest investment (Black Elk). (*Id.*).

The "Second Scheme" is alleged to have occurred from late 2015 to June 2016 and related to the Platinum Defendants' attempts to secure liquidity for PPVA. (*Id.* ¶¶ 10 – 11, 570, 690, & 716 – 17). The Liquidators allege that the Platinum Defendants and others transferred or encumbered "all or nearly all" of PPVA's remaining assets for the benefit of the "Beechwood Defendants," unidentified "insiders," and PPCO. (*Id.* ¶ 10). The Second Amended Complaint alleges certain "significant wrongful acts" by the Platinum Defendants and "Beechwood" regarding this scheme. (*See id.* ¶¶ 556 – 762).

The Liquidators bring five counts against the "Beechwood Defendants:" (1) aiding and abetting the Platinum Defendants' breaches of their fiduciary duties; (2) aiding and abetting the Platinum Defendants' fraud; (3) participating in a RICO scheme that injured PPVA; (4) conspiring to engage in tortious conduct against PPVA; and (5) unjust enrichment at PPVA's expense. (*Id.* ¶¶ 846 – 868, 938 – 947 & 960 – 985). Further, and although pleaded as "alternative allegations

of relief" and not a as a cause of action, the Liquidators allege the "Beechwood Entities" were alter egos of Defendant Platinum Management. (*Id.* ¶¶ 986 – 1000).

These allegations again fail to specify how PBIHL was specifically involved in the First Scheme or Second Scheme, or how PBIHL specifically benefited. Accordingly, and among other reasons, the Liquidators' pleadings are wholly insufficient to state a claim for relief against PBIHL.

ARGUMENT

The Liquidators cite no facts in their Second Amended Complaint which plausibly suggest that PBIHL harmed PPVA. Instead, the Liquidators allege that several entities comprising "Beechwood," the "Beechwood Entities," and the "Beechwood Defendants" engaged in conduct that harmed PPVA. Generalized allegations like these are not sufficient to meet Rule 8's pleading requirements. *See In re JP Morgan Auction Rate Sec. (ARS) Mktg. Litig.*, 867 F. Supp. 2d 407, 425 (S.D.N.Y. 2012) (holding that generalized, vague, and conclusory statements are insufficient to state a claim for relief). Stated differently, the Liquidators cite no facts which suggest that PBIHL harmed PPVA in any way. The Liquidators' claims against PBIHL should be dismissed.

I. The Second Amended Complaint Violates the Group Pleading Rule.

The first reason why the Liquidators' claims must be dismissed is because it is a group pleading that violates Rule 9(b).

Rule 9(b) reflects "the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing." *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972). Rule 9(b) "generally forbid[s]" group pleading "because each defendant is entitled to know what he is accused of doing." *In re Dreier LLP*, 452 B.R. 391, 409 (Bankr. S.D.N.Y. 2011). Accordingly, "[t]he Court must be especially vigilant in applying Rule 9(b) where a complaint is made against multiple defendants" because "the complaint should inform

each defendant of the nature of his alleged participation" in the tort. *Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 388 (S.D.N.Y. 2016).

The Liquidators' pleadings fail this most basic rule of pleading because the allegations simply lump together PBIHL with "Mark Nordlicht, David Bodner, Murray Huberfeld, David Levy, Mark Feuer, Scott Taylor, Naftali Manela, David Ottensoser, Daniel Saks, Ezra Beren, Dhruv Narain, Illumin Capital Management LP, and the Beechwood Entities" to form the "Beechwood Defendants." (Second Am. Compl. ¶ 3). The Liquidators state no reason for doing so.

The Liquidators must also "set forth the who, what, when, where and how of the alleged fraud" to adequately plead any claim that sounds in fraud. *Lipow v. Net 1 UEPS Techs., Inc.*, 131 F. Supp. 3d 144, 157 (S.D.N.Y. 2015). The Liquidators provide none of these details with regard to their claims of securities violations, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, or conspiracy against PBIHL. (*See* Sections III – V *infra*). In fact, the Liquidators do not allege any sufficient facts that tend to show that PBIHL itself engaged in any wrongful, fraudulent conduct. *See, e.g., Rosenbeck v. Rieber*, 932 F. Supp. 626, 628 (S.D.N.Y. 1996).

