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

REPLY MEMORANDUM OF LAW OF DEFENDANT PB INVESTMENT HOLDINGS, LTD., AS SUCCESSOR-IN-INTEREST TO BEECHWOOD BERMUDA INVESTMENT HOLDINGS, LTD., IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

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PB Investment Holdings, Ltd. ("PBIHL"), submits this reply brief in support of its motion to dismiss the Joint Official Liquidators' (the "JOLs") Second Amended Complaint (the "SAC").

ARGUMENT

The JOLs' allegations against PBIHL are the written equivalent of a Russian nesting doll: one looks through one layer after another only to find that the allegations as to PBIHL are hollow. The JOLs seem to believe that they need merely to allege that PBIHL was a part of "Beechwood" for their claims to survive dismissal. This is because the JOLs define "Beechwood" as encompassing the "Beechwood Defendants." (SAC, ¶ 8.) The term "Beechwood Defendants" then encompasses the "Beechwood Entities." (*Id.*, ¶ 3.) The term "Beechwood Entities" then encompasses Beechwood Capital, BAM I, BAM II, Beechwood Investments, Beechwood Holdings, PBIHL, Beechwood Cayman, the "Beechwood Reinsurance Companies," BAM Administrative, the "Beechwood SPVs," the "Beechwood Insurance Trusts," and the "Beechwood Trusts." (*Id.*, ¶¶ 209 – 220.) And somewhere in this the "Beechwood Entities," including PBIHL, were supposedly "the alter-ego of Platinum Management" with respect to allegations that form the basis of PPVA's first, second, fourth, and fifth claims—that is, the claims for breach of fiduciary duty, fraud, and constructive fraud against the "Platinum Defendants". (*Id.*, ¶¶ 987 – 88.)

When the reader finally reaches PBIHL in these allegations, all it finds are allegations that PBIHL "issued wealth management products for the Beechwood Defendants." (*Id.*, ¶ 214.) There are no further allegations that are specific to PBIHL or its supposed involvement in the schemes at issue; just one reference in the section titled "Parties Relevant to the [JOLs'] Claims." As a result, the JOLs have failed to give PBIHL fair notice of the claims against it and the grounds upon which those claims rest.

I. The Group Pleading Rule Bars the JOLs' Claims.

The JOLs first attempt to avoid dismissal by claiming that the Court's April 11, 2019 opinion allows group pleading of claims against PBIHL. (*See* Opp. at 3.) The opinion, however, explained that group pleading is appropriate for those defendants who are "alleged to have been a high-level corporate insider." (Op. at 45.) The JOLs do not, nor can they, allege that PBIHL was a high-level corporate insider. Accordingly, the Court's decision regarding the appropriateness of group pleading does not resolve the JOLs' group pleading as it relates to PBIHL.

Further, the Court did not find that group pleading was permissible for all allegations in the SAC. The opinion noted that group pleading applied to corporate insiders who were responsible for statements in a group-published document. (*Id.* at 22 – 23). The Court did not accept group pleading as applied to claims regarding individual fraudulent conduct. In fact, the Court dismissed the claims against certain "Beechwood Entities"—Beechwood Capital, BBLN-PEDO Corp., BHLN-PEDCO Corp., and Beechwood Trust Nos. 7 – 14—for "impermissible group pleading." (*Id.* at 34.)

In granting dismissal for BBLN-PEDO Corp., BHLN-PEDCO Corp., and Beechwood Trust Nos. 7 – 14, the Court noted that

> the FAC makes no specific allegations about Beechwood Trust Nos. 7 – 14, and the only specific allegation that it makes about BBLN-PEDO 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, 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.

(*Id.* at 34 – 35) (internal citations omitted). And so it is here. The only specific allegation that the JOLs make about PBIHL is that it

> is a Beechwood Entity organized under Bermuda law, with its principal place of business in Bermuda. [PBIHL's successor] was a reinsurance and wealth

> management company domiciled in Bermuda that issued wealth management products for the Beechwood Defendants.

(SAC, ¶ 214.) Every other allegation that appears to contemplate PBIHL references it collectively as part of "Beechwood," the "Beechwood Defendants," or the "Beechwood Entities." The SAC fails to give PBIHL fair notice of the claims against it, and as such, is an impermissible group pleading that must be dismissed.

II. The Alter Ego Claim Should Be Dismissed.

The JOLs fail to meet their "heavy burden" of showing that disregard of PBIHL's corporate form is warranted. *See Kalin v. Xanboo, Inc.*, No. 04 Civ. 5931 (RJS), 2009 U.S. Dist. LEXIS 34954, at * 31 (S.D.N.Y. Mar. 30, 2009). The JOLs contend that their pleadings satisfy the first element of their alter ego claim—domination and control—merely because "[t]he 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. (Opp. at 8.) However, courts in the Second Circuit consider whether the pleadings allege several factors "that tend to identify a dominated corporation," including the observance of corporate formalities, the company's capitalization, whether the debts of the company are used to pay the manager's debts, etc. *See American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997). The SAC makes none of these allegations against PBIHL. *See Jiaxing Hongyu Knitting Co. v. Allison Morgan LLC*, No. 11 Civ. 09342 (AJN), 2013 U.S. Dist. LEXIS 2852, at *21 – 22 (S.D.N.Y. Jan. 8, 2013).

