UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-JSR
MARTIN TROTT *et al*., plaintiffs *against* PLATINUM MANAGEMENT (NY) LLC, *et al.,* defendants.	No. 1:18-cv-10936-JSR
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, plaintiff, *against* BEECHWOOD RE LTD., *et al.*, defendants.	No. 1:18-cv-06658-JSR

REPLY MEMORANDUM OF LAW IN SUPPORT OF EZRA BEREN'S MOTION TO DISMISS

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CASES

Defendant Ezra Beren respectfully submits this reply memorandum of law in further support of his motion to dismiss the Liquidators' claims against him (the "**Motion**"). For convenience, we use the defined terms as used in the SAC, the opposition brief (the "**Opposition**" or "**Opp. Br.**") and in Mr. Beren's moving brief (the "**Moving Br.**").

PRELIMINARY STATEMENT

On the day that their Opposition was due, the Liquidators' counsel sought leave to attach multiple documents under seal in order to "rebut" the arguments made in the Motion. They had no explanation for why they needed to offer documentary evidence to support their pleading on a Rule 12(b)(6) motion. The Court ruled that only documents expressly referenced in the SAC could be attached and nothing could be filed under seal.

The Liquidators nominally followed the Court's order and attached no exhibits to their midnight filing. However, they flouted the substance of the Court's ruling by fundamentally rewriting the SAC. The Opposition liberally adds new "allegations" drawn presumably from the documents that could not be attached. The Opposition is filled with quotes from unidentified documents, unsupported statements about unalleged claims and uncharged crimes, and still more conclusory statements about Mr. Beren's position. By adding facts and relying thereon, without defending the allegations of the SAC, the Liquidators have effectively conceded the SAC's insufficiency.

As the Moving Brief showed, what the SAC fundamentally alleges is that Mr. Beren is Mr. Huberfeld's son-in-law[1] and took direction from his bosses; with those facts and guilt by

[1] Considering that the Liquidators argue that Mr. Beren is not a defendant merely because of his relationship to Mr. Huberfeld, they spend a remarkable amount of time and effort pointing out that relationship at every opportunity.

association, they hoped to satisfy their pleading burden. Faced with Mr. Beren's motion pointing this out, the Liquidators evidently decided not to defend the SAC, but rather to surreptitiously amend it.

1. *The Opposition improperly rewrites the SAC.* There are so many new factual assertions that it would be impossible to respond to them all here. Fortunately, because they *are* new and not contained in the SAC, we do not have to. A plaintiff must rely on the contents of the complaint and cannot rehabilitate a defective complaint by including new matter in a memorandum of law. Much of the Opposition is simply an attempt to evade the Court's ruling regarding new documents, blacken Mr. Beren's reputation and establish guilt by association. We attach the Opposition with the material that is not alleged in the SAC highlighted as **Exhibit A**. It should all be ignored.

2. *The Opposition fails to show how the SAC pleads the requisite facts with particularity*. The Liquidators continue to intone magic words that they think help them meet their burden: Mr. Beren was "involved"; he did something "material"; he served as a "conduit" for other alleged tortfeasors; he had "direct involvement" in something. The SAC never says what Mr. Beren *did* or *said* that constitutes fraud, violates a fiduciary duty or justifies aiding-and-abetting liability. In fact, many of the allegations of the SAC (as well as some of the new "allegations") undermine the plausibility of the SAC as to Mr. Beren.

3. *The Allegations of* scienter *are inadequate.* The Liquidators do not engage in any meaningful way with Mr. Beren's arguments with respect to *scienter*. The Opposition's argument is that "scienter was present due to the motive and opportunity to commit fraud." Opp. Br. 19. As explained in Mr. Beren's Moving Brief, this is insufficient. Moving Br. 11 – 13.

4. *The new "allegations" contained in the Opposition—even if considered—do not save the SAC.* The Liquidators themselves acknowledge: "The ultimate decision making for both

Platinum Management and the Beechwood Entities rested with the same controlling minds: Nordlicht, Huberfeld, Levy and Bodner." SAC ¶ 996. Every additional "fact" and every quote from the documents the Liquidators did not attach to their Opposition or offer in the SAC highlights this underlying truth: Mr. Beren was not a corporate insider properly subject to group pleading, but was simply an employee acting at the behest of others. This is insufficient to plausibly allege the necessary level of *scienter*.

ARGUMENT

It is the task of the Opposition to show how the *existing* allegations of the SAC satisfy the elements of the Liquidators' claims. For the fraud claims, this means the Opposition must demonstrate how the SAC plausibly alleged the facts of the fraud as particular to Mr. Beren plus facts plausibly suggesting *scienter*. For the fiduciary duty claims, there must be allegations of particular facts giving rise to a fiduciary duty on the part of Mr. Beren and also of its breach, plus *scienter*. For the aiding-and-abetting claims, the allegations must show actual knowledge of the underlying scheme by Mr. Beren. In all of these tasks, the Liquidators fail.

I. ALL THE NEW FACTUAL ALLEGATIONS IN THE OPPOSITION SHOULD BE IGNORED

When the Court ruled on the Liquidators' application to file the Opposition with certain documents under seal, it could not have been clearer: nothing could be filed under seal and only documents incorporated by reference in the SAC could be attached. Rather than defend the SAC, the Liquidators attempt to fundamentally rewrite their complaint in the Opposition. This attempt to amend their allegations against Mr. Beren is not concealed—the Liquidators actually blame Mr.

Beren for the deficiencies of the SAC[2]— and they simply fill the Opposition with new material, without citation to the SAC. Mr. Beren attaches the Opposition as Exhibit A, highlighting the vast amount of new material that is not alleged in the SAC. It should all be ignored.

The law here is clear: "It is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss." *Red Fort Capital, Inc v. Guardhouse Prods. LLC*, 397 F. Supp. 3d 456, 476 (S.D.N.Y. 2019) (internal citation omitted). As this Court has observed, "in deciding a motion to dismiss, 'the Court must limit its analysis to the four corners of the complaint.'" *Hsueh v. The Bank of N.Y.*, No. 05 CV 5345 JSR, 2006 WL 2778858, at *2 (S.D.N.Y. Sept. 26, 2006) (adopting report of M.J. Peck) (quoting *Vassilatos v. Ceram Tech Int'l Ltd.*, No. 92 Civ. 4574 (PKL), 1993 WL 177780, at *5 (S.D.N.Y. May 19, 1993)). If the Liquidators wish to replead, they should seek leave to do so, and not attempt to cure their defective pleading by adding new allegations in a memorandum of law.