Indeed, the Court has previously dismissed the Liquidators' claims against other "Beechwood Entities" for impermissible group pleading. For instance, in dismissing the claims against the Beechwood Trusts and PEDCO entities, the Court observed that "the [First Amended Complaint] makes no specific allegations about Beechwood Trust Nos. 7-14, and the only specific allegation that it makes about BBLN-PEDCO Corp. and BHLN-PEDCO Corp. is that they 'are special purpose vehicles . . . and Beechwood Entities that, at all relevant times, were managed by BAM Administrative and administered in New York. [] Together, the two PEDCOs are referred to as the 'Beechwood SPVs,' [] but the only allegation that the FAC makes about this collective

entity is that it was a Beechwood Entity." (Opinion at 35). The Liquidators' allegations against PBIHL share a striking similarity to these earlier allegations; the Liquidators merely allege that PBIHL was a Beechwood Entity. Dismissal is clearly proper.

II. The Liquidators' Common Law Tort Claims and Civil RICO Claims are Barred as a Matter of Law.

The Liquidators' aiding and abetting, unjust enrichment, civil conspiracy, and civil RICO claims all fail under the Second Circuit's *Wagoner* rule and the doctrine of *in pari delicto*. These two related theories are rooted in the concept that where parties are alleged to have engaged in equally wrongful conduct, one may not recover from the other. *In re Lehr Constr. Corp.*, 551 B.R. 732, 738 (S.D.N.Y. 2016) (quoting *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010)), *aff'd*, 666 F. App'x 66 (2d Cir. 2016). The Liquidators' own allegations show that PPVA's principals participated in the wrongful conduct that forms the basis of this lawsuit, with "Beechwood" playing a supporting role, if any. The claims against PBIHL may not proceed.

A. The Liquidators Lack Standing to Pursue their Claims Under the Wagoner Rule.

The *Wagoner* rule provides that, under New York law, a bankruptcy trustee may only "assert claims held by the bankrupt corporation itself," and lacks standing to assert "[a] claim against a third party for defrauding a corporation with the cooperation of management" on behalf of "the guilty corporation." *Wagoner*, 944 F.2d at 118 & 120. The rule "derives from the fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation." *In re Grumman Olson Indus., Inc.*, 329 B.R. 411, 423 (Bankr. S.D.N.Y. 2005). "Management's misconduct is imputed to the corporation, and because [the] trustee stands in the shoes of the corporation, the *Wagoner* rule bars a trustee from suing to recover for a wrong that he himself essentially took part in." *Id.* at 423 – 424.

This rule applies equally to a liquidator who similarly stands in the shoes of the creditors. *See Bullmore v. Ernst & Young Cayman Islands*, 861 N.Y.S.2d 578, 581 (Sup. Ct. N.Y. Cty. 2008) (applying *Wagoner* rule to claims brought by joint official liquidators of Cayman Islands hedge fund); *cf. Cobalt Multifamily Inv'rs I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 440 (S.D.N.Y. 2012) (applying *Wagoner* rule to claims brought by court-appointed receiver). The *Wagoner* rule is a rule of standing that should be resolved at the earliest opportunity. *Wagoner*, 944 F.2d at 117. Indeed, courts do not hesitate to apply *Wagoner* to dismiss deficient claims based on the pleadings. *See, e.g., Picard*, 454 B.R. at 37.

Dismissal under Rule 12(b) is appropriate where, as here, a complaint's allegations demonstrate that a liquidator lacks standing to sue under the *Wagoner* rule. The Liquidators allege fraud against virtually everyone who controlled or had any meaningful position in PPVA's operations, and affirmatively allege that PPVA's own officers and directors were aware of and involved in the conduct that forms the grounds for liability against the "Beechwood Defendants." (*See, e.g.*, ¶ 12, 48, 54, & 73). Accordingly, it is apparent from the face of the Second Amended Complaint that the claims against the "Beechwood Defendants," the "Beechwood Entities," and PBIHL are subject to dismissal under the *Wagoner* rule.

