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 PB INVESTMENT HOLDINGS, LTD.'S MOTION TO DISMISS

HOLLAND & KNIGHT LLP
Warren E. Gluck, Esq.
John L. Brownlee, Esq. (*pro hac vice*)
Barbra R. Parlin, Esq.
Mitchell J. Geller, Esq.
Richard A. Bixter Jr., Esq. (*pro hac vice)*
31 West 52nd Street
New York, New York 10019
Telephone: 212-513-3200
Facsimile: 212-385-9010

Attorneys for Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation), and for Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation)

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PRELIMINARY STATEMENT

At the heart of the Plaintiffs' 1,041 paragraph Second Amended Complaint ("**SAC**") is the relationship between Platinum Management[1] and its Beechwood alter egos, a group of entities that were controlled and owned, directly or indirectly, by the very defendants, Nordlicht, Huberfeld, Bodner and Levy, who controlled and owned Platinum Management, and who devised and orchestrated the First and Second Schemes with assistance from the other Platinum and Beechwood Defendants.

The motion to dismiss filed by PB Investment Holdings, Ltd., successor-in-interest to Beechwood Bermuda Investment Holdings, Ltd. ("**BBIHL**"), generally recites the same arguments as the similar motion filed on behalf of the other Beechwood Entities [Dkt. No. 307].[2] Unlike the other Beechwood Entities, however, BBIHL also seeks dismissal of Plaintiffs' Count 18, which seeks to impose liability on the Beechwood Entities, including BBIHL, as the alter ego of Platinum Management.

Significantly, none of the other Beechwood Entities moved to dismiss Plaintiffs' alter ego claim, likely because the facts pled in the SAC so clearly demonstrate the alter ego relationship between Platinum Management and the Beechwood Entities. The corrupt Beechwood enterprise was formed from the offices of Platinum Management, and Beechwood at all relevant times was staffed by Platinum Management employees, often working for the Beechwood Entities and Platinum Management simultaneously. Platinum Management and the Beechwood Entities had

[1] All capitalized terms not defined herein shall have the meaning prescribed to them in the SAC.

[2] In response, the Plaintiffs incorporate its Memorandum of Law in Opposition to Moving Defendants' Second Round of Motions to Dismiss [Dkt. No. 351] ("**Omnibus Opposition Brief**") as if fully set forth herein.

common ownership and control in the form of their majority owners, Nordlicht, Huberfeld, Bodner and Levy, who wielded their power to commingle Beechwood and Platinum Management's assets and investments in connection with the First and Second Schemes.

Notwithstanding its efforts to distinguish itself, at all relevant times, BBIHL was a Beechwood Entity and, like its affiliates, an alter ego of Platinum Management. In particular, BBIHL was used as a tool by the Platinum and Beechwood Defendants in connection with the Agera Transactions. The Agera Transactions were the means by which the Platinum and Beechwood Defendants transferred PPVA's interest in a company worth between $250-300 million to a nominee set up by the Beechwood Entities, the common equity of which was owned indirectly by Nordlicht, Bodner, Huberfeld and Levy and preferred membership interests in which were given to other Beechwood Entities, Senior Health Insurance Company of Pennsylvania and the Beechwood Reinsurance Trusts, for significantly less than its market value at the time. BBIHL played a critical role in the fraud perpetrated on PPVA in connection with the Agera Transactions. *See* pp. 8-9, *infra*.

Since BBIHL is the alter ego of Platinum Management, 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 – those defenses do not apply to claims against insiders and alter egos of insiders. As such, to the extent BBIHL relies on *Wagoner/in pari delicto* as a basis for dismissal of the claims against it, that reliance is misplaced. So too, the facts detailed in the SAC make it clear that this is the rare case where the adverse interest exception prevents the application of *Wagoner/in pari delicto.* The insiders at issue here acted in their own interests to the detriment of PPVA, and 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.

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 the corporate insiders that owned and controlled Platinum Management and its Beechwood alter ego. The Court should likewise reject BBIHL's motion to dismiss.