The JOLs also try to resuscitate their deficient pleading by filing a declaration and several exhibits with their Opposition Brief. (*See* ECF 398 ("Bixter Declaration").) Plaintiffs may not amend pleadings to avoid dismissal by alleging new facts in an opposition brief. *See Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998); *Jennings v. Hunt Cos.*, 367 F. Supp. 3d 66, 70 – 71 (S.D.N.Y. 2019); *see also O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222,

229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss."). Even so, these new factual allegations do not "tend to identify a dominated corporation" under the factors that courts in the Second Circuit apply when considering the plausibility of an alter ego claim. Accordingly, the alter ego claim does not survive dismissal under Rule 12(b)(6).

III. The *Wagoner* Rule and *In Pari Delicto* Doctrine Bar the Civil RICO and Common Law Tort Claims.

The JOLs attempt to argue around the application of the *Wagoner* Rule and *in pari delicto* doctrine by asking the Court to apply the insider and adverse interest exceptions. In doing so, the JOLs again rely upon their threadbare and conclusory allegations of PBIHL's purported status as an alter ego of Platinum Management in support. (*See* Opp. at 12.)

A. The Insider Exception Does Not Apply.

The Second Circuit reads the insider exception "narrowly to allow only for suit by a bankruptcy trustee against a fiduciary of the debtor corporation, not against third parties who are alleged to have aided and abetted the debtor's fraud, short of control by the third party over the debtor." *See Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, 987 F. Supp. 2d 311, 321 (S.D.N.Y. 2013). The law presumes that third parties who are not fiduciaries are not insiders. To overcome that presumption, the JOLs must show that the third party exercised total domination and control over the debtor. *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995).

The JOLs do not allege that PBIHL was on the board or a manager of PPVA (or owed fiduciary duties to PPVA). Accordingly, they must establish that PBIHL has "at least a controlling interest in the debtor or . . . exercise[s] sufficient authority over the debtor so as to unqualifiedly dictate corporate policy and the disposition of corporate assets" to overcome the presumption. *In*

re Borders Grp., Inc., 453 B.R. 459, 469 (Bankr. S.D.N.Y. 2011). The SAC does not include any allegation that PBIHL had any controlling interest or authority or control over PPVA. The SAC also does not allege that PBIHL was involved in PPVA's daily operations, or that PBIHL proffered advice to PPVA's management. *See In re PHS Grp., Inc.*, 581 B.R. 16, 32 (E.D.N.Y. 2018).

To the contrary, the SAC alleges that *PBIHL* was "dominated and controlled" by Platinum Management and its executives. (SAC, ¶ 985.)[1] This is the opposite of what the pleading must show for the insider exception to apply. The JOLs cite to several opinions to try and shore up their argument, but most of these cases involve owners, directors, and senior managers. (*See* Opp. at 12 – 15.)

The JOLs next attempt to impermissibly expand the insider exception by relying on cases that hold that bankruptcy trustees and liquidators have standing, in certain circumstances, to bring alter ego claims. (*Id.* at 14.) They extrapolate from these cases the argument that they have standing to sue third parties whom they allege are alter egos of bankruptcy insiders for all sorts of additional torts. The courts have never recognized this exception. *See, e.g., In re Madoff Sec.*, 987 F. Supp. 2d at 321 (declining to apply to third party based on close relationship to insider).[2]

The JOLs do not, and cannot, allege that PBIHL "controlled" PPVA or any other party in any meaningful sense. In fact, the JOLs do not allege a single fact that connects PBIHL to PPVA, let alone that establishes that PBIHL was a corporate insider. Therefore, the insider exception does not apply.

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[1] The SAC also alleges that the "Platinum Defendants" operated, managed and controlled PPVA and its affairs. (SAC, ¶¶ 12, 34, 269, & 912.) The "Platinum Defendants" consist of Platinum Management—the alleged general partner and managing member of PPVA—and those who owned, operated and managed Platinum Management. (*Id.*, ¶¶ 3, 7, 34, 39, 228, & 243.) The JOLs expressly *exclude* PBIHL from the term "Platinum Defendants."

[2] Even if the JOLs could argue that PBIHL was an insider for purposes of the *Wagoner* Rule, courts question whether New York state law even contains an insider exception to the *in pari delicto* doctrine. *See In re Lehr Constr. Corp.*, 551 B.R. 732, 743 (S.D.N.Y. 2016), *aff'd*, 666 Fed. App'x 66 (2d Cir. 2016).