B. The Doctrine of In Pari Delicto Also Bars the Liquidators' Claims.

Even if the Liquidators' pleadings are somehow adequate under Rule 9(b), their claims against PBIHL must still be dismissed by operation of the *in pari delicto* doctrine. This doctrine "prevents a party from seeking to recover against others for a wrong in which the party participated or is deemed through 'imputation' to have participated." *ICP Strategic Credit Income Fund Ltd. v. DLA Piper, LLP (US)*, 730 F. App'x 78, 81 (2d Cir. 2018). New York law defines the doctrine "extremely broadly." *Picard*, 454 B.R. 25. The doctrine is "so strong," in fact, that it controls

"even in difficult cases and should not be weakened by exceptions." *Kirschner*, 938 N.E.2d at 950.

Dismissal is appropriate where, as here, application of the doctrine is apparent from the face of the pleadings. *In re Bernard Madoff Inv. Sec. LLC*, 721 F.3d 54, 65 (2d Cir. 2013). Indeed, just as a wrongdoer cannot profit from his misconduct, a receiver cannot pursue damages when the entity in receivership engaged in the misconduct. Courts throughout the United States agree. For instance, the Seventh Circuit applied the *in pari delicto* doctrine to bar a receiver from asserting claims on behalf of an entity associated with a Ponzi-schemer. *See Knauer v. Jonathan Roberts Fin. Grp.*, 348 F.3d 230, 236 – 38 (7th Cir. 2003). "The basic equity is that a broker dealer, which apparently had little to do even with the Ponzi scheme, should not be liable to [the receivership entity], which was deeply complicit in the crimes . . .." *Id.* at 237.

Here, the Liquidators detail a massive and surreptitious fraud perpetrated by Platinum insiders. The Liquidators repeatedly identify the Platinum insiders as those who caused or orchestrated the schemes and acknowledge that PPVA's own principals were involved. (*See* Second Am. Compl. ¶¶ 233, 238 – 240). Considering New York's strong preference for robust application of the *in pari delicto* doctrine, the Liquidators should not be allowed to pursue their claims against PBIHL.[1]

C. The Narrow Interest Exception Does Not Apply.

Further, the narrow "adverse interest" exception to the *Wagoner* rule and *in pari delicto* doctrine does not apply in this instance. *In re 1031 Tax Grp., LLC*, 420 B.R. 178, 199 (Bankr. S.D.N.Y. 2009) (*Wagoner*); *Kirschner*, 938 N.E.2d at 952 (*in pari delicto*). "To come within the

[1] For these same reasons, this doctrine should bar any federal claims that the Liquidators bring against PBIHL. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 – 11 (1985) (holding that the *in pari delicto* doctrine can bar a securities act claim); *see also Republic of Iraq v. ABB AG*, 920 F. Supp. 517, 546 – 47 (S.D.N.Y. 2013) (dismissing RICO claim based on *Bateman Eichler*).

exception, the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes." *Kirschner*, 938 N.E.2d at 952 (quoting *Ctr. v. Hampton Affiliates, Inc.*, 488 N.E.2d 828, 830 (N.Y. 1985). Where the agent's alleged misconduct "enables the business to survive—to attract investors and customers and raise funds for corporate purposes—this test is not met." *Id.* at 953.

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

Here, the Liquidators affirmatively allege that PPVA benefited from the Platinum managers' wrongful conduct. The Liquidators allege that PPVA was facing a liquidity crisis that created problems when it came time to pay redemptions to investors. (Second Am. Compl. ¶¶ 20, 26, 307, 319, & 321). The Liquidators further allege that the Platinum Defendants relied upon new money from investors to pay redemptions, which also required them to maintain the pretense that PPVA's net asset value was increasing. (*Id.* ¶¶ 322 & 344). The Liquidators admit that this scheme allowed PPVA to survive for at least three additional years and attract new investors. (*Id.* ¶¶ 15 & 24). Thus, the allegations show that the conduct Platinum's principals sustained the funds, and any argument that this conduct was adverse to PPVA is without merit and should be rejected.