APPLICABLE LEGAL STANDARD

The standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is well-settled. "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 2019 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 denial of BBIHL's motion to dismiss the SAC in its entirety.

ARGUMENT

I. BBIHL IS THE ALTER EGO OF PLATINUM MANAGEMENT

Count 18 of the SAC (¶¶ 986-1000) asserts a claim for alter ego liability against the Beechwood Entities, including BBIHL, with respect to Counts One, Two, Four and Five of the SAC. This claim seeks to hold BBIHL liable as an alter ego of Defendant Platinum Management, based upon the well-pled allegations that the Beechwood Entities were created by the Platinum Defendants for the purposes of implementing the First and Second Scheme. As set forth below,

BBIHL was used as a fraudulent tool to implement the Agera Transactions, which were implemented during May-June 2016. As a result of these transactions, PPVA's most valuable remaining asset was diverted to Beechwood's nominee for significantly less than its market value at that time.

BBIHL argues that Count 18 fails to state a claim because the SAC relies upon group pleading to assert its alter ego claim against BBIHL and does not specifically reference the harm inflicted on PPVA by BBIHL. *See* BBIHL Mem., p. 19-21. 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).[3]

To sustain its alter ego claim, the plaintiffs 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. 2003). 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).

[3] 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).

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

This Court regularly finds alter ego liability exists where the facts alleged in the complaint paint a detailed picture, which, taken as true, demonstrate the alter ego relationship. *Metal Lathers Local 46 Pension Fund v. River Ave. Contracting Corp.*, 954 F. Supp. 2d 250, 259-260 (S.D.N.Y. 2013) (Rakoff, J.) (denying motion to dismiss where the complaint alleged identical management and supervision of entities and attempts to hide the alter ego relationship from third parties); *See also*, *e.g., City of Almaty v. Ablyazov*, 278 F. Supp. 3d 776, 799 (S.D.N.Y. 2017) (denying motion to dismiss and permitting alter ego claim to proceed due to allegations of non-market transactions); *JSC Foreign Econ. Ass'n*, 295 F. Supp. 2d 366 (denying motion to dismiss alter ego claim due to facts alleging that common owners "used their power over the corporation to further their owner personal interests"); *John Deere Shared Servs., Inc. v. Success Apparel LLC*, No. 15-CV-1146 (JMF), 2015 WL 6656932 (S.D.N.Y. Oct. 30, 2015) (denying motion to dismiss alter ego claim due to allegations of siphoning off assets to pay personal expenses); *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481 (S.D.N.Y. 2003) (Rakoff, J.) (finding an alter ego relationship between 130 entities), *rev'd in part*, *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004); *but see*

Motorola Credit Corp. v. Uzan, 739 F. Supp. 2d 636 (S.D.N.Y. 2010) (enforcing judgment once again against an alter ego entity).

At the motion to dismiss stage, a plausible inference that an alter ego relationship exists and alleged wrongdoing is all that is needed to proceed to discovery. *A Partner Ltd. v. Contour Acquisition Grp., LLC*, No. 16-CV-6575 (AJN), 2017 WL 10221325, * 2-3 (S.D.N.Y. Sept. 22, 2017). As stated by this Court in *Metal Lathers*:

> [Defendants] argue that there are alternative, innocent explanations for the relationship between the companies that, they claim, are more plausible than the inference the plaintiffs ask the Court to draw. . . .
>
> However, these explanations are insufficient to displace the Amended Complaint's narrative as the most plausible inference from the facts pleaded. As an initial matter, the "[p]arallel existence" of the three entities "is not an impediment to imposing alter ego status" where other evidence of such a relationship is present [internal citation omitted].
>
> At least at this stage and in the presence of allegations suggesting an attempt to hide covered work from the Funds, whether that characterization of the defendant corporations' relationships will prove accurate must await further fact discovery.

