UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	Case No.: 1:18-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), *et ano.*, Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	Case No.: 1:18-cv-10936-JSR

Reply Memorandum of Law in Further Support of Defendant Michael Katz's Motion to Dismiss

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INTRODUCTION

Plaintiffs' memorandum of law in opposition to the moving defendants' motions to dismiss (ECF No. 319) ("Pls. MOL") confirms what is obvious from the face of the SAC: Plaintiffs' sole claim against Katz for aiding and abetting breach of fiduciary duty should be dismissed.[1]

First, Plaintiffs' claim is barred by the *in pari delicto* doctrine and related *Wagoner* rule. Plaintiffs do not dispute that the acts and knowledge of the Platinum Defendants are imputed to PPVA and the Liquidators. Instead, Plaintiffs argue that the insider and adverse-interest exceptions apply. But neither apply because Plaintiffs do not (and cannot) plead that Katz exercised any control over PPVA, Plaintiffs concede that the Platinum Defendants dominated PPVA, and the SAC does not support Plaintiffs' argument that PPVA received no benefit from the Agera Transactions.

Second, Plaintiffs fail to adequately state their claim against Katz. Plaintiffs did not respond to Katz's argument that they fail to plead but-for and proximate causation, so should be found to have conceded that essential element. Plaintiffs also fail to explain how they sufficiently plead actual knowledge or substantial assistance—because they do not.

Third, Plaintiffs concede that they are not entitled to punitive damages. While the claim against Katz should be dismissed in its entirety, at a minimum, Plaintiffs are not entitled to punitive damages.

ARGUMENT

I. Plaintiffs' Claim Against Katz Is Barred by *In Pari Delicto* and the *Wagoner* Rule.

Plaintiffs do not dispute that the bad acts and knowledge of the so-called "Platinum Defendants" are imputed to PPVA and the Liquidators. Instead, they simply argue that the insider and adverse-interest exceptions to *in pari delicto*/*Wagoner* apply. Plaintiffs are incorrect.

[1] Unless otherwise indicated, capitalized terms have the same meaning as in the Memorandum of Law in Support of Defendant Michael Katz's Motion to Dismiss (ECF No. 309) (the "Katz MOL").

A. The Insider Exception Does Not Apply.

Plaintiffs' argument that the insider exception to *in pari delicto* and the *Wagoner* rule applies is unavailing. As an initial matter, Plaintiffs ignore that New York courts do not clearly recognize an insider exception. *In re Lehr Constr. Corp.*, 551 B.R. 732, 740 (S.D.N.Y.) ("*Kirschner* does not support the…conclusion that New York law provides for a broad 'insider' exception to the presumption of imputation."), *aff'd*, 666 F. App'x 66, 70 (2d Cir. 2016) (declining to address whether "New York courts recognize or would recognize" the insider exception).

Moreover, the allegations against Katz in the SAC do not allege that he was an "insider" such that the exception could apply. Despite their best efforts to enlarge the definition of an "insider" for purposes of the exception, Plaintiffs' own cases recognize that any insider exception applies to only those who were on the board, in management, or exercised control over the defunct enterprise. *See, e.g.*, *Teras Int'l Corp. v. Gimbel*, No. 13-cv-6788-VEC, 2014 WL 7177972, at *10 (S.D.N.Y. Dec. 17, 2014) (describing exception as applicable to "fiduciaries who are insiders in the sense that they either are *on the board or in management*, or in some other way *control the corporation*") (emphasis added) (quoting *In re Optimal U.S. Litig.*, 813 F.Supp.2d 383, 400 (S.D.N.Y. 2011)); *In re PHS Grp., Inc.*, 581 B.R. 16, 31-32 (E.D.N.Y. 2018) (same).

In fact, not even every *fiduciary* qualifies as an "insider" for purposes of this exception— "the 'fiduciary' must be one that *exercises control* over corporate actions." *In re Refco Inc. Sec. Litig.*, No. 07-md-1902 (JSR), 2010 WL 6549830, at *15 (S.D.N.Y. Dec. 6, 2010) (emphasis added), *aff'd in part*, 779 F. Supp. 2d 372 (S.D.N.Y. 2011). The insider must "exercise[] 'something more than the monitoring of a debtor's operations and proffering advice to management.'" *In re PHS Grp., Inc.*, 581 B.R. 16, 32 (E.D.N.Y. 2018) (quoting *In re KDI Holdings, Inc.*, 277 B.R. 493, 511 (Bankr. S.D.N.Y. 1999)). For that reason, the cases upon which Plaintiffs rely support Katz's position that he was not an insider because he did not exercise the necessary and required