III. The Liquidators' Civil RICO Claims are Predicated on Securities Fraud and Barred by the PSLRA.

In the unlikely event the Court determines that wholesale dismissal of the Liquidators' claims against PBIHL is improper, separate grounds exist for the dismissal of each and every claim that the Liquidators bring against PBIHL. Regarding the Liquidators' civil RICO claims (*see* Second Am. Compl. ¶¶ 968 – 985), dismissal is proper because securities fraud cannot serve as predicate act for this claim.

Section 1964(c) of the Private Securities Litigation Reform Act ("PSLRA") expressly bars any civil RICO claim predicated on the purchase or sale of securities. 18 U.S.C. § 1964(c). This bar is so broad, in fact, that "[i]f the alleged conduct could form the basis of a securities fraud claim against any party—be it against, or on behalf of, the plaintiff, defendant or a non-party—it may not be fashioned as a civil RICO claim." *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 644 (S.D.N.Y. 2017). This bar should be interpreted "not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819; *see also Boudinot v. Shrader*, No. 09 Civ. 10163, 2012 U.S. Dist. LEXIS 19172, at *5 (S.D.N.Y. Feb. 15, 2012), *aff'd in part*, 863 F.3d 162 (2d Cir. 2017). Accordingly, any alleged conduct by PBIHL to participate in or aid and abet any party's alleged securities fraud is subject to this bar. *See Zohar*, 286 F. Supp. 3d at 643.

The Liquidators' theory of RICO liability against PBIHL appears to relate to transactions involving the purchase or sale of securities, including the alleged Black Elk Scheme (Second Am. Compl. ¶ 978) that forms the core of the securities-fraud claims in the SEC Complaint[2] against the Platinum insiders (*see id.* ¶¶ 299 – 300). Zooming out, almost every one of the alleged predicate

[2] The SEC Complaint is attached to the Second Amended Complaint as Exhibit 25 and incorporated therein by reference.

acts looks to involve some type of securities transaction, be it an investment, a loan, a pledge, or an express offer to purchase a security. (*Id.* ¶ 978).

This conduct is precisely the type of conduct to which the PSLRA bar applies. The Court has specifically recognized in other proceedings that this bar covers conduct taken to keep a Ponzi scheme going. *See, e.g., Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012) (Rakoff, J.) (dismissing civil RICO claim based on allegation that defendants "kept Madoff Securities' Ponzi Scheme alive" and conspired "to conceal the fact that their funds[] only fed into Madoff Securities" under the PSLRA's RICO amendment). Any alleged conduct by PBIHL to participate in or aid and abet the alleged Platinum fraud is subject to the PSLRA's bar. *See Zohar*, 286 F. Supp. 3d at 643.

The Liquidators' RICO claims also fail because they are too narrow in number of victims, time, and purpose to constitute a continuous pattern of racketeering. To adequately plead the existence of a RICO pattern, the Liquidators must allege facts giving rise to an inference of either "close-ended" or "open-ended" continuity. *See H.J. Inc. v. Bell Tel. Co.*, 492 U.S. 229, 240 – 41 (1989). The former regards a "closed period of repeated conduct" while the latter regards "past conduct that by its nature projects into the future with a threat of repetition." *Id.* The Liquidators fail to adequately plead either form of conduct.

The Liquidators purport to identify a conspiracy with the singular purpose "to defraud PPVA, and to obtain money and property from PPVA, through false pretenses, representations, and promises." (Second Am. Compl. ¶ 977). That accusation identifies only one purported victim—PPVA—over a period of roughly three years. (*Id.*). These allegations fall well short of the "kind of broad-based unlawful activity that RICO was designed to address." *Feirstein v. Nanbar Realty Corp.*, 963 F. Supp. 254, 260 (S.D.N.Y. 1997) (four predicate acts over a three-

year period did not satisfy the continuity factor); *Lefkowitz v. Bank of New York*, No. 01 Civ. 6252, 2009 U.S. Dist. LEXIS 120223 (S.D.N.Y. 1997), *rev'd in part on other grounds*, 528 F.3d 102 (2d Cir. 2007) (no closed-ended continuity where a small number of parties engaged in activities with a narrow purpose directed at a single or at most three victims).

Further, the allegations are plainly deficient as to PBIHL since there are no allegations that are specific to PBIHL. Where the "alleged predicate acts attributed to [a particular defendant] . . . do not extend over a sufficiently long period of time to satisfy the requirements of closed-ended continuity," a district court should "properly dismiss[]" the substantive RICO claims as well as any related claims alleging conspiracy or improper investment of RICO proceeds. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 – 82 (2d Cir. 2004) (affirming dismissal because predicate acts that span fewer than two years are always insufficient for a closed-end pattern).

Finally, the civil RICO claims fail because the Liquidators do not allege that PBIHL invested any racketeering proceeds in a separate enterprise. *See Globe Wholesale Tobacco Distribs. Inc. v. Worldwide Wholesale Trading Inc.*, No. 06 Civ. 2865, 2007 U.S. Dist. LEXIS 72656, at *5 (S.D.N.Y. Sept. 29, 2007). The allegations also do not support an inference that PBIHL entered into an agreement to facilitate the goals of the alleged enterprise. *Sanchez v. ASA Coll., Inc.*, No. 14-CV-5006, 2015 U.S. Dist. LEXIS 73222, at *12 (S.D.N.Y. June 5, 2015). Thus, dismissal of the Liquidators' civil RICO claims is proper.

IV. The Liquidators' Conclusory Fraud-Based Claims Should be Dismissed.

The Liquidators assert two aiding and abetting claims against the "Beechwood Defendants." First, the Liquidators allege that "the Platinum Defendants breached their fiduciary duties to PPVA by their actions in connection with the First and Second Schemes." (Second Am.

Compl. ¶ 848). The Liquidators contend that the "Beechwood Defendants" aided and abetted this breach by participating in transactions with PPVA that furthered the schemes. (*Id.* ¶ 452). Second, the Liquidators allege that the "Beechwood Defendants" aided and abetted the same schemes by participating in the same series of transactions with PPVA. (*Id.* ¶ 863). While the *Wagoner* rule and *in pari delicto* doctrine visibly apply to these claims, each should also be dismissed for failure to state a claim under Rules 9(b) and 12(b)(6).[3]

A. The Liquidators Fail to State a Claim for Aiding and Abetting Breach of Fiduciary Duty.

A claim of aiding and abetting a breach of fiduciary duty requires specific allegations of: (1) a breach of fiduciary obligations to another; (2) that the aider and abettor knowingly induced or participated in the breach; and (3) damages incurred by the plaintiff as a result of the breach. *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 345 (2d Cir. 2018). "With respect to the second requirement, although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty. And a person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator." *Id.*

The Second Amended Complaint is plainly deficient with respect to the substantial assistance element. The allegations conclude that the "Beechwood Defendants substantially assisted and participated in the Platinum Defendants' breached of their fiduciary obligations in connection with the First and Second Schemes" by engaging in various transactions with PPVA. (Second Am. Compl. ¶ 852). The pleadings do not allege that PBIHL was involved in, let alone

[3] The Court has yet to rule on the fraud-based claims that Liquidators have brought against other "Beechwood Entities." While the April 11, 2019 Opinion addresses these claims as they relate to individual "Platinum and Beechwood Defendants" Bodner, Huberfeld, Ottensoser, and Levy—each of which "is alleged to have been a high-level corporate insider" (Opinion at 45)—the Court dismissed the fraud-based and other claims brought against the "Beechwood Entities" based on impermissible group pleading (*see id.* at 34 – 37).

provided substantial assistance to, any event that provides the basis of the aiding and abetting breach of fiduciary duty claim.

The Liquidators' aiding and abetting breach of fiduciary duty claim, like the aiding and abetting fraud claim (discussed in Section IV.B *infra*), appears to be an attempt to create liability by association. However, the case law requires more than pleading mere association before a claim is actionable—the party must be proximately involved with the transaction(s) at issue. There are no allegations in the entire Second Amended Complaint regarding PBIHL having any involvement in the transactions. Other than being one of the "Beechwood Entities," which is itself a conclusory allegation, there are no allegations that tie PBIHL to the transactions made the basis of the aiding and abetting breach of fiduciary duty claim.