954 F. Supp. 2d at 259-260.

This Court regularly permits alter ego and veil piercing claims to proceed with facts similar to those alleged by Plaintiffs against the Beechwood Entities:

> Plaintiff's allegations, in essence, are that Goodman dominated Success and—through payments to herself or Bruce Fine that were disguised as corporate expense payments (the May Expense Payments)—siphoned off Success's assets, rendering the company insolvent and unable to meet its obligations, including the royalty payments due to Plaintiff under the License Agreement. Specifically, Plaintiff alleges that Goodman is the Chief Executive Officer, Managing Member, and majority owner of Success, owning at least an eighty percent interest in Success while her children own a minority interest (SAC ¶¶ 91, 93); in her tenure at Success, Goodman failed to observe corporate formalities (SAC ¶ 100); she commingled personal and corporate funds (SAC ¶¶ 102–03); she personally guaranteed Success's debt to Wells Fargo (SAC ¶ 108); she (with, perhaps, Fine) was the only employee of Success when she fraudulently transferred to herself (or Fine) corporate assets in the form of expense payments (SAC ¶¶ 109–115); and the transfer made Success unable to meet its financial obligations to Plaintiff (SAC ¶ 116). Those allegations, taken as true, are sufficient to plausibly allege that

> Goodman exercised domination and control over Success to commit a wrong that injured Deere, and the allegations relating to Goodman's fraudulent actions (SAC ¶¶ 109–115) are sufficient to meet the heightened pleadings standards of Rule 9(b) of the Federal Rules of Civil Procedure, which apply to claims of fraud.

John Deere Shared Servs., Inc., 2015 WL 6656932, at * 4-5.

It is hard to imagine a clearer case for application of the alter ego doctrine than the corrupt Beechwood enterprise. The SAC contains extensive allegations regarding the Beechwood Entities, all of which are alter egos of Platinum Management, which were a labyrinth of companies created by the Platinum and Beechwood Defendants to carry out the fraudulent acts of the First and Second Schemes. The particular Beechwood Entities named as Defendants in this action are signatories to or designated agents of Beechwood for various transactions discussed in detail in the SAC, and ultimate ownership of these entities and Platinum Management rested with the same individuals: Nordlicht, Huberfeld, Bodner and Levy. 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). *See* April 2019 Decision at 36-37. These detailed allegations clearly state a "plausible claim" for veil piercing and alter ego liability with respect to the other Beechwood Entities, including BBIHL.

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. The SAC contains a detailed explanation of the creation of the corrupt Beechwood enterprise, which was created from the offices of Platinum Management. 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. The formation documents for the Beechwood Entities were drafted by the Platinum Defendants and Platinum Management's counsel. SAC at ¶¶ 344-399.

The majority ownership in and ultimate control of Beechwood, including BBIHL, was in fact held directly or indirectly by Nordlicht, Huberfeld, Bodner and Levy, who also owned and controlled Platinum Management. BBIHL was a subsidiary of Beechwood Bermuda. Pl. Decl. **Exhibit 1**. As set forth in the SAC, Nordlicht, Bodner, Huberfeld and Levy held a majority equity interest in Beechwood Bermuda, owning share capital and 70% of the common stock in the Beechwood Entity. SAC at ¶¶ 374-377.

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. SAC at ¶¶ 400-672. These transactions included, without limitation:

- The GGO Note Purchase Agreement, whereby the Platinum Defendants caused PPVA to sell its interest in worthless Golden Gate Oil debt to the Beechwood Entities, with the hidden failsafe of the GGO Put Option and Guaranty, permitting Beechwood to put the debt back to PPVA at any time. SAC at ¶¶ 413-423.

- A series of transactions whereby the Platinum and Beechwood Defendants caused PPVA and its subsidiaries to willfully and improperly subordinate its interests in PEDEVCO and Implant Sciences to Beechwood. SAC at ¶¶ 424-439.

- The Black Elk Scheme, whereby Beechwood Entities were used as a fraudulent tool to enable Platinum Management insiders, friends and designated investors/creditors to take the proceeds from the sale of the assets of PPVA's largest investment, Black Elk, in contravention of the prior rights of PPVA and Black Elk's other creditors, while leaving the Black Elk investment worthless to PPVA, and PPVA liable for tens of millions of dollars of fraudulent conveyance and other claims. SAC at ¶¶ 440-515.