control. *See Teras*, 2014 WL 7177972, at *10 ("Plaintiff has not alleged that [non-director defendants] 'controlled' [the business]; there is, therefore, no basis to find that the *in pari delicto* doctrine does not apply to them."); *In re 455 CPW Assoc.*, No. 99-5068, 2000 WL 1340569, at *5 (2d Cir. Sept. 14, 2000) (noting that "courts have required evidence of *extensive control* before finding insider status under [11 U.S.C.] § 101(31)(C)(v)" and affirming lower courts' holding that a vice president of a limited partner of the debtor was not an "insider" because the evidence did not demonstrate that he executed actual management of the debtor); *In re Glob. Aviation Holdings, Inc.*, 478 B.R. 142, 148-50 (Bankr. E.D.N.Y. 2012) (holding that certain employees were not "insiders" as defined in 11 U.S.C. § 101(31)(B) in part because, although they had responsibility for day-to-day operations, they did not have authority to make company-wide or strategic decisions); *In re Borders Grp., Inc.*, 453 B.R. 459, 469-70 (Bankr. S.D.N.Y. 2011) (same).[2]

Here, there are no allegations that Katz exercised any control whatsoever over PPVA. To the contrary, Plaintiffs' allegation that Katz "*suggested* to Mark Nordlicht a 'potential sale to an insider'" indicates that Katz had no control—he merely made a suggestion to someone who did, in fact exercise the necessary control; namely, Mark Nordlicht. *See* SAC ¶ 608 (emphasis added). The SAC conclusorily alleges that Katz "began taking an active role at Platinum Management beginning in or about January 2016." SAC ¶ 126. But, as evident from Plaintiffs' own cases, having an "active role," even to the extent of being involved with "day-to-day operations" (which is

[2] Many of Plaintiffs' cited cases are distinguishable on their facts because the alleged insiders there did actually control the business at issue. *See In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 124-25 (Bankr. S.D.N.Y. 2011) (applying insider exception to senior officers, directors, and compliance managers of BLMIS); *In re FKF3, LLC*, No. 13 Civ. 3601 (JCM), 2018 WL 5292131, at *10 (S.D.N.Y. Oct. 24, 2018) (considering insider exception for defendant who held a one-third membership interest in and was an alleged manager of the relevant entity); *In re PHS Grp., Inc.*, 581 B.R. 16, 34-38 (E.D.N.Y. 2018) (applying insider exception to defendants who, among other things, "participate[d] in almost every aspect of the Debtor's business," "was intimately involved in the Debtor's affairs," "exerted *significant influence* over decisions affecting the Debtor's operations," "loaned money to the Debtor on an in and out basis," and "used the Debtor's assets and employees to support his own company").

not alleged against Katz) is insufficient. *See In re Glob. Aviation*, 478 B.R. at 149. Similarly, the alleged fact that Katz was provided access to the offices of Platinum Management "to directly oversee his [grandfather's] investment with PPVA" does not equate to the necessary level of control over Platinum Management. And Katz's March 13, 2016 email, which (as discussed below) Plaintiffs implausibly and incorrectly interpret as initiating the Agera Transactions, is, at most, the mere proffering of a suggestion to management, which again is insufficient to allege control for purposes of the insider exception. *See In re PHS Grp.*, 581 B.R. at 32.

Plaintiffs have asserted no claim against Katz for primary breach of fiduciary duty. That is because Katz was not a fiduciary and he certainly was not an insider who exerted control over PPVA.

B. The Adverse-Interest Exception Does Not Apply.

Equally unavailing is Plaintiffs' argument that the adverse-interest exception applies here. Plaintiffs do not even address Katz's argument that New York's "sole actor rule" mandates that the adverse-interest exception not apply. *See* Katz MOL 10. As noted in Katz's opening memorandum of law, when an agent completely dominates and controls a corporation, the corporation and the agent are considered to be "one and the same," and the adverse-interest exception does not apply. *See id.* (citing *In re Bernard L. Madoff Inv. Sec., LLC*, 721 F.3d 54, 64 n.14 (2d Cir. 2013); *In re Mediators, Inc.*, 105 F.3d 822, 827 (2d Cir. 1997)).[3] Because the SAC alleges that the Platinum Defendants exercised complete control over PPVA, the sole actor rule applies and the adverse-interest exception does not. *Id.*

[3] Notably, Plaintiffs do not even attempt to rely on the "innocent insider" exception to *in pari delicto*/*Wagoner*, likely because they know there was not even "one decision-maker in a management role or amongst the shareholders [was] innocent and could have stopped the fraud." *See In re Refco Inc. Sec. Litig.*, No. 07-md-1902 (JSR), 2010 WL 6549830, at *20 (S.D.N.Y. Dec. 6, 2010) (describing innocent insider exception), *aff'd in part*, 779 F. Supp. 2d 372 (S.D.N.Y. 2011).