Much of the new matter is not even germane to the claims in the SAC and appears intended only to cast Mr. Beren in a bad light. For example, the Liquidators impliedly accuse him of a crime for which he was not charged, in an apparent attempt to tie him to his father-in-law, Mr. Huberfeld. Opp. Br. 5 – 6, 9, 14 – 16 (discussing the COBA scheme). Without reference to the SAC or any support, they say that "Beren was instrumental in the COBA bribe and the Platinum-Huberfeld-Rechnitz relationship." *Id.* at 16. The material relating to National Events is the same. The

[2] The Liquidators assert, apparently seriously, that Mr. Beren should have voluntarily appeared, despite never having been properly served, and pointed out where the SAC was deficient. *See* Opp. Br. 4. The Liquidators' peculiar theory is revealing of their general approach to pleading: "Almost every defendant in the case filed one or more motions to dismiss, and Plaintiffs amended their complaint in response to these motions to include specific name references *for appeasement purposes.*" *Id.* Complying with Rule 9 is not an accommodation nor an "appeasement." *Id*. It is their duty under the Federal Rules to allege facts that plausibly suggest culpability, and not the duty of defendants, like Mr. Beren, to help them do so.

Liquidators try to bolster the SAC by accusing Mr. Beren of a separate Ponzi scheme. *See* Opp. Br. 5 – 6, 19. Even there, the additional statements make clear that the alleged directing person was Mr. Huberfeld, not Mr. Beren.

All of this new material should be recognized as a bad-faith attempt to evade the Court's ruling and the basic rules of pleading, blacken Mr. Beren's reputation and establish guilt by association. It should all be ignored.

II. THE SAC FAILS TO PLEAD THE REQUISITE FACTS WITH PARTICULARITY

The Opposition does not spend much time defending the actual allegations of the SAC. Those allegations are characterized by certain words: "involved," "material," "conduit," "direct involvement." What is missing are the specific things that Mr. Beren is alleged actually to have *done* or to have *said, when* and *to whom,* that constitute the fraud, violate a fiduciary duty or justify aiding-and-abetting liability. It is those things that Rule 9(b) requires.

The Opposition restates in summary fashion the allegations of the SAC, but does not explain how they meet the Liquidators' burden. *Id.* at 6 – 9. The allegations still suffer from all the defects identified in Mr. Beren's Moving Brief and the Liquidators never respond to Mr. Beren's detailed comparison of the lack of allegations against him with the allegations made against the defendants whose motions to dismiss were denied. *See* Moving Br. 8 – 11. They simply declare, for example, that "[t]his Court has already ruled that the underlying fiduciary duties have been adequately pled," and that "Beren knew that the duties existed." Opp. Br. 20. This is certainly untrue as to Mr. Beren. The fact that the owners, the members of the valuation committee or others with much more robust allegations against them may be fiduciaries does not establish that status for Mr. Beren, and nothing in the SAC plausibly supports such an inference.

More important, the SAC, taken as a whole, undermines the plausibility of the claims the Liquidators try to lay out against Mr. Beren. Over and over, the Liquidators allege that others were the directing minds of Platinum and Beechwood and exercised all meaningful control. In the Opposition, the Liquidators add "allegations" that "Bodner and Huberfeld used Beren to relay *their* directives . . . ." *Id.* at 12 (emphasis added). A few sentences later, after quoting extensively from an email with no mention or reference in the SAC, they admit that "[i]n the lengthy document, Beren *is relaying Huberfeld's demands concerning the minutiae of a transaction*." *Id*. (emphasis added). Then, following discussion of yet another email exchange nowhere to be found in the SAC, he is simply "*recit[ing] Bodner's* detailed formulation of the strictures of the deal to *Steinberg*." *Id*. at 13 (emphasis added).

All of this undercuts the Liquidator's claims. Even the new story the Liquidators offer shows that Mr. Beren lacked enough authority to be subject to the group pleading doctrine or to be a fiduciary—he simply conveyed other people's decisions. He did not make any choices that would make him a primary tortfeasor—he does what others tell him to do. At best this could establish aiding-and-abetting liability and, as discussed below, the Opposition fails to establish the requisite knowledge.

A good example of the Liquidators' sneaky pleading technique is its treatment of Mr. Beren's relationship to Mr. Steinberg. In the SAC, Mr. Steinberg is plainly alleged to be a senior person with direct access to senior management, the ownership and the alleged decision-makers. He is alleged to have sat on the valuation committee and the risk committee and to have served as co-chief risk officer. *See* SAC ¶ 12 (vii). He was, in fact, Mr. Beren's boss. But in the Opposition—for the first time—the Liquidators try to invert this relationship:

> Beren is the son-in-law of Murray Huberfeld and carried out both Huberfeld and Bodner's instructions concerning Platinum

> Management and Beechwood. Mr. Beren served on valuation committees and had an interest in the overvaluation of the Platinum-Beechwood assets via profit and loss consulting agreements. The correspondence makes clear that he dictated terms to senior members of Platinum Management such as David Steinberg, who served as Platinum's "chief risk officer."

Opp. Br. 6. The contradiction is apparent. First, despite insisting that Mr. Beren is not here simply because he is Mr. Huberfeld's son-in-law, they open with that fact. Next, they say he "served on" valuation committees when in fact the real allegation is much more limited, as discussed below. They continue with the unalleged "correspondence" that has him "dictating terms" to his boss. This "correspondence" is not alleged in the SAC and the Liquidators' interpretation is not plausible. Based on the Liquidators' other statements, the only plausible scenario is that, to the extent Mr. Beren was "dictating" anything to Mr. Steinberg, he was merely relaying information from the decision-makers. *See, e.g.*, *id.* at 12. The Liquidators simply hope to mention Mr. Beren and Mr. Huberfeld together enough to somehow meet the requirements of Rule 9. But that is not how pleading works, let alone pleading with particularity.

In the Moving Brief, Mr. Beren laid out a number of facts that he knows to be true from his personal knowledge, and suggested that the Liquidators might be required to disaffirm some of their allegations upon actually reviewing the evidence available to them. *See* Moving Br. 3. The Liquidators declined to do so. They did, however, cleverly avoid actually controverting Mr. Beren. For example, the Liquidators *suggest* he was a member of the "valuation committee," *see* SAC ¶ 12 (xiii). But the factual allegations do not support that conclusion. Instead, they say that he was a "proxy" for others, Opp. Br. 19, that others "received financial information" from him, *id.* at 14, that he "participated" or "attended" meetings of a valuation committee, or "contributed" to valuations. *Id.* at 7. None of this makes him a member of the committee with any authority to *do* anything.

More important, *there is not one allegation that would support the inference that any information he provided to the actual members was inaccurate*. Based on the allegations *actually in* the SAC, it is just as plausible that Mr. Beren provided 100% truthful information to the decision-makers when he "attended" meetings or "contributed" to valuations—which in fact he did—and the decision-makers decided to ignore it. The Liquidators simply do not allege that he had sufficient authority to be responsible for the collective decisions of others, nor do they allege facts showing that he ever provided anyone with inaccurate information.

III. THE *SCIENTER* ALLEGATIONS ARE INADEQUATE

The only mention of *scienter* in the Opposition is that "scienter was present due to the motive and opportunity to commit fraud." *Id.* at 19. As shown in the Moving Brief, the allegations against Mr. Beren are markedly different from those regarding the defendants whose motions to dismiss were denied. Moving Br. 11 – 13. The best the SAC can do is allege that he might have made more money as a result of the alleged schemes. *See* SAC ¶ 12(xiii). This is insufficient. *See* Moving Br. 13.

In the Opposition, however, the Liquidators contend that this issue has been settled: the allegation that Mr. Beren profited together with his "involvement" in various "schemes" was sufficient. Opp. Br. 22. The Court, however, is capable of reading its own decision. And that decision reveals the stark difference between Mr. Beren and the founders, owners, managers and C-level executives as to whom the allegations of *scienter* were held to be sufficient.

As *Kalnit v. Eichler* explains, "[m]otives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a *concrete and personal benefit to the individual defendants* resulting from the fraud." 264 F.3d 131, 139 (2d Cir. 2001) (emphasis added). Despite being in possession of many millions of documents, including, no doubt, Mr.

Beren's pay records, and despite ignoring this Court's order and introducing numerous new facts in their brief, the Liquidators remain unable to allege that Mr. Beren *actually received* any "concrete and personal benefit" beyond his ordinary W-2 wages.[3]

This is yet another place where the new material the Liquidators try to sneak in undermines their claims: they quote an email in which Mr. Beren expressly requests to become an ordinary payroll employee. *See* Opp. Br. 16. This is hardly consistent with a fraudster eager to collect his piece of the action.

IV. THE NEW "ALLEGATIONS" CONTAINED IN THE OPPOSITION CANNOT SAVE THE SAC

None of the new material should be considered in favor of the Liquidators' position. They are not permitted to bolster a defective pleading by sneaking new factual matter into a brief. However, the new material is generally unhelpful as it undermines his role as a "corporate insider" with the kind of authority necessary to invoke the group pleading doctrine. Without group pleading, the SAC collapses as to Mr. Beren.

There is far too much that has been added to address each new "allegation" in a reply brief, *see* Ex. A, but the central theme of all the new material is that Mr. Beren was always acting at the behest of his superiors, had no decision-making authority and had to ask for sign-off on every decision. Although it should all be ignored, when read in context, it simply serves to show that the dismissal should be with prejudice—adding all of these new facts to a pleading will not help.

[3] As Mr. Beren pointed out in the Moving Brief, the Liquidators surely know he did not receive any compensation (other than his regular W-2 wages) in respect of any of the deals alleged to be fraudulent, but are cagily avoiding admitting that fact. *See* Moving Br. 3. Indeed, Mr. Beren is not aware of *any* agreement supporting the Liquidators' contention that he was compensated for "profit and loss at Platinum" or for "his deals at Beechwood." Opp. Br. 22. The Liquidators do not cite to the SAC (or anything) for this assertion.

CONCLUSION

By improperly attempting to amend the SAC through their brief, the Liquidators have effectively conceded the insufficiency of the SAC. This is the third operative complaint and yet the Liquidators are trying to sneak in new factual allegations that, even if credited, fail to satisfy their pleading burden. The new factual material introduced in the Opposition should be disregarded and, for the reasons expressed in the Moving Brief and here, the SAC should be dismissed as to Mr. Beren. Because the Opposition shows that what they would add to a further amended pleading would be insufficient, the dismissal should be with prejudice.

Dated: December 23, 2019
New York, NY

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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 EZRA BEREN'S MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

The court should deny Mr. Beren's belated motion to dismiss in its entirety. The Second Amended Complaint (SAC) states claims against him, and he is a corporate insider with direct involvement in day-to-day affairs for the purposes of the group pleading doctrine.

Mr. Beren's motion appears to be predicated on two main points: (i) that he is not mentioned specifically (by name) more times in the complaint, and (ii) the fundamentally incorrect contention that "the reason Mr. Beren is a defendant in this case is because he is Mr. Huberfeld's son-in-law." [Dkt. No. 491] ("**Beren MTD**" at 1). Neither of these points has merit.

The first issue is of Beren's own disingenuous making. If Beren had appeared in the case and filed a motion to dismiss in accordance with the Court's schedule, Mr. Beren's name would have appeared more in the complaint. When Plaintiffs filed this action, the phrases "Platinum Defendant" and "Beechwood Defendant" were utilized as defined terms to allow for readability. Almost every defendant in the case filed one or more motions to dismiss, and Plaintiffs amended their complaint in response to these motions to include specific name references for appeasement purposes. Beren did not do so, but rather chose to retain counsel, attend hearings, evade service, and belatedly appear in the case near the close of discovery. Of course, therefore, the terminology referring to him is largely unchanged. However, he is still both a Platinum Defendant and a Beechwood Defendant.

On the second issue, while Plaintiffs have no doubt as to Mr. Beren's counsel's sincerity, Plaintiffs respectfully submit that Mr. Beren is not being entirely honest with his counsel (to put it mildly). Beren acknowledges that he joins this case after substantial discovery has already been completed. He contends that Plaintiffs must disaffirm eight (8) categories of allegations based on their investigation ("Page 3 Factual Contentions"). But Plaintiffs' investigation has merely reinforced the propriety of the core allegations against Mr. Beren as a Platinum Defendant and as a Beechwood Defendant in connection with the First Scheme, Second Scheme, overvaluation, Beechwood alter ego

relationship, control by Bodner and Huberfeld, the COBA bribery and Huberfeld's arrest, and the looting of PPVA's assets – particularly Agera.

FACTS

I. Introduction

As the SAC alleges, Mr. Beren is a Platinum Defendant and a Beechwood Defendant[1]. He was materially involved in the First Scheme and the overvaluation of Platinum assets – including in respect of representations made to PPVA and the U.S. Securities and Exchange Commission. He was materially involved in the Black Elk Scheme and raising of the BEOF Funds that resulted in the dissipation of PPVA's in-the-money Black Elk bonds. He was materially involved in the fraudulent Agera transaction and the dissipation of PPVA's interests in Agera Energy to Beechwood, where he worked, in exchange for securities known by him to be near-worthless.

Mr. Beren was materially involved in facilitating the bribe of Norman Seabrook, the former President of the Correction Officer's Benevolent Association of New York ("**COBA**"), in exchange for COBA's investment of $20 million, by serving as a point-person for the Platinum-Beechwood-Huberfeld-Jona Rechnitz relationship.

Mr. Rechnitz paid the Huberfeld bribe to COBA in exchange for the COBA investment, and Mr. Huberfeld has pled guilty to defrauding PPVA in connection with the same. The COBA bribe was papered at Platinum via fraudulent sports tickets invoices. Sporting events tickets "investments" at high values had a façade of legitimacy at Platinum and Beechwood due to Platinum and Beechwood's involvement with National Events Tickets, Inc. ("**National Events**") – a separate Ponzi scheme furthered by Ezra Beren, Murray Huberfeld, Huberfeld Family Foundation, Inc. and Beechwood.[2] Jonah Rechnitz, who paid the COBA bribe on behalf of Huberfeld in the Platinum

[1] Any capitalized term not defined herein shall have the meaning prescribed in the Plaintiffs' Second Amended Complaint [Dkt. No. 285].

[2] The National Events Ponzi scheme centered around "investments" in sports event tickets, and the National Events founder was arrested and pled guilty to the preparation of fake invoices – just as Huberfeld did with PPVA – as well as running a Ponzi scheme in connection with the same. Beren was a key player in the National Events relationship and

matter, was a key player at National Events in attracting investments as well. It was under cover of the National Events sports tickets "investments" and the Beren-Rechnitz relationship that Huberfeld defrauded Platinum, transferred the funds to Rechnitz, and submitted fake invoices for sporting event tickets which really constituted the COBA bribe. Ezra Beren was central to this.

Beren acted as a proxy and conduit for both David Bodner and Murray Huberfeld at both Platinum Management and Beechwood. Beren is the son-in-law of Murray Huberfeld and carried out both Huberfeld and Bodner's instructions concerning Platinum Management and Beechwood. Mr. Beren served on valuation committees and had an interest in the overvaluation of the Platinum-Beechwood assets via profit and loss consulting agreements. The correspondence makes clear that he dictated terms to senior members of Platinum Management such as David Steinberg, who served as Platinum's "chief risk officer."

In his motion, Mr. Beren seeks to downplay the substantial and significant roles he held at Platinum Management and Beechwood. His motion ultimately ignores the well pled allegations of this matter, and Mr. Beren's central role in this fraud.

II. SAC Allegations

The SAC properly pleads claims against Beren as both a Platinum Defendant and a Beechwood Defendant, including breach of fiduciary duty, fraud, aiding and abetting fraud and aiding and abetting breach of fiduciary duty (SAC at Counts 1-8). The SAC alleges that Beren was a dual employee of Platinum Management and BAM for much of the relevant time period, working alongside the other Platinum/Beechwood Defendants, including his father-in-law, Murray Huberfeld, and David Bodner, to orchestrate and execute the First and Second Schemes.

The SAC states the following factual allegations against Beren:

- From March 2007 until December 31, 2015, Beren was the Vice President of Platinum Management (SAC at ¶ 112);

facilitated "investments" in sports tickets from Platinum offices via Platinum email on behalf of Huberfeld and Beechwood.

- Beginning in 2014, Beren was a co-investment advisor to BAM, concurrently providing his services to Platinum Management and the Beechwood Entities (SAC at ¶ 12(vii);

- In his role at Platinum Management, Beren was responsible for overseeing and managing certain of PPVA's investments, including but not limited to PEDEVCO (SAC at ¶ 12(xiii));

- Beren attended Platinum Management valuation committee meetings in his role as Vice President and portfolio manager (SAC at ¶ 12(xiii));

- As a Platinum Management portfolio manager, Beren contributed to valuation and risk determinations made by Platinum Management in connection with PPVA's investments (SAC at ¶ 256);

- While employed at Platinum Management, Beren entered into an investment management agreement with BAM, for which he was paid based on the performance of the investments he managed. As such, Beren was a prime example of the "revolving door" of Platinum Management/Beechwood employees (SAC at ¶ 12(xiii), 350);

- Beren worked for the Beechwood Entities and Platinum Management at the same time in connection with transactions for which they were ostensibly on different sides (SAC at 12(xiii));

- At all relevant times, the management team of the Beechwood Entities, including Beren, served and worked at the sole discretion of Beechwood's ultimate beneficial owners – Nordlicht, Bodner, Huberfeld and Levy -- and functioned as the alter ego of Platinum Management to PPVA's detriment (SAC at ¶ 389). David Bodner, who regularly worked with Beren, admitted the alter ego relationship between Platinum and Beechwood (SAC at Exhibit 33);

- Beren and the other Platinum Defendants developed and formed Beechwood while working out of Platinum's offices. (SAC at ¶ 349) Beren and the other Beechwood Defendants worked to create the entities for Beechwood's reinsurance business, and structured them to provide common ownership with Platinum Management (SAC at ¶ 373-399);

- Immediately after the Beechwood Entities gained access to the first reinsurance trust assets, Beren and the other Platinum/Beechwood Defendants caused PPVA to enter into numerous non-commercial transactions with the Beechwood Entities and, in some cases, to co-invest with the Beechwood Entities in third-party companies. (SAC at ¶ 400);

- Beren and the other Platinum Defendants and individual Beechwood Defendants (also including Beren) used a portion of the funds entrusted to the Beechwood Entities to enrich themselves, as the Beechwood Entities provided Platinum Management with transaction partners that could be used to justify the First Scheme and PPVA's inflated NAV, while ultimately causing significant harm to PPVA. (SAC at ¶ 351);

- On or about May 25, 2018, Huberfeld pled guilty to federal charges of conspiracy to commit wire fraud, in connection with a bribe Huberfeld offered to Norman Seabrook, the former President of the Correction Officer's Benevolent Association of New York ("COBA"), in exchange for COBA's investment of $20 million with PPVA and other Platinum-affiliated funds. (SAC at ¶ 71) Huberfeld was arrested in connection with the COBA bribe on June 8, 2016 (SAC at ¶ 70);

- Beren worked closely with his father-in-law Huberfeld and Bodner, who were involved in every aspect of the First and Second Schemes, including, *inter alia*, (i) using his position as a senior Platinum Management executive to participate in the false inflation of the value of PPVA's assets, particularly during the period from 2012 through 2016, in order to report information that resulted in PPVA's NAV being inflated and overstated during that period, causing PPVA to pay excessive fees and other amounts to the Platinum Defendants; (ii) orchestrating the Black Elk Scheme; (iii) orchestrating the series of transactions among PPVA and the Beechwood Entities designed to mask the inflation of PPVA's NAV and the overpayment of fees and other amounts to the Platinum Defendants, (iv) orchestrating the series of transactions among PPVA, Beechwood and/or affiliated entities in order to encumber or strip PPVA's remaining valuable assets; and (v) using his position to cause PPVA to engage in the transactions referred to herein as the Security Lock-Up (SAC at 12(iii));

- Due to his management role with Platinum Management and Beechwood (as well as his familial relationship with Huberfeld), Beren was involved in the acts that comprise the First and Second Schemes, including the misrepresentation of PPVA's NAV, the creation of Beechwood and the series of transactions between Beechwood Entities and PPVA designed to strip PPVA of its Remaining Valuable Assets (SAC at ¶ 112, 114);

- Beren's influence over the overvaluation of PPVA's illiquid positions, which included but was not limited to PEDEVCO, enabled PPVA's overstated "performance," which was largely composed of unrealized gains, to steadily increase, thereby ensuring that there would always be distributions and fees due to Platinum Management and its owners (SAC at ¶ 320);

- Beren had direct knowledge of the misrepresented valuation of the PEDEVCO investment and participated in misleading PPVA as to the value of this asset (SAC at ¶ 424-434);

- Beren was aware of and facilitated the actions of the Platinum Defendants in connection with the Black Elk Scheme, including management of the BEOF Funds (SAC at ¶ 466, 889);

- In addition, Beren was involved with setting up the BEOF Funds, a standalone mechanism by which Platinum Management personnel, their family and friends, and certain preferred investors were offered the opportunity to invest in a rapidly deteriorating Black Elk "outside of the regular funds." (SAC ¶ 451-452);

- Beren joined Beechwood on a permanent basis as of January 1, 2016, when he was hired by Feuer and Taylor (SAC at ¶ 395);

- As early as March 2016, the Platinum Defendants and Beechwood Defendants, including Beren, had conspired to transfer the rest of the Remaining PPVA Assets by way of a series of "insider" transactions in order to clear out the uncollectable debt obligations owed to Beechwood by companies such as PEDEVCO, leaving PPVA with little to nothing in exchange for the transactions. (SAC at ¶ 607);

- On June 9, 2016, the day after the arrest of his father-in-law, Beren, working in concert with the other Platinum Defendants and Beechwood Defendants, caused PPVA to transfer its interests in the Agera Note to AGH Parent at a substantial undervalue (SAC ¶ 643-659); and

- Even though the Platinum Defendants and Beechwood Defendants had evidence and believed that the market value for the Agera Note was between $225-285 million, the stated purchase price for the Agera Note was only $170 million, with approximately two-thirds of that amount equating to nearly worthless debt, such as PEDEVCO, and other consideration of dubious value (SAC ¶ 648-650).

III. Beren's Involvement in the Platinum-Beechwood Fraud

1. The Fraudulent Agera Transactions

The Agera Transaction looted PPVA of one of its last remaining valuable assets under circumstances where PPVA went into liquidation and wind-down within days after the transaction closed, and therefore could not have been for liquidity purposes (¶¶ 607-672). Rather, the Agera Transaction was the frenetic product of the encroaching COBA investigation under circumstances where the SDNY began examining the Platinum-Beechwood relationship in February 2016, negotiations between Platinum and the Government broke down in April 2016, and the transfer of Agera to Beechwood was immediately accelerated on instructions from Mark Nordlicht on terms which David Steinberg, who "led" negotiations on behalf of PPVA stated in writing, were fundamentally against the business interests of PPVA.

Starting in 2015, Beren attended multiple meetings at Agera Energy with, among others, Bodner, Huberfeld, and Saks, including on February 3, 2015 and February 9, 2015. Beren's involvement with Agera Energy continued into spring 2016, including in the critical months leading up to the Agera Transactions. At this time, Beren's role *vis a vis* Agera Energy appears to have increased, as he was considered a point of contact by third-parties seeking to invest or otherwise

transact with Agera Energy. For instance, in a March 10, 2016 email responding to an inquiry concerning an investment in Agera Energy, Beren says that "I spoke with Dhruv [Narain] and we plan on addressing all of your questions once Agera identifies a given acquisition target." Likewise, in April 2016, Beren attended additional meetings involving potential counterparties with Agera Energy.

In addition, through his role managing and evaluating the PEDEVCO investment, Beren knew that the PEDEVCO debt assigned from Beechwood to Platinum as part of the Agera Transactions was nearly worthless. No later than February 2014, Beren and Steinberg discussed issues with PEDEVCO as disclosed in a third-party valuation report. The report concluded, *inter alia*, that PEDEVCO had "drastically" reduced its recovery and raised its operating costs by a factor of four. By a February 2015, the situation had deteriorated and Beren reports "I am going to respond to Pedevco [*sic*] that the option on the holiday [from PEDEVCO paying down a Beechwood note] is not available as David and I don't want to go back and forth with Beechwood[.]"

In May 2016, in the context of the distribution of an invoice to PEDEVCO from Beechwood, Beren told another Beechwood employee that the PEDEVCO "interest is going to be deferred regardless" so she should not worry about the prompt distribution of the invoice – the determination had already been made that the near-worthless PEDEVCO debt would be put to Platinum in exchange for Agera so it did not matter from Beren's perspective, wearing his Beechwood hat.

2. Beren Participated in the BEOF (Black Elk) Scheme

The successful perpetuation of the Black Elk Scheme, which ultimately left "PPVA holding the bag" concerning its interest in a "rapidly deteriorating Black Elk," required marketing the opportunity to purchase prioritized preferred equity to potential investors. *See, e.g.,* SAC ¶¶ 440, 450, 453.

Beren had knowledge of, and with respect to the marketing of the 2013 investment in the BEOF Funds, active involvement in this element of the Black Elk Scheme. For example, on February

5, 2013, Beren emailed Levy with the subject "Black Elk." Beren told Levy that "I'm trying to set up a call for you to talk with a contact of mine in Chicago who can bring some money to the deal."

The next day, attaching the BEOF marketing materials and executive summary, Beren emails the potential investor (emphasis added):

> I have attached the deck on Black Elk for you to review and cc'd David Levy who is running the Black Elk deal.
>
> David, *Mendy is a dear friend of mine and I want to introduce you two. Mendy wants to hear all the details of the project and has great contacts to potentially help raise some money for the deal*. Now that you have each others [*sic*] email[,] if you two could be in touch and find a time to speak with another[,] that would be great."

3. Beren Knowingly Acted as a Conduit to Allow Huberfeld and Bodner to Control Beechwood and Platinum

Defendants Bodner and Huberfeld managed and controlled Platinum Management and the Beechwood Entities and used such control to obtain ill-gotten profits derived from the years-long effort to siphon assets from PPVA via the events constituting the First and Second Schemes. Beren, as Huberfeld's son-in-law, acted as proxy for Huberfeld and Bodner in furthering those goals at Platinum Management and Beechwood.

Beren was unquestionably aware of and facilitated the control that Bodner and Huberfeld wielded over Platinum Management and Beechwood's investments and operations. For instance, in the context of a February 2015 discussion over whether Platinum Management would cause PPVA to make interest payments to Beechwood on behalf of PEDEVCO, Nordlicht asks Beren "[w]ho at Beechwood are we dealing with exactly?" Beren responds "David Steinberg spoke to Danny *who brought in Murray and David Bodner*" (emphasis added).

Beren and Bodner held meetings, including a meeting to discuss "learning," and another to confer about a "New Deal." The importance of Beren's meetings with Bodner, Huberfeld, and others was often evident. For instance, in a calendar invite dated May 2, 2014, and with the importance

"High," Chief Risk Officer Steinberg schedules a two-hour meeting with Bodner, Huberfeld and Beren wherein the "time slot should be completely blocked off from David's schedule."

On numerous other occasions, Bodner and Huberfeld used Beren to relay their directives concerning Platinum/Beechwood's execution of the First and Second Schemes. On October 28, 2014, from his Platinum email address, Beren emailed Saks at his Beechwood email address to discuss a potential Beechwood loan. In describing the structure of the loan, Beren refers to an "80-20 metric (there [*sic*] group puts up 20% of every deal) with a 10m [*sic*] credit line to draw on. *I think Murray wants to structure a 12% debt component with a preferred return of 20-30% of [g]ross revenue before expenses[,] etc…*" (emphasis added). In the lengthy document, Beren is relaying Huberfeld's demands concerning the minutiae of a transaction.

After acknowledging Bodner and Huberfeld's role over a loan position in which the Beechwood Entities had an interest, Beren goes on to explain the issues with PEDEVCO fulfilling its debt obligations to the Beechwood Entities, thus necessitating Platinum Management causing PPVA to pay PEDEVCO's interest obligations. Ultimately, the discussion ends with Steinberg telling Nordlicht and Beren that he consulted with Huberfeld on the issue, and "he [Huberfeld] told me 'as long as you get me something back it will be ok.'"

Less than a month later, on November 20, 2014, Steinberg emails Beren to ask if "you want to go over the numbers on this deal with murray? I know we have to flip the backend split to be more favorable to us, but is it a business he is interested in for beechwood? [*sic*]. Beren responds: "I will discuss with him."

As another example of Beren's knowledge and facilitation of Huberfeld's supervisory role at Beechwood, on July 13, 2015, in the context of a potential Beechwood deal, Beren tells Steinberg that "[w]e need to have a talk with Murray at some point about economics on this deal. Want to address today?"

Beren likewise aided and abetted Bodner's control of Beechwood and Platinum-related transactions. SAC at ¶ 12(xiii). For example, on October 22, 2014, an unaffiliated individual proposes an investment to Saks via his Beechwood email account, which is then passed along to Beren and Steinberg to their Platinum accounts. The same person follows up "Any news? Movement? Something?" Beren responds: "Hope to speak to David Bodner tomorrow."

After a meeting the next day at Bodner's behest, Beren recites Bodner's detailed formulation of the strictures of the deal to Steinberg:

> Spoke with David Bodner,
> He wants to offer a 3million credit facility with a 2yr term and a 10% coupon on all money outstanding along with the following:
>
> At closing, 1mm will be used strictly for the installation of the IBeacon technology in the Simon Malls-15% Equity kicker in stock on a fully diluted basis
>
> Additionally, 1 mm will only be available once specific benchmarks (tbd) are reached- Equity Kicker for the addtl 1 mm will be another 7.5% equity in the company
>
> The remaining 1mm will only be available once specific benchmarks (tbd) are reached- Equity Kicker for the addtl 1mm will be another 7.5% equity in the company
>
> He also mentioned that in case the stock soars at any point to throw in a convert feature conv at $1 or somewhere in that range[3]

Beren also assisted David Bodner and other Platinum Defendants with PPVA investments in businesses such as PEDEVCO. SAC at ¶ 424-434. For example, on February 11, 2014, in the wake of a valuation report casting serious doubts on the prospects of PEDEVCO, Beren is copied on an email from Steinberg to Nordlicht asking whether Nordlicht wants to join a call with the valuation company, as "(David Bodner will be on it)." Notably, less than a month later, a PPVA subsidiary invested in PEDEVCO via notes structured to ensure that the PPVA subsidiary would receive no interest payments on its investment until the Beechwood Entities had been paid in full. *See* SAC ¶¶ 428-431.

[3] The entire quotation is [*sic*].

Huberfeld and Bodner, who wanted to perpetuate the ruse that they had no day-to-day involvement or control over Platinum Management, received financial information from Beren concerning the valuation of PPVA's assets. In this regard, it is also evident that Beren appears to have participated in PPVA valuation committee meetings on multiple occasions in 2014. SAC at ¶ 12(xiii). In fact, Platinum Management represented that Beren participated in PPVA valuation committee meetings in response to an SEC Audit.

4. Beren and the COBA Bribery

Beren is at the core of the COBA bribery scheme that (a) resulted in Mr. Huberfeld's arrest and guilty plea for defrauding PPVA, (b) evidences the knowingly false NAV statements submitted in respect of PPVA from 2013 onwards (as bribery was necessary to obtain fund investments), and (c) served as the impetus for the Second Scheme, including the looting of PPVA by Beechwood.[4]

In particular, the COBA bribery scheme was effected via Jonah Rechnitz, and papered and concealed via invoices associated with the National Events sports tickets relationship between Rechnitz and Beren as set forth below.

In October 2014, Beren via his Platinum email address, proposed to Beechwood a deal involving National Events, Inc., an alleged broker of tickets to entertainment events.[5]

At the outset of the proposed deal between Beechwood and National Events, it was apparent that Huberfeld was directing Beren to set its terms and to conduct due diligence, which included reviewing agreements sent by National Events. Once instructed by Huberfeld, on October 22, 2014,

[4] In particular, the Agera transaction was executed and accelerated because of the SDNY investigation of Platinum from 2015 through April of 2016, when negotiations between Platinum and the Government broke down and Platinum insiders knew that the last remaining asset (Agera) needed to be transferred because of the imminent criminal proceedings.

[5] The principal of National Events, Jason Nissen, was indicted in May 2017 by the U.S. Attorney's Office for the Southern District of New York. Prosecutors alleged that Nissen had used "the veneer of a successful business" to mask that he was running "a massive Ponzi scheme" that resulted in losses of a minimum of $70 million. Nissen later pled guilty to one count of wire fraud and was sentenced to 27 months in prison. *See United States v. Nissen*, 1:17-cr-00477-PAE (S.D.N.Y.) (Dkt. 75). A civil complaint setting forth largely the same allegations was filed in 2017 in the State Supreme Court of New York, New York County. *See Taly USA Holdings, Inc. v. Nissen*, Index No. 652865/2017 (NYSCEF Doc. No. 1). The complaint alleges that Beren, as well as Huberfeld, Huberfeld's wife, the Huberfeld Family Foundation, Jona Rechnitz among many others, accepted or paid money from the defendants.

Beren worked to move the deal forward, emailing Danny Saks with a proposed deal structure for Beechwood that attached sample invoices for sporting tickets. SAC at 12(xiii), 389. From his Platinum email address, Beren sent a draft term sheet to Thomas, Beechwood's in-house counsel. Later that day, Beren emailed Steinberg "I reviewed our initial Term [*sic*] sheet with Chris Thomas at Beechwood and this is what we came up with for the ticket funding opportunity which conceivably would be funded by Beechwood. Let's review later."

One day later, Huberfeld's assistant sent Jona Rechnitz an email with the subject "Pls call Murray 212-675-2020" and the text "Hi Jona, I just tried you. Please call the office when you can." On December 11, 2014, Jona Rechnitz, sent Platinum a fraudulent invoice for sporting tickets to mask a $60,000 payment from PPVA to Rechnitz to be provided to Norman Seabrook in connection with the COBA Bribe. *See* SAC at Exhibit 1.

The National Events negotiations and related "investments" were the front used by Huberfeld and Beren to mask the bribe payment with a façade of legitimacy. They were "investing" in sports tickets anyway and an additional set of ticket invoices would not be noticed. In discussions after Huberfeld's arrest, Mark Nordlicht stated that Michael Kimmelman, the Platinum employee responsible for writing the checks to Rechnitz, would have not been suspicious of such payments and no one would undermine his version of events.

The COBA bribe led to a government investigation that was made known to the Platinum Defendants and Beechwood Defendants by at least May 21, 2015, when Murray Huberfeld and Platinum Partners received grand jury subpoenas. It is clear from correspondence that Platinum counsel was in negotiations with the government until around April of 2016, when negotiations broke down, and the Agera Transaction was immediately accelerated on an urgent basis, and Mark Nordlicht directed David Steinberg to proceed with terms that David Steinberg stated in writing were against the business interests of Platinum.

The government investigations that began with the COBA bribe was the impetus for the Second Scheme and particularly the Agera Sale. Faced with criminal investigations, the Platinum Defendants and Beechwood Defendants, including Beren, took steps to transfer or encumber nearly all of PPVA's remaining valuable assets, for the benefit of themselves and insiders. Beren was instrumental in the COBA bribe and the Platinum-Huberfeld-Rechnitz relationship

5. Beren is at the Center of the Beechwood/Platinum Alter Ego Scheme

The SAC alleges at great length the alter ego relationship between Platinum Management and the Beechwood Entities, which serves as the fulcrum to the perpetuation of the First Scheme and Second Schemes. Beren's dual role at Platinum Management and the Beechwood Entities epitomizes the alter ego relationship at issue. SAC at ¶¶ 12(xiii), 112, 256 and 350.

Beren had knowledge of this scheme and contributed to the inextricable links between Platinum Management and the Beechwood Entities, along with their ultimate owners, Nordlicht, Bodner, Huberfeld, Levy, Feuer and Taylor. As but one example, on August 27, 2015, after acknowledging his role at Platinum Management, Beren explains many of these connections (emphasis added):

> Some of the principals of PMNY are also shareholder of a second investment company named B Asset Manager/Beechwood re, which provides asset management for insurance companies. Often, investment opportunities brought by [portfolio managers] of PMNY may not fit the investment parameters of PPVA or PPCO, and PMNY may refer the opportunity to Beechwood. *The compensation terms for [portfolio managers] are the same for investments taken by PPVA, PPCO and Beechwood. So in essence Steinberg and Beren are PM's for PPVA, PPCO and Beechwood. Same principles, just different sources of capital.*

Beren benefited from this fungibility concerning his own compensation and benefits. On November 11, 2014, more than a year prior to Beren's "official announcement" of his hiring at BAM, Manela informed Beren that "as of January 1, [2015], you'll be on draw from PPVA and get health insurance from them as well and well [*sic*] stop everything from Beechwood." Beren responds "[s]ounds good to me … [m]y only request is that I go back to being a payroll employee vs being a 1099 at the end of the year."

Moreover, in his role as a portfolio manager, Beren regularly sourced and negotiated deals involving Beechwood using his Platinum email address. For instance, on April 28, 2015, from his platinumlp.com email address, Beren sends an email with the subject "BAM Redlined Term Sheet." Beechwood executives have also admitted that Beren had a simultaneous presence at Platinum and Beechwood. Mark Feuer told counsel for WNIC and BCLIC that Beren is "someone who sits in Beechwood's offices – and has for years – and brings Beechwood deals."

ARGUMENT

I. Applicable Legal Standard

The standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is well-settled and not in dispute. "The court must accept the well-pleaded factual allegations in the complaint as true." *In re Livent, Inc. Noteholders Sec. Litig.,* 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001) (citing *Grandon v. Merrill Lynch & Co.,* 147 F.3d 184, 188 (2d Cir. 1998)). In addition, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face,'" and claims based upon fraudulent conduct must be "stated with particularity." *In re Refco Sec. Litig.*, 759 F. Supp. 2d 301, 315 (S.D.N.Y. 2010) (Rakoff, J.) (citing Fed. R. Civ. P. 9(b)) ("**Refco I**"); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009) (setting forth pleading requirements under Rule 8). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 120 (2d Cir. 2013) (internal quotation marks omitted).

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

of conscious misbehavior or recklessness." *Id.* (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

This Court's April 2019 Decision (Dkt. No. 290 at 22) denied motions to dismiss the First Amended Complaint in which various Platinum Defendants and Beechwood 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).

II. Beren Is the Exact Type of Corporate Insider for Which Group Pleading is Appropriate

This Court's April 11, 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)). *See 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).

Beren is the exact type of Defendant for which group pleading is appropriate. Beren had direct involvement in managing PPVA's investments while acting as a dual employee of Beechwood and Platinum Management. He was directly involved in the day-to-day management of Platinum/Beechwood, bringing deals to the other Platinum Defendants and Beechwood Defendants, including the National Events deal that was the precursor to the COBA bribe. Beren served as a proxy for Bodner and Huberfeld on the valuation committee and worked with them on a regular basis as a conduit to other Platinum Defendants and Beechwood Defendants. Beren acted in furtherance of the First and Second Schemes at all times, and *scienter* was present due to the motive and opportunity to commit fraud. As a Platinum Defendant and a Beechwood Defendant, Beren is liable on causes of action relating to fraud and breach of fiduciary duty for the well-pled allegations in the Second Amended Complaint. Neither the fraud nor breach of duty analysis changes depending on whether Beren is viewed as a Platinum Defendant or a Beechwood Defendant. Beren played significant roles at both (which were in fact "integrated" alter-egos), and cannot hide behind a purported downgrade to "credit analyst" at Beechwood, when, beginning in 2015, Beechwood undertook efforts to (falsely) portend to dissociate itself from Platinum, when in fact Beren's stated role far more substantial – he had brought deals to Beechwood for "years."

III. The SAC Sufficiently Alleges Beren's Breach of Fiduciary Duty Owed to PPVA and Aiding and Abetting Breach of Fiduciary Duty Owed TO PPVA.

This court clearly stated the elements of a breach of fiduciary duty claim in its April 11, 2019 Opinion:

> The elements of a breach of fiduciary duty claim are: "(l) that a fiduciary duty existed between plaintiff and defendant, (2) that defendant breached that duty, and (3) damages as a result of the breach." *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 114 (S.D.N.Y. 2009). "In determining whether a fiduciary duty exists, the focus is on whether one person has reposed trust or confidence in another and whether the second person accepts the trust and confidence and thereby gains a resulting superiority or influence over the first." *Indep. Asset Mgmt. LLC v. Zanger*, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008). In particular, where a "defendant ha[s] discretionary authority to manage [a plaintiff's] investment accounts, it owe[s] [the plaintiff] a fiduciary duty of

> the highest good faith and fair dealing." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 915 N.Y.S.2d 7, 16 (1st Dep't 2010), *aff'd,* 962 N.E.2d 765 (N.Y. 2011).

Dkt. No. 290 at 24.

Here, Beren was a Vice President and Portfolio Manager of PPVA, with decision making authority and management responsibilities with respect to PPVA's assets. *See generally* SAC ¶ 12. In that role, Beren was responsible for negotiating transactions for the benefit of PPVA and in fact acted as proxy for Bodner and Huberfeld in connection with the same. He had a duty to act in the best interest of PPVA. Beren breached his fiduciary duty to PPVA via his involvement in the Black Elk Opportunities Scheme, by simultaneously managing the assets of the Beechwood Entities and acting on behalf of both BAM and Platinum Management in the same transactions, and via the Agera Transaction. *See id.* at ¶ 12(xiii). Beren was compensated by BAM on a performance basis, and he put his own interests before PPVA by knowingly pushing PPVA into a series of transactions that artificially inflated PPVA's NAV and looted PPVA of its Agera asset for the securities he knew to be near worthless. He further breached his duties to PPVA in connection with facilitation of the Rechnitz relationship and COBA bribe.

Beren aided and abetted breaches of fiduciary duty owed to PPVA by Platinum Management, Nordlicht, Bodner, and Huberfeld, among others. Like a claim for aiding and abetting fraud, a claim for aiding and abetting breach of fiduciary duty requires pleading the underlying fiduciary duty, and that defendant knowingly induced or participated in the breach. *Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2012). A claim for aiding and abetting breach of fiduciary duty also requires pleading actual knowledge, although "an intent to harm" is not required. *Id.*

This Court has already ruled that the underlying fiduciary duties have been adequately pled. Here, Beren knew that the duties existed and knowingly pushing PPVA into a series of transactions that artificially inflated PPVA's NAV and looted PPVA of its Agera asset for the securities he knew to be near worthless. He further breached his duties to PPVA in connection with facilitation of the Rechnitz relationship and COBA bribe. He participated in the managing of the BEOF Funds and

sought investors for the same under circumstances where the BEOF Funds purpose and priority payout was antithetical to PPVA's interests. He further contributed to Bodner and Huberfeld's covert control over Platinum, acting as proxy for the same, and furthered the corrupt Platinum-Beechwood alter-ego relationship. Beren was also an investment manager for BAM, and he necessarily had knowledge that the Beechwood/PPVA transactions on which he was on both sides would be to the benefit of Beechwood and the detriment of PPVA – this is particularly so for Agera.

IV. The SAC Sufficiently Alleges Beren's Participation in Defrauding PPVA and Aiding and Abetting Fraud against PPVA Pursuant to Fed. R. Civ. P. 9(b).

Under New York law, a "plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 165 (1st Dep't 2003). Fraud claims are subject to the heightened pleading standard of Rule 9(b), which requires a plaintiff "(l) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). "In cases where the alleged fraud consists of an omission and the plaintiff is unable to specify the time and place because no act occurred, the complaint must still allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff, and (4) what defendant obtained through the fraud." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000).

This Court has already determined that Plaintiffs' First Amended Complaint ("FAC") – which substantially mirrors the SAC with respect to Plaintiffs' fraud claims – meets Rule 9(b)'s specificity requirements in detailing the Platinum Defendants' "persistently inflated reports of PPVA's NAV" and determined that the other Platinum Defendants, who – like Beren – are "high-level corporate insider[s]," are appropriately charged with misstatements of PPVA's NAV. *See* Dkt. No. 290 at 45. Beren is no different than the other Platinum Defendants against whom this Court has upheld these

causes of action. The SAC alleges that Beren was Vice President of Platinum Management with responsibilities as a portfolio manager for eight years spanning the entirety of the First and Second Schemes. *See* SAC ¶ 112. In his role, Beren oversaw PPVA's investments including PEDEVCO, *see id.* at ¶ 12(xiii); participated in valuing PPVA's assets, *id.*; and managed the Platinum Management investment relationship with the Beechwood Entities, *id.* at ¶ 256, including working simultaneously for both the Beechwood Entities and Platinum Management on both sides of the same transaction, *see id.* at ¶ 389. The allegations against Beren are as robust as those this Court has already determined sufficient to survive a motion to dismiss brought previously by other Defendants.

Beren's argument that the only allegation close to meeting the Rule 9(b) standard is that he stood to benefit financially is disingenuous. *See* Moving Br. at 12. However, Mr. Beren was compensated for his deals at Beechwood and via profit and loss at Platinum. Inflated profits and Beechwood-Platinum deals directly related to his compensation. In any event, this Court has also already determined that allegations of financial interest, participation in the valuation of PPVA's NAV, and involvement in creating the transactions that comprised the First and Second Schemes are "sufficient by themselves to give rise to a strong inference of fraudulent intent." Dkt. No. 290 at 51 (citation omitted). Here, Beren told third parties "*The compensation terms for [portfolio managers] are the same for investments taken by PPVA, PPCO and Beechwood. So in essence Steinberg and Beren are PM's for PPVA, PPCO and Beechwood*" – Beren cannot now deny his financial motivations.

A claim for aiding and abetting fraud must plead the existence of a fraud, defendant's knowledge of the fraud, and defendant's provision of "substantial assistance to advance the fraud's commission." *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014). Actual knowledge must be pled, and constructive knowledge is insufficient. *Id.* Moreover, "there must . . . be a nexus between the primary fraud, the alleged aider and abettor's knowledge of the fraud, and what the alleged aider and abettor did with the intention of advancing the fraud's commission." *Id.*

The SAC pleads in detail Beren's involvement in and actual knowledge of Platinum's overvaluation of PPVA's assets. Specifically, the SAC alleges, *inter alia*, that Beren had influence over the overvaluation of PPVA's illiquid positions, which included but was not limited to PEDEVCO, enabled PPVA's overstated "performance," which was largely composed of unrealized gains, to steadily increase, thereby ensuring that there would always be distributions and fees due to Platinum Management and its owners, SAC ¶ 320; Beren was aware of and facilitated the actions of the Platinum Defendants in connection with the Black Elk Scheme, including management of the BEOF Funds, *id.* at ¶¶ 466, 889; and that Beren conspired with the other Platinum and Beechwood Defendants to cause PPVA to transfer its interests in the Agera note to AGH Parent at a substantial undervalue the day after his father-in-law's arrest, *id.* at ¶¶ 643-659.

Finally, Beren is correct that civil conspiracy is not an independent tort. However, Beren participated in the civil conspiracy hatched by Nordlicht, Bodner and Huberfeld whereby Bodner and Huberfeld secretly exerted control over Platinum and Beechwood via myriad entities, trusts and proxies – including Beren – and whereby Platinum and Beechwood were operated as integrated alter-egos for the purpose of enriching themselves at the expense of "outside" stakeholders.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny Beren's Motion to Dismiss in its entirety, and grant any appropriate relief that this Court deems just and proper.

Dated: New York, New York
December 16, 2019

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