- The Montsant Transactions, whereby Platinum Management granted debt interests and security interests to the Beechwood Entities and SHIP at the subsidiary level, in exchange for Black Elk bonds, worth significantly less in the wake of the Black Elk Scheme. SAC at ¶¶ 516-528, 556-567.

- The Nordlicht Side Letter, a one page document dated January 13, 2016, signed by Mark Nordlicht and witnessed by Mark Feuer, which requires PPVA and any of its subsidiaries and affiliates holding the valuable proceeds from the sale of Implant Sciences Corporation to use such proceeds to pay approximately $37 million of uncollectable debt owed to Beechwood by Golden Gate Oil, LLC, for no benefit to PPVA. SAC at ¶¶ 568-583.

- The March 2016 "Restructuring,", and the Master Guaranty between and among PPVA, certain of its subsidiaries, and Beechwood, among others, by which Beechwood was granted liens on available PPVA assets to further collateralize uncollectable debt. SAC at ¶¶ 584-606

- The Agera Transactions, the June 9, 2016 transfer of one of PPVA's last valuable assets, a majority interest in Agera Energy, worth between $200-$300 million, to Beechwood and Senior Health Insurance Company of Pennsylvania, for a substantial discount. The Agera Transactions were the culmination of the Second Scheme and a self-described "insider transaction" conceived of by the Platinum and Beechwood Defendants and others to strip PPVA of its largest asset and acquire the value of the same while dissipating the purported proceeds. SAC at ¶¶ 607-672.

The Platinum and Beechwood Defendants used various Beechwood Entities as fraudulent tools at various times. In the case of BBIHL, it was utilized by Platinum Management and their common owners in connection with the Agera Transactions, among other transactions. Exhibit 91 of the SAC contains a Flow of Funds Memorandum and various closing documents, listing the cash to be paid to various parties and other interests to be transferred in connection with the Agera Transactions. BBIHL is listed as one of the Beechwood Entities that receive a cash payment for "debt forgiveness" in connection with the Agera Transactions, receiving a cash payment of $5 Million. SAC, Ex. 91, at p. 4.

In fact, prior to the June 9, 2016 closing of the Agera Transactions, on April 1, 2016, the Platinum and Beechwood Defendants caused PPVA's subsidiary to assign the Agera Note to BBIHL and other Beechwood Entities in partial consideration for the eventual cash portion of the

Agera Note Purchase Price (the "**BBIHL Assignment Agreement**"). Pl. Decl. at **Exhibit 2**. The BBIHL Assignment Agreement is signed by BAM II, as BBIHL's investment advisor. On June 9, 2016, PGS, BBIHL and other Beechwood Entities entered into a repurchase agreement, whereby the Agera Note was assigned back to PGS for purposes of completing the Agera Transactions (the "**Repurchase Agreement**). Pl. Decl. at **Exhibit 3**.[4]

The BBIHL Assignment Agreement and the Repurchase Agreement clearly demonstrate the insider nature of the Agera Transactions and the alter ego relationship between Platinum Management and BBIHL. Platinum Management, acting under the direction of Nordlicht, Huberfeld, Bodner and Levy, caused the Agera Note to be assigned away to BBIHL and other Beechwood Entities for only $15 million. The Platinum Defendants knew that the Beechwood Entities, including BBIHL, would assign the Agera Note back to PGS in order to close the Agera Transactions because the interests of Platinum Management and BBIHL were perfectly aligned due to common ownership and control.

The JOLs also understand that BBIHL was used to hold participation interests in the Golden Gate loan, which is the subject of the Nordlicht Side Letter (the "**NSL**") and the March Restructuring. Pl. Decl. at **Exhibits 4 and 5.** The NSL and the March Restructuring are both detailed in the SAC. *See* SAC at ¶¶ 568-606.