Even aside from the sole actor rule, the adverse-interest exception does not apply here because Plaintiffs have not alleged that PPVA did not benefit at all from the Agera Transactions, the only transactions in which Katz was allegedly involved. *See Kirschner v. KPMG, LLP*, 15 N.Y.3d 446, 466-67 (2010) ("To come within [this most narrow] exception, the agent must have *totally* abandoned his principal's interests and be acting *entirely* for his own or another's purposes."). One of the emails on which Plaintiffs rely confirms that the purpose of the Agera sale was to increase PPVA's liquidity. *See* SAC at Ex. 87 (Nordlicht noting, with respect to an Agera sale, that "the liquidity is just too transformative for us to ignore")). And the SAC alleges that PPVA and its subsidiary Principal Growth Strategies, LLC ("PGS") received direct benefits from the sale of Agera: a stated purchase price of $170 million, including $55 million in cash paid to PGS. *See* SAC ¶¶ 648, 653.

Plaintiffs allege that ultimately Agera sold for less than fair market value. But these allegations do not undermine the application of *in pari delicto* and *Wagoner* here. For purposes of the adverse-interest exception, whether the defunct company received fair market value is irrelevant; all that is required is that the company benefitted. *See Kirschner*, 15 N.Y.3d at 466 (agent's allegedly "fraudulent conduct" that "enables the business to survive" does not fall within adverse-interest exception, even if it "can be said to have caused the company's ultimate bankruptcy"); *see also New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 41 N.Y.S.3d 1, 10 (1st Dep't 2016) (actions that "enabled the funds to continue to survive" defeat the adverse-interest exception); *Concord Capital Mgmt., LLC v. Bank of Am., N.A.*, 958 N.Y.S.2d 93, 94 (1st Dep't 2013) (same). As a result, the adverse-interest exception does not apply and Plaintiff's claim against Katz is barred.

II. Plaintiffs Do Not State a Claim Against Katz.

Plaintiffs' memorandum in opposition to Katz's motion to dismiss does little to explain

how Plaintiffs adequately plead their aiding and abetting claim against Katz, which they have not.

First, Plaintiffs do not properly plead but-for or proximate causation. As explained in Katz's opening memorandum, Plaintiffs do not plead that the Agera Transactions would not have occurred but for Katz's emails, and the link between Katz's emails and the actual sale of Agera is far too attenuated to constitute proximate cause. Katz MOL 16-18. Aside from saying that "Katz's tortious acts resulted in significant damage to PPVA,"[4] Plaintiffs do not address this element and should be found to have conceded that it is not adequately pleaded. *In re Platinum-Beechwood Litig.*, No. 18-CV-10936 (JSR), 2019 WL 1570808, at *19 (S.D.N.Y. Apr. 11, 2019) (treating as abandoned a claim for which Plaintiffs did not address a defendant's argument because "[t]his Court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed") (quoting *Lipton v. Cty. of Orange, NY*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004)).

Second, the SAC fails to adequately allege that Katz had actual knowledge of any breach of fiduciary duty. Plaintiffs' memorandum fails to even address whether Katz possessed actual knowledge of any such breach. *See* Pls.' MOL 39-41. Instead, Plaintiffs only ambiguously argue, citing paragraphs 123-128, that Katz "gained knowledge and information concerning PPVA's financial condition" after Katz began his undefined "active role at Platinum Management beginning in or about January 2016."[5] *Id.* at 40-41.

Preliminarily, we note that neither those paragraphs nor any other paragraphs in the SAC allege that Katz had knowledge or information concerning PPVA's financial condition. *See* SAC

[4] As discussed below, the only alleged tortious act by Katz was the sending of an email suggesting that the sale of Agera at a market price would provide much-needed liquidity to PPVA.

[5] Plaintiffs' allegation that Katz played an "active role" is conclusory and inconsistent with Plaintiffs' more specific allegations that Katz's role at Platinum was a passive one: to oversee and protect his grandfather's investment.

¶¶ 123-28. But even if Plaintiffs had made that allegation, a conclusory allegation of knowledge of merely PPVA's financial condition is insufficient—there must be a non-conclusory allegation that Katz had actual knowledge of the Platinum Defendants' breach of their fiduciary duty, not just PPVA's financial condition. *See In re Platinum-Beechwood Litig.*, 2019 WL 1570808 at *8, 11.

Moreover, unlike other defendants in this case, Plaintiffs are not entitled to an inference of Katz's knowledge based on his position. Plaintiffs do not plead that Katz held any position within Platinum, Beechwood, or Agera (because he did not). For example, unlike Bodner and Huberfeld, Katz is not alleged to have been an owner or founder of Platinum Management or the Beechwood entities. *Compare Platinum-Beechwood Litig.*, 2019 WL 1570808 at *17. Unlike Michael Nordlicht and Kevin Cassidy, Plaintiffs do not allege that Katz held any position within Agera or, significantly, that Katz personally benefitted from the Agera Transactions. *Id.* at *20. At most, Plaintiffs allege that Katz was an "advisor" to Platinum Management so that he could "directly oversee his [grandfather's] investment with PPVA." SAC ¶¶ 182, 609. But these allegations are "entirely consistent with normal, lawful business practices" and do not amount to actual knowledge. *See Krys v. Pigott*, 749 F.3d 117, 131-32 (2d Cir. 2014). As a result, there are no alleged "facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness" and thus no inference of scienter. *Platinum-Beechwood Litig.*, 2019 WL 1570808 at *20 (citing *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

Finally, the SAC does not sufficiently plead that Katz provided substantial assistance to the Platinum Defendants. Plaintiffs double-down on their unavailing and conclusory theory that Katz conspired with the Platinum Defendants "to develop the plan to transfer PPVA's interest in

Agera Energy to an 'insider.'" Pls.' MOL 40. But there are no plausible, non-conclusory allegations that Katz meant anything wrongful by the word "insider" in the single email (Exhibit 82) on which Plaintiffs entirely base their allegations of substantial assistance. *Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, No. 00 Civ. 8688, 2003 WL 22218643, at *10 (S.D.N.Y. Sept. 25, 2003) (finding no substantial assistance in part because the defendants' alleged acts were not "wrongful"). Indeed, that email is clear that the reference to "insider" is to a "strategic buyer," one "[h]aving insider knowledge and expertise in the oil & gas sector." *See* SAC Ex. 82.

Additionally, Plaintiffs entirely ignore that the SAC fails to allege that Katz was even suggesting a transaction that would be in any way unfair, offensive, illicit, or improper to PPVA. *See* Katz MOL 15-16 (discussing this requirement). Of course, to do so would be implausible given that Katz's alleged role was to oversee his grandparents' significant investment. *See, e.g.*, *Pigott*, 749 F.3d at 131-32 (finding allegations of knowledge implausible). It would be illogical and counter-intuitive for Katz to suggest a transaction that would necessarily harm his grandparents' interest, which Plaintiffs allege he was appointed to oversee, particularly because Katz is not alleged to have personally benefitted from the transaction. And indeed, the portion of the email that Plaintiffs excluded from their SAC (which is attached as Exhibit A to the Katz Declaration) unequivocally proves that Katz was not suggesting any transaction below "an above industry average" price. *See* Katz Decl., Ex. A (ECF No. 310-1).

Even if Plaintiffs had adequately alleged that Katz initially suggested selling Agera to a Platinum or Beechwood "insider" for less than fair market value (which they have not), those allegations would still be insufficient to support the required element of substantial assistance. To the contrary, the SAC reflects that after Katz's supposed emails in mid-March 2016 concerning Agera, Katz played no role in the actual transactions, which finally occurred months later in June.

See SAC ¶¶ 632-672 (describing Agera sale without mentioning Katz). Plaintiffs cite no case in which a court has held that sending one email suggesting a potential transaction without being further involved constitutes substantial assistance; indeed, it does not. *See In re Sharp Int'l Corp.*, 403 F.3d 43, 49-53 (2d Cir. 2005) (requiring, among other things, affirmative assistance enabling the breach to occur for aiding and abetting liability).

Plaintiffs therefore fail to state a claim for aiding and abetting breach of fiduciary duty against Katz.

III. Plaintiffs May Not Recover Punitive Damages from Katz.

Similar to Katz's causation argument, Plaintiffs did not respond to Katz's argument that Planitiffs are not entitled to punitive damages. *See* Katz MOL 18-19. As a result, the Court must, at a minimum, dismiss Plaintiffs' claim against Katz for punitive damages. *See In re Platinum-Beechwood Litig.*, 2019 WL 1570808 at *19 (finding claim abandoned).

CONCLUSION

Plaintiffs' sole claim against Katz for aiding and abetting breach of fiduciary duty is barred by the *in pari delicto* and *Wagoner* doctrines. The insider exception does not apply because Katz is not alleged to have exercised any control over PPVA, and the adverse-interest exception does not apply because the Platinum Defendants dominated and controlled PPVA and PPVA received a benefit from the transactions in which Katz was allegedly involved. Moreover, Plaintiffs fail to adequately plead their claim against Katz because they concede causation and they do not plausibly or non-conclusorily allege actual knowledge or substantial assistance. Finally, Plaintiffs concede that they are not entitled to punitive damages. Consequently, we respectfully submit that the Court should grant Katz's motion to dismiss.

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