Bare and conclusory allegations fail to satisfy Rule 9(b)'s heightened pleading requirements. A plaintiff that raises an aiding and abetting claim must plead knowing participation with particularity or risk dismissal at the pleading phase. *See Kaufman v. Cohen*, 760 N.Y.S.2d 157, 169 – 70 (1st Dep't 2003) (that one defendant with a fiduciary duty was alleged to have a beneficial interest in other entity defendants merely shows constructive knowledge, "an insufficient basis for aider and abettor liability"); *see also Global Minerals & Metals Corp. v. Holme*, 824 N.Y.S.2d 210, 216 – 17 (1st Dep't 2006) (complaint dismissed for failure to plead additional facts that would have shown key element of actual knowledge). The Liquidators' vague and conclusory claims against PBIHL fail to meet these requirements. Accordingly, the Liquidators' claim for aiding and abetting a breach of fiduciary duty should be dismissed with prejudice.

B. The Liquidators Fail to State a Claim for Aiding and Abetting Fraud.

A claim of aiding and abetting fraud requires specific allegations of facts supporting "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Ritchie Capital Mgmt., L.L.C. v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 338 (S.D.N.Y. 2015), aff'd, 821 F.3d 349 (2d Cir. 2016). The Liquidators' claim here is deficient for several reasons. First, and as set forth in Section V.A above, the Liquidators fail to specifically plead the "who, what, when, where, and how" of the alleged underlying fraud. Indeed, the Liquidators fail to plead any facts that tend to establish PPVA's justifiable reliance on any material misrepresentation or actionable omission by the Platinum Defendants, which is an essential element of any fraud claim. *See Eurycleia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976, 979 (N.Y. 2009). The Liquidators do not detail how PPVA could have been misled by, or how PPVA could have relied on, any alleged misstatement that was purportedly made on by or on behalf of the Platinum Defendants.

Second, the knowledge of Platinum's top management is imputed to PPVA. This means that PPVA's own agents were involved in "every aspect of the First and Second Schemes" (Second Am. Compl. ¶¶ 12, 48, 54, & 73), which bars PPVA's claims. Since the Liquidators stand in the shoes of PPVA, they are barred from asserted claims against the "Beechwood Defendants" for aiding and abetting PPVA in deceiving itself.

Third, there is absolutely no allegation that PBIHL knew of the fraud. Indeed, the allegations that relate to the aiding and abetting fraud claim do not even mention PBIHL by name; rather, the Liquidators generally name the "Beechwood Defendants" as the wrongdoers (*see id.* ¶¶ 859 – 868), depriving PBIHL of any understanding of the allegations against it.

Fourth, and finally, the Liquidators' allegations fail to show that PBIHL substantially assisted in achievement of the fraud. "Substantial assistance" under New York law requires allegations "that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001). The Liquidators' allegations do no such thing, as there is no allegation that PBIHL provided substantial assistance to any transaction that the Liquidators rely upon in support of this claim. The Liquidators' aiding and abetting fraud claim should be dismissed.

V. The Liquidators' Civil Conspiracy Claim is Duplicative of the Aiding and Abetting Claims.

Like the aiding and abetting claims, the Liquidators' civil conspiracy claim is ripe for dismissal. For one, it is duplicative of the fraud-based claims because all three claims seek to hold the "Beechwood Defendants" secondarily liable for primary torts committed by other defendants. *See, e.g., Briarpath Ltd. LP v. Phx. Pictures, Inc.*, 312 F. App'x 433, 434 (2d Cir. 2009) (noting that a claim for conspiracy to breach fiduciary duty is duplicative of an aiding and abetting claim); *In re Allou Distribs., Inc.*, 446 B.R. 32, 60 – 61 (Bankr. E.D.N.Y. 2011) (cases holding that conspiracy and aiding and abetting claims are duplicative). For another, the allegations are insufficient under Rule 9(b) because the same allegations for the aiding and abetting claims are the grounds for the conspiracy claim. Those allegations fail to meet Rule 9(b)'s heightened pleading requirements. Therefore, the conspiracy claim should be dismissed in its entirety.

VI. The Liquidators' Unjust Enrichment Claim is Implausible.

The Liquidators also bring a claim, "in the alternative," against the "Beechwood Defendants" for unjust enrichment. (Second Am. Compl. ¶¶ 938 – 947). The Liquidators contend the Platinum Defendants "intentionally engaged in certain acts for the purpose of transferring or encumbering PPVA's assets" in relation to the Second Scheme; that the Platinum Defendants

"orchestrated the Second Scheme for the intentional purpose of diverting the remaining assets of PPVA and its subsidiaries to insiders, such as the Beechwood Defendants[;]" and that the "Beechwood Defendants would be unjustly enriched at the expense of PPVA if they were permitted to receive full benefit from the Second Scheme Transactions and related transfers." (*Id.* ¶¶ 939, 940 & 943). There are two reasons why dismissal of this unjust enrichment claim is proper.

First, an unjust enrichment claim cannot stand where an express agreement governs the rights at issue. *SmartStream Techs., Inc. v. Chambadal*, No. 17-CV-2459, 2018 U.S. Dist. LEXIS 63867, at *7 (S.D.N.Y. Apr. 16, 2018). This applies to both signatories and non-signatories alike. *Vitale v. Steinberg*, 764 N.Y.S.2d 236, 239 (1st Dep't 2003). Here, the Liquidators limit their claim to the Second Scheme, and each one of the alleged related bad acts is connected to a structured agreement, be it the Montsant Assignment Agreement, the Nordlicht Side Letter, the Master Guaranty, or the Agera deal documents. (*See* Second Am. Compl. ¶¶ 566, 574, 593, 647, & 939 – 940). The alternative unjust enrichment claim should be dismissed.

Second, pleading a general, non-specific benefit is insufficient to support an unjust enrichment claim. *Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 533 (S.D.N.Y. 2018) (allegations that parties were "enriched" were "entirely conclusory" and "not entitled to be assumed true"); *see also Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352 – 53 (S.D.N.Y. 2018) (complaint failed to plead specific facts showing how any single defendant might have profited from the alleged scheme or how the money was diverted to them). As the Court explained in a related proceeding, "[r]elief for unjust enrichment is 'available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff.'" *Senior Health Ins. Co.*, 345 F. Supp. 3d at 532 (quoting *Corsello v. Verizon N.Y., Inc.*,

967 N.E.2d 1177, 1185 (N.Y. 2012)). The Liquidators merely allege the "Beechwood Defendants" were unjustly enriched at PPVA's expense; there are no well-pleaded allegations concerning how PBIHL was supposedly "enriched." Therefore, the Court should dismiss the Liquidators' unjust enrichment claim.

VII. The Liquidators Fail to State a Plausible Claim for Alter Ego Liability.

Finally, the Liquidators bring allegations against the "Beechwood Entities" for alter ego liability. (Second Am. Compl. ¶¶ 986 – 1000). These vague and conclusory group pleadings do not support any claim that PBIHL was an alter ego of Platinum Management.

"[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. New York State Dep't of Taxation & Fin.*, 623 N.E.2d 1157, 1160 – 61 (N.Y. 1993). As to the first prong of this test, New York courts consider multiple factors in determining whether domination and control of the corporation existed, including:

> (1) disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arms length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of the corporation's debts by the dominating entity, and (10) intermingling of property between the entities.

Freeman v. Complex Computing Co., 119 F.3d 1044, 1053 (2d Cir.1997).

The Liquidators make broad assertions about Platinum Management's alleged control of the "Beechwood Entities." For example, the Liquidators make conclusory statements about "overlapping management, founders and officers[;]" that the "Beechwood Entities and Platinum Management were inadequately capitalized relative to their business investment risks at all

relevant times[;]" that Platinum Management "financed and created" the "Beechwood Entities[;]" that "assets controlled by Platinum Management were used to finance the Beechwood Entities[;]" that Platinum Management and the "Beechwood Entities" "entered into informal and unreported loan agreements and terms, put-back agreements, and guarantees[;]" and that "[t]he ultimate decision making for both Platinum Management and the Beechwood Entities rested with the same controlling minds[.]" (Second Am. Compl. ¶¶ 990, 992, 993, 995, & 996).

These conclusory statements are not enough to satisfy the domination component of an alter ego claim. The Liquidators must show that Platinum Management actually exercised control over PBIHL specifically with respect to the transactions made the basis of this lawsuit. *See Network Enters., Inc. v. Reality Racing, Inc.*, No. 09 Civ. 4664, 2010 U.S. Dist. LEXIS 89598, at *5 (S.D.N.Y. Aug. 24, 2010) ("The Court considers not whether Defendants exhibited behavior at any time that might indicate domination and control, but whether they exhibited such behavior with respect to the transaction at issue."). The general allegations regarding domination and control are not enough to establish a direct claim against PBIHL specifically. Therefore, the facts alleged in the Second Amended Complaint are insufficient to allow the Court to reasonably infer that Platinum Management exercised domination and control over PBIHL with respect to the transactions at issue.

However, even if the Court assumes that the Liquidators have sufficiently established Platinum Management's domination of the "Beechwood Entities," and PBIHL in particular, as to the transactions at issue, the reasoning for even seeking alter ego liability from PBIHL is unclear, as the typical allegations in favor of piercing the corporate form seek to hold an owner personally liable for company wrongdoing. The Second Amended Complaint falls well short of alleging facts to allow the Court to reasonably infer that Platinum Management used this control to commit a

fraud or other wrong that resulted in loss or injury to PPVA. *See Freeman*, 119 F.3d at 1053; *Morris*, 623 N.E.2d at 1161. For example, the Second Amended Complaint alleges:

> As set forth in detail herein, Platinum Management and the Beechwood Entities used the property of PPVA in furtherance of a fraud, in order to siphon fees off of inflated NAVs. The Beechwood Entities and Platinum Management caused PPVA and Beechwood to make joint investments, often to the detriment of PPVA and its creditors and investors. . . . Beechwood and Platinum Management engaged in a corrupt enterprise to pursue fraudulent, wrongful, and illicit purposes, which directly harmed PPVA. This enterprise and plan is summarized herein as the First Scheme and the Second Scheme, wherein Platinum Management formed and created the Beechwood Entities for the corrupt and wrongful purposes of inflating PPVA's asset values and taking fees based upon these values, engaging in the Black Elk Scheme for the benefit of the BEOF Funds and to the detriment of PPVA, and then forming and executing the Second Scheme for the purpose of dissipating PPVA's remaining valuable assets to Beechwood, most notably its interests in IMSC and Agera Energy.

(Second Am. Compl. ¶¶ 995 & 999). Absent from the Liquidators' pleadings are any facts or allegations relating to specific acts committed by PBIHL itself which harmed PPVA. The "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the allegations in the complaint are true." *Network Enters.*, 2010 U.S. Dist. LEXIS 89598, at * 3 (internal quotations and citations omitted). "[T]his standard demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* Therefore, the Liquidators' claim for alter ego liability against PBIHL should be dismissed with prejudice.

CONCLUSION

As the above makes clear, dismissal is proper for each claim the Liquidators bring against PBIHL: (1) aiding and abetting the Platinum Defendants' breaches of their fiduciary duties; (2) aiding and abetting the Platinum Defendants' fraud; (3) participating in a RICO scheme that injured PPVA; (4) conspiring to engage in tortious conduct against PPVA; and (5) unjust enrichment at PPVA's expense; and (6) alter ego liability. The reasons for dismissal include

impermissible group pleading, operation of the *Wagoner* rule and *in pari delicto* doctrine, and failure to plead with sufficient specificity under Rules 9(b) and 12(b)(6).

For these reasons, the Liquidators' claims against PBIHL should be dismissed with prejudice.

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LAW OFFICES OF CHARLES A. GRUEN

By: _____
CHARLES A. GRUEN

Attorneys for Defendants
7703 Fifth Ave, Suite 300
Brooklyn, New York 11209
and
381 Broadway, Suite 300
Westwood, New Jersey 07675
(201) 342-1212

Aaron Z. Tobin
Condon Tobin Sladek Thornton, PLLC
8080 Park Lane, Suite 700
Dallas, Texas 75231
(214)265-3851 Telephone
(214)691-6311 Fax
(Pro Hac Vice to be filed)