These allegations are sufficient to find the Beechwood Entities, including BBIHL, as the alter ego of Platinum Management and liable to the same extent as Platinum Management under the SAC. At every turn, Platinum Management and Beechwood's common owners used the

[4] The BBIHL Assignment Agreement and Repurchase Agreement are specifically referenced in **Exhibit 91** of the SAC.

corrupt Beechwood enterprise as a tool enrich themselves to the detriment of PPVA. BBIHL's motion to dismiss therefore should be denied in its entirety.

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

BBIHL argues 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**").

For the reasons set forth in the Omnibus Opposition Brief and below, BBIHL is 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 and their alter egos. Given that BBIHL qualifies as an alter ego of Platinum Management, PPVA's investment manager and general partner, this Court need not look any further for a basis to deny BBIHL's motion to dismiss. 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. As a Matter of Law, Wagoner and In Pari Delicto Do Not Apply to Claims against Insiders and Alter Egos of Insiders

It is black letter law in New York that corporate insiders cannot rely upon *Wagoner*/*in pari delicto*. *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).

For purposes of *Wagoner/in pari delicto,* the "control" analysis 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).

Moreover, *Wagoner/in pari delicto* also do not prevent Plaintiffs from bringing alter ego claims, 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, e.g., 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*).

In this case, the Beechwood Entities, including BBIHL, are the ultimate form of corporate insiders, with common ownership and management as Platinum Management, and that were involved in nearly all of the wrongful acts alleged in the First and Second Scheme. Plaintiffs allege specific facts in the SAC showing how the Platinum and Beechwood Defendants and their alter egos, the Beechwood Entities, used their positions of authority, influence and control to cause PPVA to engage in non-commercial transactions to inflate the NAV and eventually loot PPVA.

To that end, the SAC includes detailed allegations of how the Beechwood Entities were conceived of and functioned as the alter egos of Platinum Management for the wrongful purpose

of implementing the First and Second Schemes, and the ways in which PPVA's assets were used for this purpose. 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. SAC at ¶¶ 400-672.

The 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 and several others, many of whom worked at Platinum Management at the same time they also worked at or exercised control over the Beechwood Entities. SAC ¶¶ 344-399.

As is evident from the SAC and the documents attached thereto, the Platinum and Beechwood Defendants used the various Beechwood Entities to effect different parts of the First and Second Schemes. In the case of BBIHL, at a minimum it was used as a party to the Agera Transactions, with BBIHL acting as a temporary holder of the Agera Note and receiving a payment of $5 million in connection with this "insider" transaction, whereby Platinum Management and Beechwood's common owners stripped PPVA of its most valuable remaining asset. SAC ¶¶ 607-671, Ex. 91; Pl. Decl. Exs. 2 and 3. It also transferred worthless debt and other instruments that were assigned to AGH Parent as part of the paper "consideration" provided in connection with this sham transaction by which PPVA was stripped of its interest in its last remaining valuable asset

for the ultimate benefit of Nordlicht, Bodner, Huberfeld, Levy and their various designees. BBIHL also held interests in the Golden Gate loan, that was the subject of the NSL and March 2016 Restructuring transactions.

The detailed allegations in the SAC clearly show that the Beechwood Entities, including BBIHL, exerted sufficient control to be deemed insiders, and that *Wagoner/in pari delicto* therefore does not apply to Plaintiffs' claims against BBIHL and the other Beechwood Entities.

B. 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 against BBIHL, as the adverse interest exception applies to the conduct alleged in the SAC.

It is well settled that the conduct of an entity's agent will not be imputed to the entity when the agent issue is acting solely 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.

In such cases, 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.

The SAC details a litany of self-interested tortious conduct by the insiders from the Black Elk Scheme, whereby the Platinum Defendants caused PPVA to subordinate its higher priority Black Elk bonds for the benefit of the friends and family investors in the BEOF Funds, who held Black Elk preferred equity, thereby rendering those bonds worthless, to buying back worthless Black Elk bonds at full price from Beechwood, to the Second Scheme, during which all of PPVA's remaining assets were looted, stripped and encumbered by the Platinum Defendants and Beechwood Defendants, to the NSL, where the interests of PPVA, its subsidiaries and affiliates were specifically subordinated to those of Beechwood to pay off $35 million of uncollectible Golden Gate debt, to the Agera Transactions, this case represents one of the rare "looting and embezzlement" circumstances where the adverse interest exception to *in pari delicto* applies.