B. The Adverse Interest Exception Does Not Apply.

The adverse interest exception is the "'most narrow of exceptions' [and] is reserved for cases of 'outright theft or looting or embezzlement . . . where the fraud is committed against a corporation rather than on its behalf.'" *Picard v. JPMorgan Chase Bank & Co. (In re Bernard L. Madoff Inv. Secs. LLC)*, 721 F.3d 54, 64 (2d Cir. 2013) (quoting *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 467 (N.Y. 2010)). The JOLs concede that it applies only where the agent's acts are "entirely opposed (*i.e.*, 'adverse') to the corporation's own interests.'" (Opp. at 16.)[3]

The best the JOLs can muster in support of applying the exception against PBIHL is that PBIHL "was a party" to "the Agera Transactions," which "enabled Defendants to loot PPVA's assets and provided no benefit to PPVA." (Opp. at 17.) The allegations, however, tend to show that PGS was the holder of the Agera Note that was convertible into 95.01% of the equity of Agera Holdings. (SAC, ¶ 615.) The principal amount of the Agera Note was $600,071.23. (*Id.* at Ex. 90.) PPVA held a 55% interest in PGS. (*Id.*, ¶ 614.)

Further, when the Agera Note was sold in June 2016, at least $45 million of the purchase price was paid to PGS (and therefore PPVA) in cash. (*Id.*, ¶ 653.) These allegations show a "benefit to PPVA" as opposed to abandonment or looting. *See, e.g., ICP Strategic Income Fund, Ltd. v. DLA Piper L.L.P. (U.S.) (In re ICP Strategic Income Fund, Ltd.)*, 730 Fed. App'x 78, 82 (2d Cir. 2018) (adverse interest exception did not apply where law firm helped the feeder fund's investment manager to sustain an investment vehicle and "preserved the Fund's large investment in it, which constituted a benefit at the time"); *Concord v. Capital Mgmt, LLC v. Bank of Am.,*

[3] The JOLs do not allege that PPVA's agents acted entirely for their own or another's interests. One of the central allegations in the SAC is that PPVA's agents overvalued assets to artificially inflate PPVA's net asset value and, in turn, increase their compensation. New York state courts have held that such allegations are insufficient to establish that an agent acted entirely for its own benefit. *See, e.g., Walker, Truesdell, Roth & Assocs., Inc. v. Globeop Fin. Servs. LLC*, 43 Misc. 3d 1230(A) (Sup. Ct. N.Y. Cty. 2013).

N.A., 102 A.D.3d 406, 406, 958 N.Y.S.2d 93, 94 (1st Dep't 2012) (adverse interest exception inapplicable where alleged scheme "brought in millions of dollars in plaintiffs' coffers and allowed plaintiffs to survive for a few years"). Therefore, the adverse interest exception does not apply in this instance.

IV. The JOLs' Remaining Claims Should Be Dismissed.

The JOLs spend a scant two pages of their Opposition Brief addressing PBIHL's arguments regarding dismissal of the civil RICO, aiding and abetting, civil conspiracy, and unjust enrichment claims. (*See* Opp. at 18 – 19.) They argue that they plead facts showing how PBIHL, "acting separately and through [its] Platinum Management alter ego, provided substantial assistance to the Platinum Defendants and [was] unjustly enriched by the First and Second Schemes." (*Id.* at 18.) The JOLs then go on to incorporate their arguments in the Omnibus Opposition Brief (the "Omnibus Opposition") "[i]n order to avoid duplication." (*Id.*)

Evidencing the inadequacy of this approach, the JOLs follow with a two-paragraph summary of their pleadings. (*See id.* at 18 – 19.) This summary, for the first time anywhere, states in unsupported, conclusory fashion that PBIHL "provid[ed] substantial assistance to the fraud and breach of the Platinum Defendants' fiduciary duties to PPVA" and "played a critical role in the fraud perpetrated on PPVA." (*Id.* at 19.) And yet, the JOLs fail to detail what this "substantial assistance" or "critical role" entailed, or where they pleaded these facts in the SAC.

Given the JOLs' incorporation of the Omnibus Opposition and lack of any direct argument to PBIHL's grounds for dismissal, PBIHL joins in and incorporates the arguments for dismissal that the other defendants have made. The following subsections touch upon key points of these arguments as they relate to PBIHL.

A. Civil RICO.

The JOLs argue in the Omnibus Opposition that their RICO claims should not be dismissed. However, the Court has already found that identical claims advanced by SHIP were barred by the RICO Amendment. *See Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd. (In re Platinum-Beechwood Litig.)*, No. 18-cv-6658 (JSR), 2019 U.S. Dist. LEXIS 67952, at *8 (S.D.N.Y. Apr. 22, 2019). The SAC alleges the Beechwood Entities used reinsurance funds to enter into "non-commercial transactions" with PPVA. (SAC, ¶¶ 9, 28, 30, 400, 811, & 835.) That falls within the RICO Amendment, as does conduct undertaken to keep a Ponzi scheme alive. *See Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012).

The JOLs attempt to draw a distinction by walking away from most of the predicate acts of racketeering set forth in the SAC, but recasting the RICO claims is unavailing. For example, regarding the Second Scheme, the JOLs argue that various (securities) transactions were not, in fact, "'transactions' in connection with securities" for the purposes of the RICO Amendment. (Omnibus Opp. at 19.) This is incorrect. The Supreme Court has found fraud in connection with the purchase or sale of securities where purported victims maintained an ownership position in fraudulently overvalued securities, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 77 (2006), and where transactions "enabled [a respondent] to convert the proceeds of the sales of securities to his own use." *S.E.C. v. Zandford*, 535 U.S. 813, 819 – 20 (2002). That is exactly what the JOLs allege here.

Further, the JOLs fail to identify factual allegations which show, with the requisite particularity, that PBIHL engaged in mail or wire fraud that is enough to constitute a pattern of racketeering activity. A civil RICO claim focuses "on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise."

United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987). Simply tying PBIHL to a RICO conspiracy is insufficient to allege a civil RICO claim against it under 18 U.S.C. § 1962(c). The JOLs do not identify a single predicate act of racketeering involving PBIHL. *See Gross v. Waywell*, 628 F. Supp. 2d 475, 493 – 95 (S.D.N.Y. 2009). Further, the allegations against PBIHL fail to meet the Second Circuit's two-year continuity requirement. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008).

B. Aiding and Abetting.

The aiding and abetting claims are still subject to dismissal because "a corporate insider cannot aid and abet another corporate insider." *In re Grumman Olson Indus., Inc.*, 329 B.R. 411, 425 (Bankr. S.D.N.Y. 2005). "[A] third-party relationship between the aider and abettor and the corporation is a necessary element in any such action." *Solow v. Stone*, 994 F. Supp. 173, 181 (S.D.N.Y.), *aff'd*, 163 F.3d 151 (2d Cir. 1998). Thus, the aiding and abetting claims fail if PBIHL was a PPVA insider (as the JOLs assert by arguing application of the insider exception to the *Wagoner* Rule and *in pari delicto* doctrine).

Further, even though the JOLs assert that the SAC "provides extensive detail" on the Beechwood Entities' purported involvement in the transactions and aiding and abetting a breach of fiduciary duty (Opp. at 18), it lacks any factual allegations that tend to show that PBIHL had actual knowledge of any wrongful act, or that PBIHL provided substantial assistance to the commission of any of those allegedly wrongful acts, which dooms the claim for aiding and abetting breach of fiduciary duty. The claim for aiding and abetting fraud fares no better. The JOLs assert that they have also alleged with particularity "how the Beechwood Entities, which includes [PBIHL]," were involved in "a common fraudulent purpose." (*Id.*) However, nowhere in the SAC

is there any indication that PBIHL had knowledge of, or provided substantial assistance to, any fraud or other wrongdoing.

C. Civil Conspiracy.

The JOLs do not dispute that the civil conspiracy claim arises out of the same misconduct as the aiding and abetting claims. (*Compare* SAC, ¶ 964 *with* ¶¶ 852 & 863.) Rather, the JOLs assert that they "are permitted to plead claims in the alternative or that may be seen as duplicative." (Opp. at 18 n.5.) Perhaps, but the JOLs do not specify how their duplicative claim for civil conspiracy is a pleading "in the alternative." (*Id.*) Nor do they address the clear authority that a claim of civil conspiracy that is duplicative of an aiding and abetting claim should be dismissed. *See, e.g., Briarpatch Ltd. LP v. Phoenix Pictures, Inc.*, 312 Fed. App'x 433, 434 (2d Cir. 2009). Given that the underlying acts are identical, there is no alternative theory of liability, so the conspiracy claim should be dismissed.

D. Unjust Enrichment.

Finally, the SAC fails to allege facts that tend to establish that (a) PBIHL received a benefit at PPVA's expense, or (b) "equity and good conscience" require that anything be turned over to PPVA. The JOLs do not refute any of PBIHL's arguments, do not distinguish the authority that PBIHL cites, and do not remedy the SAC's fatal pleading deficiencies because the SAC does not state what PBIHL allegedly received. These failures constitute a tacit admission by the JOLs that they have no actionable unjust enrichment claim against PBIHL.

CONCLUSION

For these reasons, and those reasons stated in the moving brief, the JOLs' claims against PBIHL should be dismissed with prejudice.

Dated: May 31, 2019

Respectfully Submitted,

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