Taken together, the transactions listed above and the others described in the SAC enabled Defendants to loot PPVA's assets and provided no benefit to PPVA. The fraudulent schemes described in the SAC culminated with the Agera Transactions, to which BBIHL was a party, whereby a PPVA asset worth between $250-$300 million was looted for the benefit of the common owners of Platinum Management and Beechwood and their designees.

Under the circumstances, and taking Plaintiffs' allegations as true, the adverse interest exception applies, so BBIHL cannot rely on *Wagoner/in pari delicto* to avoid liability for the wrongful acts set forth in the SAC.

III. PLAINTIFFS STATE FACTS SUPPORTING THE CLAIMS AGAINST BBIHL

The SAC also properly pleads facts sufficient to state claims for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, civil conspiracy, Civil RICO and unjust enrichment claims against the Beechwood Entities, including BBIHL, as these Defendants, acting separately and through their Platinum Management alter ego, provided substantial assistance to the Platinum Defendants and were unjustly enriched by the First and Second Schemes.[5] In order to avoid duplication, the Plaintiffs incorporate their arguments set forth in the Omnibus Opposition Brief as if fully set forth herein.

The SAC provides extensive detail regarding how the Beechwood Entities, which includes BBIHL, 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 Entities, all of which are alter egos of Platinum Management, were created by the Platinum and Beechwood Defendants to carry out the tortious acts of the First and Second

[5] BBIHL sets 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 conspiracy, and the unjust enrichment claim against the Beechwood Entities, pled in the alternative, is due to Plaintiffs seeking to invalidate certain Second Scheme transactions.

Schemes. Acting through its majority owners, Nordlicht, Huberfeld, Bodner and Levy, the Beechwood Entities engaged in insider transactions for the purpose of enriching the Platinum and Beechwood Defendants to the detriment of PPVA. The Second Scheme culminated with the Agera Transactions, with BBIHL providing substantial assistance to the fraud and breach of the Platinum Defendants' fiduciary duties to PPVA. Various agreements in connection with the Agera Transactions were signed by BAM II, as investment advisor for BBIHL. This Court has already held that the claims in the SAC against the Beechwood Entities are sufficiently pled against BAM II. April 2019 Decision at 36-37.

BBIHL played a critical role in the fraud perpetrated on PPVA. The June 2016 Agera Transactions resulted in the dissipation of PPVA's remaining asset of significant value, at a time when Murray Huberfeld, Platinum's co-founder, had been arrested the day prior and where Mark Nordlicht would shortly thereafter announce PPVA's liquidation. The NSL and March 2016 Restructuring likewise caused significant damage to PPVA. BBIHL and the rest of the Beechwood Entities should not be permitted to evade responsibility for the substantial assistance it provided to the First and Second Schemes. Accordingly, the motion to dismiss filed by PB Investment Holdings, Ltd., as successor-in-interest to Beechwood Bermuda Investment Holdings, Ltd., should be denied in its entirety.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny in its entirety the motion to dismiss filed by PB Investment Holdings, Ltd., as successor-in-interest to Beechwood Bermuda Investment Holdings, Ltd., and grant any appropriate relief that this Court deems just and proper.

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HOLLAND & KNIGHT LLP

By: /s/ Warren E. Gluck, Esq.

Warren E. Gluck, Esq.
Barbra R. Parlin, Esq.
John L. Brownlee, Esq. (*pro hac vice*)
Mitchell J. Geller, Esq.
Richard A. Bixter Jr., Esq. (*pro hac vice)*
HOLLAND & KNIGHT LLP
31 West 52nd Street
New York, New York 10019
Telephone: 212-513-3200
Facsimile: 212-385-9010
Email: warren.gluck@hklaw.com
barbra.parlin@hklaw.com
john.brownlee@hklaw.com
mitchell.geller@hklaw.com
richard.bixter@hklaw.com

Attorneys for Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation), and for Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation)