UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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),	:	No. 18 Civ. 10936 (JSR)
Plaintiffs,	:	**BEECHWOOD DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT**
v.	:	
PLATINUM MANAGEMENT (NY) LLC, *et al.*,	:	
Defendants.	:	

PLEASE TAKE NOTICE, that upon the accompanying Declarations of Ira S. Lipsius, Esq., and Christian R. Thomas, the Memorandum of Law in Support of the Beechwood Defendant's Motion for Summary Judgment, the Statement of Undisputed Facts, and the Exhibits annexed, Defendants B Asset Manager LP, B Asset Manager II LP, BAM Administrative Services, LLC, Beechwood Re Investments LLC, Beechwood Re Holdings, Inc., Beechwood Bermuda International Ltd., Mark Feuer, Scott Taylor, and Dhruv Narain, by their counsel, will move this Court pursuant to Fed. R. Civ. P. 56(a), at the United States Courthouse, Southern District of New York 500 Pearl Street, New York, New York 10007, on such date and at such time as the Court may direct, for an Order granting their Motion for Summary Judgment, and for such other and further relief as this Court may deem just and proper.

Dated: Kew Gardens, New York
February 14, 2020

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Attorneys for the Beechwood Defendants

By: _____

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B Asset Manager LP, B Asset Manager II LP, BAM Administrative Services LLC, Beechwood Re (in Official Liquidation), Beechwood Re Holdings, Inc., Beechwood Bermuda International Ltd., Mark Feuer, Scott Taylor, and Dhruv Narain

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Defendants B Asset Manager LP ("BAM"), B Asset Manager II LP ("BAM"), BAM Administrative Services, LLC ("BAM Admin"), Beechwood Re Investments LLC ("BRILLC"), Beechwood Re Holdings, Inc. ("BRE Holdings"), Beechwood Bermuda International Ltd. ("BBIL" and, together with BAM, BAM II, BAM Admin, BRILLC, and BRE Holdings, the "Beechwood Entities"), Mark Feuer, Scott Taylor, and Dhruv Narain (together, with the Beechwood Entities, the "Beechwood Parties"), respectfully submit this memorandum of law in support of their motion for an order granting them summary judgment dismissing the second amended complaint filed by Martin Trott and Christopher Smith, the Court-appointed Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the "Liquidators").[1]

PRELIMINARY STATEMENT

This is one of several actions that were filed in this Court arising out of the failure of the Platinum Partners Value Arbitrage Fund L.P. ("PPVA" or the "Master Fund"), formerly a highly-regarded hedge fund. The Liquidators initiated the case in November 2018, filing a scattershot complaint against nearly one hundred parties, asserting a variety of incongruous theories. Over the course of two rounds of motions, most of the case against the Beechwood Parties was dismissed. But a handful of the Liquidators' allegations were just plausible enough to get past the pleading stage. Predictably despite extensive discovery, the Liquidators have been unable to marshal the requisite evidentiary support to parade their case before a jury. Summary judgment should be granted for the following reasons:

[1] The Liquidators' claims are equally deficient as to Beechwood Re ("BRE"). However, on July 23, 2019, the Bankruptcy Court for the Southern District of New York issued an Order staying all proceedings involving that entity. Order Pursuant to 11 U.S.C 1504, 1517 and 1520 Recognizing Foreign Representative and Foreign Main Proceeding, *In re Beechwood Re*, No. 19-11560 (S.D.N.Y. July 23, 2019), ECF No. 48. For that reason, BRE does not join this motion.

First, the Liquidators' aiding and abetting claims against Feuer, Taylor, and Narain should be dismissed pursuant to the *Wagoner* rule or the doctrine of *in pari delicto.* The Liquidators stand in the shoes of PPVA, and the principal wrongdoer is alleged to be the fund's investment manager, Platinum Management (NY) LLC ("Platinum Management"), and its principal, Mark Nordlicht. The conduct of Platinum Management and Nordlicht is imputed to PPVA, which deprives the Liquidators of standing to sue Feuer, Taylor, and Narain.

Moreover, with the benefit of discovery, it is clear that the adverse interest exception does not apply to any of the transactions at issue. As Counsel for the Liquidators has acknowledged, this case is largely about overvaluations and other misconduct that allegedly helped the Master Fund "maintain the façade of financial viability in the eyes of their creditors and investors" and "attract[] additional capital from investors …." *In re Platinum-Beechwood Litig.*, No. 18-CV-12018 (JSR), 2019 WL 4934967, at *27 (S.D.N.Y. Oct. 7, 2019); San Filippo Tr. 35:15-20. And, although this Court held that the Liquidators' Second Amended Complaint ("SAC") plausibly alleged that the adverse interest exception applied to aspects of two transactions — the Nordlicht Side Letter and the Agera Sale — this has not been borne out by discovery. To the contrary, the evidence demonstrates that Nordlicht was desperately trying to address the Master Fund's liquidity crisis. He was, in the words of one witness, "trying to save the fund."

Even if the adverse interest exception did apply, summary judgment would still be appropriate. That is because Platinum Management, as general partner, was vested with sole decision-making authority and responsibility for managing PPVA. And, under the sole actor rule, the adverse interest exception does not apply where the principal and agent can be considered identical. This rule has repeatedly been applied to general partners like Platinum Management and managers like Nordlicht. It should be applied here as well.

Second, to the extent that the *Wagoner* rule or the doctrine of *in pari delicto* is determined not to apply to any of the transactions at issue, summary judgment should still be granted in connection with the Liquidators' aiding and abetting claims against Feuer, Taylor, or Narain. As discussed in greater detail below, the Liquidators cannot, as a matter of law, establish by clear and convincing evidence the requisite elements of their aiding and abetting claims.

The aiding and abetting allegations against BAM II should also be dismissed because that entity was formed in September 2014, after many of the First Scheme transactions took place, and, even after it was formed, existed only to purchase loans from BAM as part of a "season and sell" structure. Discovery has adduced no evidence that it was involved with, let alone substantially assisted any of the transactions at issue. It is entitled to summary judgment.

Third, the alter ego allegations against all of the Beechwood Entities should be dismissed. The evidence adduced during discovery establishes that they were appropriately capitalized, observed corporate formalities, and were run by Feuer and Taylor, and not by anyone else. If the alter ego allegations are dismissed as to the Beechwood Entities, the aiding and abetting claims must be dismissed as well under the *Wagoner* rule or the doctrine of *in pari delicto.*

Finally, summary judgment should be granted on both of the Liquidators' declaratory judgment claims. Discovery has adduced no evidence to support the Liquidators' contention that the Nordlicht Side Letter and the Master Guaranty were structured for the purpose of stripping value from the Master Fund. Instead, the undisputed record demonstrates that Nordlicht was trying to save the Master Fund when he entered into these agreements and that the Master Fund received valuable consideration for both.

STATEMENT OF FACTS

For the sake of brevity, the relevant facts are set forth in the Beechwood Parties' 56.1 Statement, the Lipsius Affidavit, the Thomas Declaration, and the exhibits thereto, and will not be repeated here except as necessary to advance the legal argument. PPVA was a highly-regarded hedge fund with a long history of strong returns. It employed a master-feeder structure, which is typical in the hedge fund industry. SF 1-6 The general partner of the Master Fund was Platinum Management, which also served as the Master Fund's investment manager. The Chief Investment Officer ("CIO") of Platinum Management was Mark Nordlicht. As CIO, Nordlicht had complete authority over all aspects of the PPVA's business, including investment and valuation decisions. SF 7-9, 16.

The Beechwood entities are a group of reinsurance companies and asset managers, separate from Platinum, that were formed in 2013 by Mark Feuer and Scott Taylor. SF 71. The Beechwood entities' initial investors included trusts established for the benefit of family members of certain Platinum Defendants, and Beechwood's first CIO was Levy, who came to Beechwood from Platinum. The initial investors included Nordlicht, as well as two of Platinum's largest investors: David Bodner and Murray Huberfeld.[2]

The fact that Beechwood had a relationship with Platinum was not a secret. Indeed, as the Liquidators have acknowledged, "Beechwood marketed Levy to potential clients as a member of its management team and specifically highlighted Levy's eight years of experience with Platinum Management as a key to Beechwood's future success." (*SAC* ¶¶ 53, 850.) Beechwood also held meetings with potential clients, like CNO Financial Group, Inc., at Platinum's offices, before the company officially launched. SF 46-70.

[2] The Beechwood Parties refer to the Bodner and Huberfeld submissions for the full and complete description of their respective relationships with Platinum.

Moreover, as relevant to this motion, the relationship between Beechwood and Platinum was expressly disclosed to investors in the Master Fund. In 2014, for example, shortly after Beechwood launched, Nordlicht explained on a series of investor calls that (1) he had "partial ownership" in Beechwood; (2) Platinum's principals owned 50% of Beechwood; (3) he was involved with Beechwood "as an advisor"; (4) Platinum had helped Beechwood on things like "financial reporting"; (5) Levy had served as CIO at Beechwood; and (6) given the respective mandates of the two businesses, he hoped Beechwood would be able to co-invest or purchase certain positions from PPVA to make the fund "more liquid throughout the portfolio." The recordings were available to investors on Platinum's website. *Id*.

The fact that there was a relationship between Beechwood and Platinum was also detailed in the Master Fund's audited financial statements, which described "Beechwood Asset Management" as a "related party of the General Partner" and described its role in connection with investments involving Platinum portfolio companies like Golden Gate, Implant, and Black Elk. These audited financial statements were disseminated investors. *Id*.

By 2016, PPVA's fortunes had changed. The fund's investment portfolio had grown increasingly "unbalanced" with a growing concentration of illiquid, private-equity-style investments. This lack of balance was not well matched with the Master Fund's redemption policies. To correct this, the fund took several actions designed to increase liquidity, attract new investors, and prolong the life of the fund. These actions included cleaning up the balance sheet; restructuring various loans with Beechwood to reduce interest rates, defer interest payments, extend maturities, and release encumbrances on certain assets; and selling certain companies.

Unfortunately for everyone involved — particularly Beechwood (one of the Master Fund's largest creditors) — these efforts were unsuccessful. In August 2016, following a series of

unanticipated events, including the arrest of Huberfeld, the Master Fund was placed into liquidation. Two years later, in November 2018, the Liquidators brought this action.

PROCEDURAL HISTORY

The Court has already dismissed all of the Liquidators' claims against Beechwood Capital, BBLN-PEDCO Corp., BHLN-PEDCO Corp., and Illumin. (ECF No. 183, at 3; ECF No. 225, at 34-37; ECF No. 488, at 26.) It has also dismissed (1) the Liquidators' claims for unjust enrichment, civil conspiracy, and civil RICO against all of the Beechwood Parties and (2) the Liquidators' claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraud against BRILLC, BRE Holdings, BRE, and BBIL. (ECF No. 488, at 3, 26-32.) Thus, only the following claims remain against the Beechwood Parties:

- Aiding and abetting breach of fiduciary duty claims against BAM, BAM II, BAM Admin, Feuer, Taylor, and Narain;
- Aiding and abetting fraud claims against BAM, BAM II, BAM Admin, Feuer, Taylor, and Narain;
- Alter ego allegations against the Beechwood Entities—that is, BAM, BAM II, BAM Admin, BRILLC, BRE, BRE Holdings, and BBIL;
- A declaratory judgment claim seeking to invalidate the Nordlicht Side Letter; and
- A declaratory judgment claim seeking to invalidate the Master Guaranty.

The Beechwood Parties now move for summary judgment on the Liquidators' claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraud (Counts 7 and 8); the alter ego allegations against the Beechwood Entities (Count 18); and declaratory judgment claims seeking to invalidate the Nordlicht Side Letter and the Master Guaranty (Counts 20 and 21).

LEGAL STANDARD

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is "no genuine dispute as to any material fact" where (1) the parties agree on all facts (that is, there are no disputed facts); (2) the parties disagree on some or all facts, but a reasonable fact-finder could never accept the nonmoving party's version of the facts (that is, there are no genuinely disputed facts), *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); or (3) the parties disagree on some or all facts, but even on the nonmoving party's version of the facts, the moving party would win as a matter of law (that is, none of the factual disputes are material), *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

I. THE LIQUIDATORS' AIDING AND ABETTING CLAIMS ARE BARRED BY THE *WAGONER* DOCTRINE AND THE DOCTRINE OF *IN PARI DELICTO*.

A. The Liquidators Lack Standing to Bring Aiding and Abetting Claims Because They Stand in the Shoes of the Alleged Wrongdoers

The *Wagoner* rule provides that a bankruptcy trustee may only "assert claims held by the bankrupt corporation itself," and lacks standing to assert "[a] claim against a third party for defrauding a corporation with the cooperation of management" on behalf of "the guilty corporation." *Shearson Lehman Hutton Inc. v. Wagoner*, 944 F.2d 114, 118, 120 (2d Cir. 1991). The rule "derives from the fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation." *In re Grumman Olson Indus., Inc.*, 329 B.R. 411, 423 (Bankr. S.D.N.Y. 2005).

The *Wagoner* rule is subject to certain exceptions, including, as relevant here, the "adverse interest" exception. Under the adverse interest exception, the *Wagoner* rule will not apply where a corporate officer "totally abandoned the corporation's interests and [is] acting entirely for his own

or another's purposes." *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 947 (N.Y. 2010). The exception "cannot be invoked merely because [an officer] has a conflict of interest or because he is not acting primarily for his principal." *Ctr. v. Hampton Affiliates, Inc.*, 488 N.E.2d 828, 830 (N.Y. 1985). Instead, New York law "reserves this most narrow of exceptions for those cases - outright theft or looting or 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." *Kirschner*, 938 N.E.2d at 952.

1. The "Most Narrow" Adverse Interest Exception Does Not Apply

On the Beechwood Parties' motion to dismiss, the Court found that the Liquidators' aiding and abetting claims could not be dismissed at that juncture based on the adverse interest doctrine. The Court concluded that, accepting the allegations in the SAC as true and viewing them in the light most favorable to the Liquidators, the Liquidators had plausibly alleged that the adverse interest exception applied to aspects of the Nordlicht Side Letter and the Agera Sale. Following discovery, however, it is clear that the adverse interest exception does not apply to the facts of this case.[3] To the contrary, the evidence adduced during discovery makes clear that each of the transactions identified in the SAC was designed to help the Master Fund survive.

Application of the adverse interest exception in the context of each specific transaction is discussed in greater detail in Point II, below.

2. The Sole Actor Exception to the Adverse Interest Exception Applies

[3] This Court has already determined that Feuer, Taylor, and Narain are not "insiders" for the purposes of the insider exception to the *Wagoner* rule. ECF No. 488, at 21; *see also* ECF No. 654, at 78-79 ("None of the FAC Beechwood Defendants - even Taylor and Feuer - are alleged to control or owe fiduciary duties to the PPCO entities, and do not fit within the definition of "insiders" for the purpose of the insider exception.").

Even if, contrary to all of the evidence adduced during discovery, the Platinum Defendants could be found to have acted adversely to PPVA's interest in connection with the transactions at issue in the SAC, their knowledge is nonetheless imputed to PPVA.

The adverse interest exception does not apply where the principal and agent can be considered identical. This sole actor rule "imputes the agent's knowledge to the principal notwithstanding the agent's self-dealing [conduct that defrauds the corporation] because the party that should have been informed was the agent itself albeit in its capacity as principal." *In re Mediators, Inc.*, 105 F.3d 822, 827 (2d Cir. 1997); *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1094 (2d Cir. 1995) (finding that the trustee lacked standing because both of the debtor's general partners collaborated with the defendants in promulgating and promoting the Ponzi scheme); *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 838–42 (8th Cir. 2005) (invoking the sole actor doctrine and imputing knowledge of fund's general partner to the fund despite the general partner acting adversely to the fund).

Here, it is undisputed that Nordlicht was the sole decision-maker for PPVA, either directly or through his control of Platinum Management. Nordlicht created PPVA, directed its business, invested its assets, and made all decisions regarding PPVA's assets. As such, PPVA cannot escape imputation of Nordlicht's knowledge of his own fraud.

II. THE RECORD DOES NOT SUPPORT THE LIQUIDATORS' CLAIMS FOR AIDING AND ABETTING FRAUD AND BREACH OF FIDUCIARY DUTY

The Court need not reach the merits of the Liquidators' claims against Feuer, Taylor, and Narain because those claims are barred by the *Wagoner* doctrine and the doctrine of *in pari delicto*. However, in the event that the Court did reach the merits, it will find that the undisputed facts establish that the Liquidators cannot prove what is left of their claim for aiding and abetting fraud, which requires (1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) proof that the defendant provided substantial assistance to advance the fraud's commission, *In re*

Platinum-Beechwood Litig., No. 18-CV-10936 (JSR), 2019 WL 1570808, at *9 (S.D.N.Y. Apr. 11, 2019), or their claim for aiding and abetting breach of fiduciary duty, which requires "that the defendant knowingly induced or participated in the breach," *id.* at *8. All of the Beechwood Parties are therefore entitled to summary judgment and complete dismissal of the Liquidators' aiding and abetting claims. An analysis of each transaction follows.

A. Golden Gate Oil Transaction

The Liquidators allege that "the Platinum Defendants and Beechwood Defendants caused BAM I, acting as agent for certain Beechwood reinsurance trusts, to purchase the Golden Gate Oil Loan from [the Master Fund's subsidiary] Precious Capital" at par value. (SAC ¶¶ 416, 418). The Note Purchase Agreement for the transaction "provided that BAM I could put the Golden Gate Oil Loan it had purchased to PPVA and that PPVA would guarantee payment of that debt in full." (SAC ¶ 421). This "left PPVA liable to pay the Beechwood Entities in the event that the underlying operating company failed to repay the Golden Gate Loan" and "protected Beechwood's investment in Golden Gate Oil at the expense of PPVA." (SAC ¶¶ 422-23). The Liquidators state that this is "[a]n example of a First Scheme Transaction used to artificially inflate the reported value of PPVA's investments …" (SAC ¶ 413.)

The adverse interest exception does not apply to allegations concerning "overvaluations which helped maintain the façade of financial viability in the eyes of their creditors and investors and thereby attracted additional capital from investors …." *In re Platinum-Beechwood Litig.*, No. 18-CV-12018 (JSR), 2019 WL 4934967, at *27 (S.D.N.Y. Oct. 7, 2019). For this reason, Feuer and Taylor should be granted summary judgment on aiding and abetting claims related to the Golden Gate transaction.

However, even if the adverse interest exception did apply, the Liquidators cannot establish by clear and convincing evidence the existence of the underlying fraud or breach of fiduciary duty.

To the contrary, discovery has shown that the central premise underlying the Liquidators' claims — the Platinum Defendants' purported failure to disclose their relationship with Beechwood to gatekeepers and investors — is erroneous. Indeed, the 2013 audited financial statements for the Master Fund and the Feeder Funds, which were disseminated investors, and which should have been reviewed by the Liquidators before they filed this Complaint, specifically identify "Beechwood Asset Management" as "a related party of the General Partner." With respect to the Golden Gate transaction, in particular, the funds disclosed that "[o]n February 26, 2014, Beechwood Asset Management ("BAM"), a related party of the General Partner, purchased approximately $28 million of Golden Gate senior secured debt owned by Precious Capital, a majority-owned subsidiary of the Master Fund…." Exhibit to SF 135-136.

Beyond that, no evidence adduced during discovery suggests that Feuer or Taylor were involved in the transaction described in the SAC, let alone substantially assisted with it. For its part, BAM II had not yet been formed in February 2014.

B. Pedevco Transaction

The Liquidators allege that the Platinum Defendants and Beechwood Defendants "caused" PPVA's subsidiary RJ Credit and certain Beechwood Entities to purchase the senior secured PEDEVCO Notes. (SAC ¶ 428). RJ Credit "was the only lender obligated to make continuing loans to PEDEVCO, such that the Platinum Defendants and Beechwood Defendants favored the interests of the Beechwood Entities and its clients over PPVA with this transaction." (SAC ¶ 429). RJ Credit's PEDEVCO Notes "were also subordinated in priority to those held by the Beechwood Entities and its clients such that no interest could be paid on the PEDEVCO Notes held by RJ Credit unless and until all interest due to Beechwood's clients was paid in full." (SAC ¶ 430). The Liquidators further allege that in May 2016, the PEDEVCO Notes were restructured due to the failing price of oil and other operational issues that had caused a significant revenue shortfall at the

company. (SAC ¶ 421). The Liquidators maintain that, by participating in the restructuring, the Beechwood Defendants participated in misleading PPVA as to the value of this asset. (SAC ¶ 434-35).

Taking the last issue first, the only damages related to the PEDEVCO transactions that the Liquidators purport to have identified are those that allegedly resulted from "inflated" values reported by Platinum. (Quintero, Table 1.)[4] And, as noted above, the adverse interest exception does not apply to allegations concerning "overvaluations," which benefitted the Master Fund by helping it "maintain the façade of financial viability" and "attract[] additional capital." Oct 7, 2019 Order, at *27. Accordingly, Feuer, Taylor, and Narain should be granted summary judgment on the Liquidators' aiding and abetting claims related to PEDEVCO.

Moreover, discovery has shown that: (1) BAM's clients funded more than $30 million of a $34.5 million facility, which PEDEVCO then used to acquire an interest in 40 oil wells and 28,000 acres in the Niobrara Shale Formation in Colorado; (2) despite funding less than $4 million of that facility, RJ Credit received an "equity kicker," which the other lenders did not receive; (3) the "equity kicker" made RJ Credit a 50% working interest partner with PEDEVCO in the development of certain assets going forward; and (4) in its capacity as working interest partner, RJ Credit was obligated to fund 50% of a drilling facility with its new equity partner. In other words, the Master Fund was able to use a loan that was largely funded by Beechwood to obtain a 50% interest in various oil and gas assets. There is nothing about this that resembles "embezzlement" or "looting," and the only thing deceptive about the PEDEVCO transaction seems to be the misleading description in the SAC. SF 114-128.

[4] The Beechwood Parties do not contend that the report satisfies *Daubert* and only cite to the report to show the Liquidators' damages position.

In addition, as noted above, no evidence adduced during discovery suggests that Feuer or Taylor was involved in the transaction described in the SAC, let alone substantially assisted with it. BAM II had not yet been formed in March 2014 and did not play any role in the restructuring. For his part, Narain was not employed at BAM until 2016, and the portion of the transaction that he is alleged to have participated in is barred by the *Wagoner* rule. Perhaps more importantly, it strains credulity to suggest that it is any way unusual or improper for a lender who is contemplating providing money to a distressed entity to request or receive seniority in a company's capital stack in exchange for making the loan.

C. Implant Sciences Transaction

The Liquidators allege that the Platinum Defendants and Beechwood Defendants "caused BAM Administrative . . . to refinance $20 million of the revolving loan issued by" PPVA's subsidiary DMRJ to the portfolio company IMSC. (SAC ¶ 436). This transaction "caused DMRJ to subordinate all of its liens on IMSC's assets, including the lien securing DMRJ's revolving loan to IMSC . . . to the liens securing repayment of BAM [Admin's] term loan" and "ceded to BAM I significant rights in the event of an IMSC bankruptcy, even though DMRJ held much larger loans to that company." (SAC ¶ 439).

As a threshold matter, this transaction is clearly barred by the *Wagoner* rule. The Liquidators admit that the Master Fund was experiencing liquidity issues in 2014, and this transaction is alleged to have involved BAM Admin providing a loan to Implant, which Implant then used to repay $20 million of its outstanding indebtedness to the Master Fund's subsidiary, DMRJ, providing it with liquidity. Feuer and Taylor are entitled to summary judgment on the Liquidators' aiding and abetting claims related to the Implant transaction on this basis alone.

Even if the adverse interest exception were applicable, however, the Liquidators cannot establish the existence of an underlying fraud or breach of fiduciary duty. First, the Liquidators

have not identified any misstatement or omission made in connection with this transaction, and it is clear from the funds' audited financials that this transaction was disclosed to the Master Fund's auditors and its investors as a related-party transaction. Indeed, the Master Fund and both Feeder Funds identified BAM as a "related party of the General Partner" and disclosed that:

> On March 19, 2014. Implant Sciences entered into a note purchase agreement with BAM pursuant to which the company issued senior secured promissory notes in the aggregate principal amount of $20,000,000. The notes bear interest at 15% per annum and mature on March 31, 2015. The company used all of the proceeds from the sale of the notes to repay (i) $17,624,000 of indebtedness to a majority owned subsidiary of the Master Fund under the amended and restated revolving promissory note (ii) $1,809,000 of interest outstanding under that facility, and (iii) $567,000 of interest outstanding under the senior secured convertible promissory note.

[SF70]

Second, the Liquidators cannot establish justifiable reliance in light of the related-party disclosure above, and the other detailed disclosures that were provided to investors. [SF 46-70] These specific, targeted disclaimers, combined with the sophistication of the Master Fund's investors, foreclose justifiable reliance on any alleged misrepresentation or omission. *See Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 735-36 (2d Cir. 1984) (finding disclaimers precluded reasonable reliance "where the substance of the disclaimer provisions track[ed] the substance of the alleged misrepresentations").

Third, and perhaps most importantly, the Liquidators' expert has not identified *any* alleged damages resulting from this transaction, let alone any out-of-pocket losses. *See Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996) (quoting *Reno v. Bull*, 226 N.Y. 246, 253 (1919)). Accordingly, the aiding and abetting claims must be dismissed against all of the remaining Beechwood Parties on this basis as well.

Finally, the Liquidators have adduced no evidence during discovery that suggests that Feuer or Taylor aided and abetting any underlying fraud or breach of fiduciary duty. There is nothing to suggest that Feuer or Taylor was involved in the transaction described in the SAC, and there is

nothing to suggest that they substantially assisted with the alleged misconduct. For its part, BAM II had not yet been formed in March 2014. SF 85.

D. Black Elk Scheme

The Liquidators allege the Platinum Defendants "caused PPVA to transfer a portion of the 13.75% Senior Secured Notes it held [in Black Elk] to the BEOF Funds, partly in exchange for series E preferred equity held by the BEOF Funds." (SAC ¶ 480). Platinum Management "thereafter caused PPVA to sell approximately $24.5 million worth of the 13.75% Senior Secured Notes to Beechwood Entities managed by BAM at prices solely designated by Nordlicht." (SAC ¶ 485). The "purpose" of selling and swapping these notes "was to create the appearance that independent entities . . . were the owners of the" notes (SAC ¶ 484), so that an independent majority of noteholders could vote to amend the Indenture (SAC ¶¶ 477-78). The amended Indenture would permit Black Elk to "divert the proceeds from the Renaissance Sale to redeem the series E preferred shares in Black Elk" (SAC ¶ 475), instead of using those proceeds to "repay the holders of the 13.75% Senior Secured Notes, a significant portion of which were held by PPVA or its subsidiaries," as called for in the original Indenture (SAC ¶ 469).

Following discovery, it is clear that none of these allegations survive the application of the *Wagoner* rule and the doctrine of *in pari delicto.* First, a significant portion of the damages that the Liquidators purport to have identified in connection with the Black Elk scheme are those that allegedly resulted from "inflated" values reported by Platinum, (Quintero, Table 1), and the adverse interest exception does not apply to alleged "overvaluations." Oct 7, 2019 Order, at *27.

Second, evidence adduced during discovery suggests that the purported architect of the Black Elk scheme believed that action was necessary to keep the Master Fund alive. The documentary evidence demonstrates, for example, that Nordlicht viewed paying back the Black Elk Series E preferred equity holders as an existential issue for the Master Fund. *See* SF 148 ("I need to

figure out how to restructure and raise money to pay back 110 million of [Black Elk] preferred which if unsuccessful, [would] be the end of the fund."). And actions designed to keep a hedge fund alive are not subject to the adverse interest exception. *See New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 41 N.Y.S.3d 1, 10 (1st Dep't 2016) (adverse interest exception inapplicable where alleged conduct of funds' management "enabled the funds to continue to survive and to attract investors"); *Concord Capital Mgmt., LLC v. Bank of Am.*, N.A., 958 N.Y.S.2d 93, 93 (1st Dep't 2013) (same).

Third, the Master Fund benefitted in several ways from the Renaissance Sale. For example, as disclosed in the Master Fund's audited financials, the Master Fund sold more than 52 million shares of Black Elk Series E preferred equity at a price of $1.00 per share during 2013. In connection with those sales, the Master Fund provided purchasers with a put option to repurchase all of the shares for an aggregate repurchase price of $1.00 per share. The Liquidators posit that Black Elk should have used the proceeds of the Renaissance Sale to pay off the Black Elk 13.75% Senior Secured Notes in full. But, had the proceeds been allocated in this fashion, the Master Fund would have been responsible for repurchasing those 52 million shares following distribution of the proceeds, which would have exacerbated the Master Fund's liquidity concerns.[5] Indeed, according to Nordlicht, it "[would] be the end of the fund." SF 137-150

To the extent the allegations survive the application of the *Wagoner* rule and the doctrine of *in pari delicto*, it is not clear that the Liquidators can establish by clear and convincing evidence the existence of the underlying fraud or breach of fiduciary duty. For example, the Liquidators allege that [t]he "purpose" of selling and swapping these notes "was to create the appearance that independent entities . . . were the owners of the notes." (SAC ¶ 484). To be sure, the government

[5] As another example, the Black Elk Series E preferred equity accrued interest at a rate of 20%—higher than the 13.75% rate on the Notes—thus, the Master Fund also benefitted indirectly through interest rate reduction.

has alleged that Platinum Management did not adequately disclose the relationship between the relevant entities to Black Elk bond holders. But the Liquidators cannot credibly maintain that this information was not disclosed to the Master Fund. Indeed, along with each of the PPBE transactions referenced in the SAC, the audited financials identify BAM as a related party of the General Partner and expressly disclose that:

> During 2014, the Master Fund sold short BEEOO corporate bonds with an aggregate face value of $24,987,000 to BAM for total proceeds of $24,497,130. The prices of the short sales ranged from $96 to $99. The securities were borrowed from PPBE in order to effectuate the short sale transaction.

In light of this, and as above, the Liquidators cannot establish justifiable reliance by the Master Fund's sophisticated investors in the face of such disclosures. *See Grumman Allied Indus.*, 748 F.2d at 735-36. Nor can they identify any out-of-pocket loss attributable to Beechwood. The Master Fund profited off the Black Elk transaction at Beechwood's expense. The Master Fund borrowed Black Elk bonds from PPBE, sold them short to BAM at prices close to par, and then covered the short at $93. Through that, Beechwood lost money, and the Master Fund made money.

Even if there were a genuine dispute as to a material fact regarding the underlying torts, the Liquidators still cannot establish aiding and abetting liability against Feuer or Taylor. There is, quite simply, no evidence suggesting that, at the time of the Renaissance Sale, Feuer or Taylor (1) were aware that BAM clients had purchased Black Elk bonds from the Master Fund; (2) knew anything about Black Elk's operations, including the Renaissance Sale; (3) knew about the consent solicitation; (4) knew how BAM's clients voted or intended to vote on the consent solicitation; (5) knew how Black Elk planned to use the proceeds of the Renaissance Sale; or (6) knew how the Master Fund distributed the proceeds of the Renaissance Sale. SF 149-150.

There is also no evidence whatsoever that Feuer or Taylor played any part in purchasing Black Elk bonds from the Master Fund, voting in the consent solicitation, or distributing the proceeds of the Renaissance Sale. *Id*. Accordingly, the Liquidators cannot establish that Feuer or

Taylor were the proximate cause of any loss relating to the Renaissance Sale. Thus, Feuer and Taylor should be granted summary judgment on the aiding and abetting claims related to the Renaissance Sale. For its part, BAM II had not yet been formed during the summer of 2014. And, for that reason, the aiding and abetting counts against BAM II must also be dismissed.

E. Northstar Transaction

The Liquidators allege that the Platinum Defendants and Beechwood Defendants "grant[ed] certain Beechwood Entities a lien on PPVA's interests in Agera Energy, one of PPVA's most significant assets, as additional collateral to secure repayment of the Northstar Notes." (SAC ¶ 532).

As a threshold matter, any aiding and abetting claims against Feuer, Taylor, or Narain predicated on the Northstar transaction should be barred by the *Wagoner* doctrine. The only damages related to Northstar that the Liquidators purport to have identified are those allegedly resulted from "inflated values reported by Platinum." (Quintero, Table 1.) The adverse interest exception does not apply to allegations concerning "overvaluations." Oct 7, 2019 Order, at *27.

Beyond alleged overvaluation, the Northstar transaction clearly provided a benefit to the Master Fund. The loan provided a subsidiary of the Master Fund with $50 million to purchase an oil and gas company with oil reserves in the Gulf of Mexico and a strong management team. (SF 155) According to Nordlicht, this was part of an effort to replace some of the offshore reserves that had been divested during the Renaissance Sale, to consolidate the Master Fund's oil and gas holdings, and to upgrade the team that was managing the Master Fund's oil and gas holdings. (*Id*.)

Even if the adverse interest exception were applicable to the Northstar transaction, the Liquidators cannot establish the existence of an underlying fraud or breach of fiduciary duty. BAM and its clients were under no obligation to loan money to the Master Fund and had every right to request security in exchange for the $50 million they were providing. At the time, Agera was a

company that had just been purchased out of bankruptcy, not the Master Fund's crown jewel, as the Liquidators ask the Court to accept *ipse dixit*. Moreover, the lien was extinguished as part of the consideration exchanged during the March 2016 restructuring, so there are no damages. Additionally, the Master Fund made similar arrangements with New Mountain Finance Holdings Ltd., the other lender involved in the transaction. The Master Fund granted New Mountain a put option to induce it to fund the balance of the $80 million facility.

Finally, the Liquidators have adduced no evidence during discovery that suggests that Feuer or Taylor aided and abetted any underlying fraud or breach. There is nothing to suggest that Feuer or Taylor were involved in the transaction described in the SAC, and there is nothing to suggest that they substantially assisted with the alleged misconduct. For its part, BAM II was formed to engage in season-and-sell transactions, and was not involved in the Northstar loan described in the SAC. Summary judgment should be granted.

F. First Scheme Montsant Transaction

The Liquidators allege that the Platinum Defendants and Beechwood Defendants allegedly "caused a wholly-owned subsidiary of PPVA, Montsant . . . to purchase all of the 13.75% Senior Secured Notes held by the Beechwood Entities at 93.5% of par, and to pay interest on the Golden Gate Oil Loan." (SAC ¶ 522). "To finance these transactions, Platinum Defendants and Beechwood Defendants caused Montsant to 'borrow' $35.5 million at 12% interest from SHIP, a Beechwood client, via a loan administered by Beechwood." (SAC ¶ 523). To secure that loan, Platinum Management allegedly "transferred equity securities and notes belonging to PPVA and DMRJ to an account pledged as collateral" for the loan. (SAC ¶ 526).

On the second-round motion to dismiss, the Court found that the Liquidators' aiding and abetting claims against a different defendant, Danny Saks, could not be dismissed at that juncture based on the adverse interest doctrine. The Court explained that, accepting the allegations in the

SAC as true, the Montsant Transaction could be considered analogous to "looting," as the Master Fund was alleged to have "borrowed money and encumbered its assets in order to relive Beechwood Entities of worthless security." June 21, 2019 Order. Following discovery, however, it is clear that the adverse interest exception does not apply to this transaction.

To start, as discussed in Point II.D., *infra*, a significant portion of the damages that the Liquidators purport to have identified in connection with Black Elk are those that allegedly resulted from "inflated values reported by Platinum." (Quintero, Table 1.) To the extent that the Liquidators allege that Black Elk bonds were repurchased at an above-market price, this is very clearly the type of allegation relating to "overvaluations" and an "effort to maintain the façade of financial viability" that falls outside the adverse interest exception. Oct 7, 2019 Order, at *27.

Outside of innuendo, the Liquidators have adduced nothing to support their contention that the Black Elk Notes were worthless or that Nordlicht believed them to be worthless. To the contrary, the documentary evidence makes clear that Nordlicht was trying to consolidate the Master Fund's offshore oil and gas assets under Northstar and needed to purchase 13.75% Senior Secured Notes in order to effectuate the transaction. (SF 168.) Using 13.75% Senior Secured Notes was necessary because the assets that were being sold to Northstar were subject to the Black Elk bond Indenture. (SF 170-171.) Pursuant to § 4.10(a)(2) of the Indenture, at least 75% of consideration received by Black Elk in connection with an asset sale needed to be in the form of "Cash" or "Additional Assets." (*Id.*) The definition of Cash under the indenture included "Liabilities assumed by a transferee pursuant to a customary novation agreement that releases the company from further liability." (*Id.*) Black Elk's position was that transferring the 13.75% Senior Secured Notes and then retiring them would fit within this definition of Cash. (SF 172) As an equity holder in Black Elk, the Master Fund benefitted from this debt reduction.

The documentary evidence also makes clear that the primary reason the Master Fund sought to purchase the Black Elk bonds from BAM's clients was that it did not have enough on its own to complete the transaction and BAM's clients collectively owned a large block of bonds. (SF 173) Because BAM's clients owned a large block of bonds, BAM was able to negotiate a small premium. (*Id.*)

Not only does the evidence adduced during discovery completely contradict the Liquidators' bogus allegations, but when all of the facts are presented, their allegations do not pass the smell test. The Liquidators admit that Montsant has not paid back a single cent on the loan. And they further acknowledge that they are in possession of the collateral. Moreover, as discussed above, the Liquidators cannot dispute the fact that Beechwood bought Black Elk bonds at an average price of approximately $98 and sold them back at approximately $93, with the Master Fund pocketing the difference. That is the opposite of looting.

If the adverse interest exception applies, the aiding and abetting claims still must be dismissed. That is because the Liquidators cannot establish by clear and convincing evidence that they suffered an out-of-pocket loss as a result of this transaction. *Starr Found. v. Am. Int'l Grp., Inc.*, 76 A.D.3d 25, 33 (1st Dep't 2010). As noted above, Montsant has not paid back a penny of the $35.5 million that it borrowed, and it still holds all of the underlying collateral.

Additionally, there is no evidence that Feuer or Taylor knew how the Master Fund planned to use the $35.5 million. [SF 175] And the Liquidators' speculation and innuendo are not sufficient to demonstrate any "actual knowledge" on the part of any Defendant. BAM II did not participate in the Montsant Transaction. Accordingly, it is entitled to summary judgment as well.

G. <u>Second Scheme Montsant Transaction</u>

The Liquidators allege that the Platinum Defendants allegedly "caused PPVA and its subsidiaries to transfer . . . equity securities in Navidea Biopharmaceuticals . . . and equity securities

and debt instruments issued by Vistagen Therapeutics" to the account pledged as collateral for Montsant's $35.5 million loan from SHIP. (SAC ¶ 564). The Liquidators also allege that DMRJ "assigned to Montsant its rights, title, and interest in" a note issued by IMSC, which "the Platinum Defendants and Beechwood Defendants . . . caused Montsant to deposit" into the same collateral account. (SAC ¶¶ 566-67).

The Liquidators have not advanced their claims related to the Second Scheme Montsant Transaction during discovery, and the allegations in the SAC do not identify any wrongdoing on the part of BAM II, Feuer, Taylor, or Narain. Beyond that, for the reasons set forth above, the Liquidators cannot establish any injury in connection with the Second Scheme Montsant Transaction—Montsant has not paid back the loan, and the Liquidators retain possession of the collateral. What is more, the Master Fund appears to have converted a portion of the Vistagen collateral for its own benefit. Accordingly, summary judgment should be granted for Feuer and Taylor in connection with the Second Scheme Montsant Transaction.

Any allegations relating to the Second Scheme Montsant Transaction should be dismissed against Narain because it pre-dates his arrival at BAM. With respect to BAM II, it played no role in the Second Scheme Montsant Transaction and should be dismissed as well.

H. Nordlicht Side Letter

Through the Nordlicht Side Letter, the Liquidators allege that "Nordlicht purported to grant the Beechwood Entities an interest in the proceeds of a separate investment held by another PPVA subsidiary, that otherwise would not have been available to them to pay off the Golden Gate Oil Loan, to the detriment of PPVA." (SAC ¶ 578).

On the Beechwood Parties' motion to dismiss, the Court found that the Liquidators' aiding and abetting claims against Feuer could not be dismissed at that juncture based on the adverse interest doctrine, explaining that the Liquidators had plausibly alleged that the exception applied to

the allegations relating to the Nordlicht Side Letter. However, with the benefit of discovery, it is clear that this pledge agreement does not satisfy the adverse interest exception. Indeed, the only theory of damages the Liquidators attempted to advance during discovery was that the pledge was not appropriately reflected in PPVA's NAV. (*See, e.g.*, San Filippo Tr. at 35:15-50:14.)

The evidence adduced during discovery makes clear that the Nordlicht Side Letter was motivated by Nordlicht's effort to save the Master Fund. And the adverse interest exception is inapplicable because the pledge contained in the Nordlicht Side Letter was provided as consideration for BAM Admin's agreement not to default Implant. *See In re ICP Strategic Credit Income Fund Ltd*., No. 13-12116 (REG), 2015 WL 5404880, at *19 (Bankr. S.D.N.Y. Sept. 15, 2015), affd, 568 B.R. 596 (S.D.N.Y. 2017*), affd*, 730 F. App'x 78 (2d Cir. 2018) (exception inapplicable where transaction prevented stakeholder "from foreclosing on collateral in which the Funds were heavily invested")

By 2016, the Master Fund was experiencing major liquidity issues. On January 13, 2016, the day the Nordlicht Side Letter was executed, Nordlicht wrote to colleagues: "tomorrow is a crisis … I need the team to be at beechwood first thing in the morning … I am not asking anyone to take responsibility … I just need my money freed up so we can save both businesses." (SF 183). Steinberg and Katz testified that Nordlicht was counting on being able to monetize Implant to address part of the Master Fund's liquidity concerns. [SF 184]. He also needed over $1 million to pay interest on the BAM Notes. For that reason, Nordlicht sought assurance from BAM that it would not default Implant. As Mark Feuer testified, "Nordlicht came over to my office, which was very unusual, and suggested that he wasn't going to leave until he could convince me not to default on a company called Implant Sciences." SF 188

The suggestion that this is akin to "embezzlement" or "looting" is further belied by the fact that the Master Fund was already responsible for paying off the Golden Gate loan if the company

defaulted. As the Liquidators acknowledge, the Note Purchase Agreement provided BAM Admin with a put option and a Master Fund guarantee. The Master Fund was on the hook.

The Liquidators do not identify any misrepresentations or omissions, and they do not specify how the Master Fund justifiably relied on this in any way. Moreover, the Liquidators' expert has been unable to identify any damages in connection with the Nordlicht Side Letter. This is not surprising given that it has not been enforced, and the Liquidators have not distributed any of the proceeds of the Implant sale to BAM's clients. SF 192

Finally, there are no allegations connecting Taylor to the Nordlicht Side Letter, and the agreement pre-dated Narain's arrival at BAM by several weeks.[6] Accordingly, summary judgment should be granted for Taylor and Narain in connection with the Liquidators' aiding and abetting claims related to the Nordlicht Side Letter.

I. March 2016 Restructuring

The Liquidators allege that, as part of the March 2016 restructuring transactions, certain Platinum Defendants and Beechwood Defendants "orchestrated a series of transactions in connection with a 'restructuring' of all of the transactions previously entered into between and among PPVA, PPCO and the Beechwood Entities." (SAC ¶ 584). The "net effect" of these transactions "was to prop up Beechwood and PPCO to PPVA's substantial detriment, under circumstances where Beechwood and PPCO were chosen as the 'good funds' to continue onward, while PPVA was left heading towards liquidating with the Platinum Defendants' insiders largely paid out for their actual investments." (SAC ¶ 604). This has not been borne out by discovery.

The *Wagoner* rule and the doctrine of *in pari* delicto bar aiding and abetting claims based on the March 2016 restructuring. Discovery demonstrated that the March 2016 restructuring was an

[6] Narain did not join BAM until January 2016, near the end of the month. Accordingly, the aiding and abetting claims should be dismissed against him with regard to all transactions that pre-date his arrival.

effort to address the Master Fund's liquidity issues and keep the fund alive. To ease the pressure on the Master Fund, Platinum Management sought to reduce interest rates, to defer interest payments, to eliminate certain encumbrances, and to clean up the Master Fund's balance sheet. Whereas measures like interest rate reduction and deferred interest payments provided short-term liquidity relief, the elimination of encumbrances on companies like Agera were designed to allow the Master Fund to go out and borrow money, and balance sheet cleanup was designed to attract investors into a new management share class. Nordlicht hoped that by bringing in new investors he could rebalance the portfolio, which would make the Master Fund more sustainable.

The Master Fund received a number of tangible benefits via the March 2016 restructuring. Among other things, the lien on the Master Fund's interest in Agera was released; Northstar debt, which had a high monthly interest rate, was exchanged for PPCO debt, which paid interest in kind; interest rates on the Golden Gate and Montsant loans were lowered substantially; the maturity dates on the Golden Gate and Montsant loans were extended; BAM returned certain Navidea shares to the Master Fund; the Master Fund negotiated the right to remove certain Implant loans from the Montsant collateral account; and BAM agreed to release $2.3 million in collateral it was holding against timely interest payments.

In short, the March 2016 Restructuring is not analogous to "looting" or "embezzlement," the adverse interest exception does not apply, and summary judgment should be granted. However, even if the adverse interest exception were to apply, summary judgment would still be appropriate. That is because the Liquidators fail to identify any misrepresentation or omission, evidence supporting justifiable reliance, or cognizable injury.

J. Agera Sale

The Liquidators allege that "the Platinum Defendants, working in concert with the Beechwood Defendants and SHIP, caused PGS to transfer its interest in the Agera Note to AGH

Parent LLC – an entity not affiliated with PPVA, but at that time controlled directly by the Platinum Defendants and Beechwood Defendants, and for the benefit of SHIP." (SAC ¶ 643). Before this, "PPVA held 55% of the membership interests in PGS" (SAC ¶ 614), which in turn held the Agera Note, a "promissory note convertible into approximately 95% of the equity in Agera Energy" (SAC ¶ 615). The Liquidators allege that this was an "insider transaction . . . intended to be substantially below fair value" (SAC ¶ 637), which "resulted in the dissipation of as much as $150 million of value to the Beechwood Entities" to PPVA's detriment (SAC ¶ 671).

On the Beechwood Parties' motion to dismiss, the Court found that the Liquidators' aiding and abetting claims against Taylor and Narain could not be dismissed at that juncture, explaining that the Liquidators had plausibly alleged that the adverse interest exception applied to the allegations relating to the Agera Sale. However, the Court recognized that the defendants "may well be able to show after discovery that PPVA received necessary liquidity from the Agera Sale. If this liquidity enabled PPVA to sustain its operations, then it may qualify as a benefit, even if the convertible note was sold below market price. And if the Agera Sale benefitted PPVA, then the adverse interest exception does not apply …."

Discovery has made clear that the Agera Sale was motivated by the Master Fund's liquidity needs, the Platinum Defendants anticipated a liquidity benefit for the Master Fund, and the Agera Sale did, in fact, provide the Master Fund a liquidity benefit. Moreover, as Steinberg testified, "[Nordlicht] was certainly trying to save the fund" when he approved the deal.

First, the Agera Sale was motivated by the Master Fund's liquidity needs. Platinum's internal emails show that the Agera Sale was pitched as a way to "[s]olve together with the sale of Implant[] our liquidity problem." Nordlicht's emails reflect that he was, "reluctant on agera at first," but ultimately felt that "the liquidity [was] just too transformative for us to ignore." This is corroborated by the deposition testimony of those involved with the sale. *See*, *e.g.*, Steinberg Tr.

170:20-171:7 ("[T]he urgency towards closing Agera, for sure what I knew and based on what I actually knew to be occurring at PPVA at the time, was liquidity-based.").

Second, Steinberg testified that the Master Fund anticipated a liquidity benefit from the transaction that was ultimately agreed upon. (*See, e.g.*, Steinberg Tr. 215:21-216:10 ("Platinum needed the liquidity … we were expecting whatever was left of the liquidity. It was only 20, 30 million dollars that was left from the $55 million we were going to get. Platinum needed it, and they were depending on that cash coming from this transaction ….") His recollection was that Nordlicht was hoping for "a smooth Agera closing," "a smooth Implant closing," and "to close the management share class" to save the fund." (Steinberg Tr. 368:22-369:9.) (SF 195-217)

Third, evidence adduced during discovery clearly establishes that the Master Fund did receive a liquidity benefit from the Agera Sale. Steinberg's testimony is illustrative. Specifically, he testified that "PPVA definitely got cash as part of [the Agera] closing"; "PPVA needed that cash and benefited from the cash that it got"; "it was probably at least a month, maybe even more, where the proceeds from the Agera sale were the only cash that Platinum had … available to it"; "Platinum operated with that cash … probably until the liquidators came on board [in August]"; and he "recall[ed] no other inflows came in … for the entire month of June and maybe parts of July, the only source of liquidity that Platinum had was from the Agera transaction." (Steinberg Tr. 336:2-337:23.) SF 195-217. The adverse interest exception does not apply where there is a benefit—even a short-term one. *See Baena v. KPMG*, 453 F.3d 1, 7, 2006 U.S. App. LEXIS 15577, *16 (1st Cir. 2006) (the fraud of overstating earnings to facilitate stock sales and acquisitions profits the company in the short term and would therefore eliminate applicability of the adverse interest exception); *Beck v. Deloitte & Touche LLP*, 144 F.3d 732, 736 (11th Cir. 1998) (where management's actions "brings short-term gain" but ultimately cause "insolvency," the adverse interest exception does not apply). Summary judgment should be granted.

The Liquidators' theory ignores a number of key facts: (1) Agera was a complex, hard-to-value asset; (2) Beechwood was uniquely well-positioned to purchase the asset because it was familiar with the company and was, therefore, able to move quickly; (3) the noncash component of the transaction was akin to debt reduction for PPVA and PPCO; (4) recognizing this, the purchase option agreement provided that that the noncash component of the transaction would be valued using the *face value* of the securities; (5) Steinberg, the individual negotiating the deal on behalf of the Master Fund, believed that there was sufficient collateral coverage for companies like China Horizon and Pedevco to cover the loans; and (6) as sometimes happens with complex, hard-to-value companies, Agera ultimately failed, declaring bankruptcy in October 2019. SF 218-283

Finally, the Liquidators' theory of the case regarding the Agera Sale is utterly illogical. If the Agera Sale was "pure pilfering," as alleged, there would have been no need for Platinum to repurchase the Agera Note pursuant to the first repurchase agreement. Through pure inaction, the defendants could have let Beechwood keep Agera for a price of only $20 million. That did not happen. Following discovery, the SAC must be appreciated for what it is: law-school-exam quality, issue-spotting nonsense.

III. THE RECORD CANNOT SUPPORT THE LIQUIDATORS' ALTER EGO ALLEGATIONS AGAINST THE BEECHWOOD ENTITIES.

The alter ego allegations against all of the Beechwood Entities must be dismissed. "Those seeking to pierce a corporate veil . . . bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339, 703 N.E.2d 749 (1998). Thus, there are two elements of a veil-piercing claim, both of which must be satisfied. First, it must be shown that the Beechwood Parties completely controlled Platinum Management, the defendant whose veil the plaintiff is seeking to pierce.

Second, it must be shown that the defendant abused its complete control of the corporate entity to perpetrate a wrongful or unjust act on the plaintiff to the plaintiff's detriment.

Here, the evidence adduced during discovery establishes that the Liquidators will not be able to meet their burden. Witness testimony firmly established that Feuer and Taylor alone controlled Beechwood. [Sf 92-97].[7] The opposite is also true. There is no evidence that the Beechwood Parties exerted any control over Platinum Management. Moreover, the record is clear that the Beechwood entities followed corporate formalities, and the plaintiffs have offered no evidence to the contrary. There is also no evidence that the Beechwood entities were undercapitalized.

At bottom, the Liquidators' alter ego allegations are premised on the fact that family members of Huberfeld, Bodner, and Nordlicht had passive economic interests in certain Beechwood entities. The fact that two companies have the same or similar owners, officers, and/or offices comes nowhere close to a finding of alter ego status. Under New York law, "[s]uch facts are not sufficient to satisfy the 'heavy burden' necessary to pierce the corporate veil or to establish an alter ego relationship." *Etex Apparel, Inc. v. Tractor Intl Corp.*, 83 A.D.3d 587 (1st Dep't 2011).

IV. THE RECORD CANNOT SUPPORT DECLARATORY JUDGMENT CLAIMS SEEKING TO INVALIDATE THE NORDLICHT SIDE LETTER AND THE MASTER GUARANTY.

The Liquidators seek to invalidate the Nordlicht Side Letter and Master Guaranty, arguing that they are void and unenforceable under New York law. Their position is based on the legal principle that "a contract is unenforceable under New York law if the finder of fact concludes that the agreement was made with corruption and fraud contemplated as its purpose." *See* ECF 488 at 31 (citing *CMF Investments, Inc. v. Palmer*, No. 13-CV-475 VEC, 2014 WL 6604499, at *2 (S.D.N.Y. Nov. 21, 2014).)

[7] Here, the Beechwood Parties expressly incorporate those portions of the Bodner and Huberfeld submissions that discuss their respective relationships with Platinum and Beechwood.

Here, the Liquidators contend that the Nordlicht Side Letter and Master Guaranty were structured for the corrupt purpose of stripping value from PPVA. This contention is premised on the allegation that PPVA supposedly received "no consideration" for entering into these transactions. Yet, at the conclusion of discovery, the Liquidators have failed to adduce any facts to support this contention. To the contrary, the undisputed record demonstrates that Nordlicht was trying to save PPVA by entering into these agreements and that PPVA received valuable consideration for both:

1. ***Nordlicht Side Letter***. With respect to the Nordlicht Side Letter, New York case law is clear that forbearance on a right to demand payment constitutes consideration. *Sun Forest Corp. v. Shvili*, 152 F. Supp. 2d 367, 392 (S.D.N.Y. 2001). Here, the uncontroverted record establishes that Implant was at or near default on the BAM Admin loan, and that Nordlicht made this pledge to avoid BAM Admin placing Implant into default. This was essential to Nordlicht's efforts to save the fund as he was counting on liquidity from the Implant sale to keep the fund alive. The Liquidators can cite to nothing but innuendo to support the proposition that this agreement was made with corruption and fraud contemplated as its purpose. Indeed, the Master Fund was already obligated to pay BAM's clients in the event of a Golden Gate default pursuant to the put option and the guarantee in the Note Purchase Agreement. And the Liquidators have not paid BAM Admin or its clients a dime from the proceeds of the Implant Sale.

2. ***Master Security Guaranty***. Similarly, with respect to the Master Security Guaranty, the Liquidators can point to nothing but innuendo to support the inference that this was executed with corruption and fraud contemplated as its purpose. To the contrary, the record establishes that the Master Security Guaranty was executed as part of the March 2016 restructuring, which was sought out by Platinum for the purpose of easing liquidity pressure, eliminating or moving certain encumbrances so that the Master Fund could try to leverage certain assets, and cleaning up the

balance sheet to attract investors to a new management share class. The record also establishes that the Master Fund achieved many of its goals, including lower interest rates, deferred interest payments, extended maturities, and the release of a number of encumbrances. The fact that the Master Fund did not get everything it wanted is, at best, evidence of a sharp-elbowed negotiation, not fraud.

CONCLUSION

In light of the undisputed evidence in this case, and for the reasons set forth above, the Beechwood Parties respectfully request that the Court enter partial summary judgment in their favor, dismissing with prejudice the Liquidators' remaining claims with prejudice.

Dated: Kew Gardens, New York
February 14, 2020

LIPSIUS-BENHAIM LAW, LLP
Attorneys for Defendants

By: _____

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CERTIFICATE OF SERVICE

I, Ira S. Lipsius, of Lipsius BenHaim Law LLP, certify that I am over eighteen years of age, am an attorney in good standing admitted to the Southern District of New York and that on February 14, 2020, I will electronically file the foregoing *Memorandum of Law in Support of Motion for Summary Judgment* with the Court view the CM/ECF system, which will send a notification of such filing (ECF) to all counsel of record.

Dated: February 14, 2020
Kew Gardens, New York

By: */s/ Ira S. Lipsius*
Ira S. Lipsius

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.	No. 18 Civ. 10936 (JSR)

STATEMENT OF MATERIAL UNDISPUTED FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, B Asset Manager LP, B Asset Manager II LP, BAM Administrative Services, LLC, Beechwood Re Investments LLC, Beechwood Re Holdings, Inc., Beechwood Bermuda International Ltd., Mark Feuer, Scott Taylor, and Dhruv Narain (together, the "Beechwood Parties"), by their attorneys Lipsius BenHaim Law LLP, file this 56.1 Statement of Undisputed Material Facts in Support of the Beechwood Parties' Motion for Summary Judgment.

Platinum Partners Value Arbitrage Fund

1. Platinum Partners Value Arbitrage Fund L.P. ("PPVA" or the "Master Fund") is an exempted limited partnership domiciled in the Cayman Islands that is currently in liquidation. (Ex. C[1], Second A&R Limited Partnership Agreement, Section 1.01(a); *see also* ECF No. 285 ¶ 2.)

[1] Exhibits are referring to those attached to Affirmation of Ira S. Lipsius

2. Platinum Management (NY) LLC ("Platinum Management") served as the general partner and investment manager of the Master Fund. (*See* Ex. C, Second A&R Limited Partnership Agreement, at 1; *see also* San Filippo Tr. at 34:4-6, 34:19-22.)

3. The limited partners of the Master Fund were, at various times:

- Platinum Partners Value Arbitrage Fund (USA) L.P. (the "Onshore Feeder Fund");
- Platinum Partners Value Arbitrage Fund (International) Limited (the "Offshore Feeder Fund" and, together with the Onshore Feeder Fund, the "Feeder Funds"); and
- Platinum Partners Value Arbitrage Intermediate Fund Limited (the "Intermediate Fund").

Exhibit E, Winding Up Petition at ¶ 3.

4. During the period at issue, the limited partners of the Master Fund were the Onshore Feeder Fund and the Intermediate Fund. That is because, on or around June 22, 2010, the Offshore Feeder Fund ceased to be a limited partner of the Master Fund and the Intermediate Fund took its place. *Id*.

5. The Feeder Funds and the Master Fund formed a typical master-feeder investment structure whereby:

- Offshore and U.S. tax-exempt investors invested their capital into the Offshore Feeder Fund, which in turn invested into the Intermediate Offshore Feeder Fund, which in turn invested into the Master Fund;
- Onshore investors invested into the Onshore Feeder Fund, which in turn invested into the Master Fund;
- The investment activities of the Feeder Funds and the Master Fund were managed by the general partner, Platinum Management, in its separate capacity as an investment manager, appointed pursuant to the Amended and Restated Investment Management Agreement, dated April 27, 2007.

Winding Up Petition at ¶ 5.

6. The relationship between Platinum Management, the Master Fund, the Intermediate Fund, the Feeder Funds, and investors in the Feeder Funds was governed by the following documents:

- The Second Amended and Restated Limited Partnership Agreement, dated July 1, 2008 (the "Limited Partnership Agreement"). (Ex. C.)

- The Second Amended and Restated Operating Agreement of Platinum Management (NY) LLC, dated January 1, 2011 (the "Operating Agreement"). (Ex. F.)

- The Amended and Restated Investment Management Agreement, dated April 27, 2007 (the "Investment Management Agreement"). (Ex. G.)

- Confidential Private Offering Memoranda (the "Offering Memoranda"). (*See, e.g.*, Ex. H.)

- Subscription Agreements for Limited Partnership Interests or Shares (the "Subscription Agreements"). (*See, e.g.*, Ex. I.)

Relevant portions of these documents are discussed below.

Platinum Management and its Principals

7. Platinum Management, as general partner, was vested with sole decision-making authority and responsibility for managing the Master Fund. The Limited Partnership Agreement provides, among other things, that "management of the Partnership shall be vested exclusively in the General Partner." (Ex. C, Second A&R Limited Partnership Agreement, Section 2.02.)

8. According to the Limited Partnership Agreement, the Master Fund was "organized for the purposes of realizing capital appreciation by investing and trading in U.S. and non-U.S. securities … and to engage in all activities and transactions as the General Partner may deem necessary or advisable in connection therewith …." (Ex. C, Second A&R Limited Partnership Agreement, Section 1.06(a).)

9. The Limited Partnership Agreement grants Platinum Management broad authority to pursue that goal. Indeed, it provides:

> "The General Partner shall have the power by itself on behalf and in the name of the Partnership to carry out any and all of the objects and purposes of the Partnership set forth in Section 1.06, and to perform all acts and enter into and perform all contracts and other undertakings which it may deem necessary or advisable or incidental thereto …." (Ex. C, Second A&R Limited Partnership Agreement, Section 2.03.)

10. One of the areas where the Limited Partnership Agreement grants Platinum Management broad authority and discretion is in connection with the valuation of investments. Section 3.06 of the Limited Partnership Agreement, the section entitled "Net Asset Value," lists a variety of scenarios in which this is the case. (Ex. C, Second A&R Limited Partnership Agreement, Section 3.06(a)-(ix).)

11. This is particularly true for illiquid private equity investments. The Limited Partnership Agreement provides that the value of "Other Assets" — *i.e.*, assets that are not listed securities, unlisted securities, restricted securities, short positions, options, dividends, commodity

interests, cash items, or assets allocated to portfolio managers — "shall be their fair value, determined in such manner as may be selected from time to time by the General Partner in its discretion." The Limited Partnership Agreement goes on to say that "[a]ll values assigned to assets by the General Partner pursuant to this Article III [of the Limited Partnership Agreement] shall be final and conclusive as to all of the Partners." (Ex. C, Second A&R Limited Partnership Agreement, Section 3.06(x).)

12. Moreover, the Limited Partnership Agreement provides that, "if the General Partner determines that the valuation of any Securities or other property in accordance with subsection (a) does not fairly represent market value, the General Partner shall value such Securities or other property as it reasonably determines and shall set forth the basis of such valuation in writing in the Partnership's record." (Ex. C, Second A&R Limited Partnership Agreement, Section 3.06(c).)

13. At bottom, under the Limited Partnership Agreement, "[a]ll matters concerning the valuation of assets of the Partnership, the allocation of profits, gains and losses among the Partners … shall be determined by the General Partner, whose determination shall be final and conclusive as to all of the Partners." (Ex. C, Second A&R Limited Partnership Agreement, Section 3.09.)

14. This was specifically disclosed to investors. The Offering Memorandum states, among other things, that "the Investment Manager has substantial discretion in determining the value of certain of the Master Fund's Financial Instruments," and that "[p]rivate equity investments and other illiquid investments will be valued by the Investment Manager in consultation with the Administrator." (Ex. F, Offering Memorandum, at 56.)

15. The members of Platinum Management were, at various times: Mark Nordlicht, Uri Landesman, Ari Glass, Bernard Fuchs, David Levy and the Mark Nordlicht Grantor Trust. San Filippo Tr. at 54:18-55-6; 68:7-13.) During the time period at issue in the SAC, Ari Glass was not a member of Platinum Management. *See* (Ex. F, Second A&R Operating Agreement of Platinum Management (NY) LLC, at 1.)

16. During the entire period, Mark Nordlicht was Platinum Management's Chief Investment Officer and, as such, was delegated "such responsibilities as are customarily assigned to such office." (*See* Ex. F, Second A&R Operating Agreement, at § 4.15.)

17. Just as Platinum Management was vested with sole decision-making authority and responsibility for managing the Master Fund, Mark Nordlicht was effectively the sole decision maker at Platinum Management. As disclosed to investors: "Mark Nordlicht oversees all operations and risk management functions for the Investment manager. Mr. Nordlicht is the Co-Chief Investment Officer and majority owner of the Investment Manager and is responsible for the day-to-day investment decisions regarding the Offshore Feeder Fund, the Intermediate Fund, the Onshore Feeder Fund, and the Master Fund." (Ex. H, Offering Memorandum, at 2, 23.)

18. It was also disclosed that "[i]nvestment and trading decisions made by [Platinum Management] ***ultimately are based on the judgment of Mark Nordlicht***. No assurance can be given that the Master Fund's investment and trading methods and strategies will be successful

under any market conditions. If Mr. Nordlicht were to die or become disabled or otherwise terminate his relationship with the Investment Manager, any such event could have a material adverse effect on the Fund and its performance." (*Id.*)

19. For its part, the membership interest that the Mark Nordlicht Grantor Trust had in Platinum Management was passive, meaning that it did not come with "the right, authority or power to act for or on behalf of the Company or to take any action or do anything that would be binding on the Company, or to make any expenditures or incur any indebtedness in the name or on behalf of the Company solely by reason of being a Passive Member." (*See* Ex. F, Second A&R Operating Agreement, at § Preamble and 3.2; *see also* BW-SHIP-00273970 at 1.)

20. The Mark Nordlicht Grantor Trust was created "to provide certain limited liability companies with the economic equivalent of a passive membership interest in [Platinum Management]." Ex. J (BW-SHIP-00273970 at 1.)

21. The trustee of the Mark Nordlicht Grantor Trust is Mark Nordlicht, and the beneficiaries of the Mark Nordlicht Grantor Trust are Manor Lane Management LLC, Grosser Lane Management LLC, and Nordlicht Management III LLC. Ex. J (BW-SHIP-00273970 at 1.)

22. Manor Lane Management LLC is an entity associated with Murray Huberfeld, Grosser Lane Management LLC is an entity associated with David Bodner, and Nordlicht Management III LLC is an entity associated with Mark Nordlicht. Ex. J (BW-SHIP-00273970 at 1; San Filippo Tr. at 68:18-24.)

23. The beneficiaries of the Mark Nordlicht Grantor Trust were not partners of Platinum Management. (SanFilippo Tr. 55:21-56:12, 56:23-58:10.)

24. Murray Huberfeld and David Bodner did not have a role at Platinum Management. (*See, e.g.*, SanFilippo Tr. 74:7-13; 92:14-23; 126:23-127:3; 417:8-419:21) But Huberfeld occasionally raised money for the Platinum funds. Ex. D (SanFilippo Tr. 105:4-17.)

25. The trustee of the Mark Nordlicht Grantor Trust was the only one who had the legal right to vote or make business decisions on its behalf as partner or member of Platinum Management. Ex. D (SanFilippo Tr. 58:6:13.)

26. The Mark Nordlicht Grantor Trust was selected as a vehicle for owning Platinum Management because Mark Nordlicht wanted control over the investment manager. Ex. D (SanFilippo Tr. 73:5-22.)

PPVA was Limited to Sophisticated, Qualified Investors

27. PPVA was a hedge fund that was limited to qualified, eligible purchasers. (Ex. H, Offering Memorandum, at *iii*, 12, 48, 60, 95, 100, 102, 105.)

28. The Offering Memoranda set a minimum investment level at $1 million per subscriber. (*Id.* at 1.)

29. PPVA's investors represented that they had adequate means of providing for all their current needs and possible contingencies, the ability to bear the economic risk of losing their entire investment, and had *no need for liquidity* with respect to their investment into the Master Fund. (*See, e.g.*, Ex. K, CTRL7528448, at 1.)

30. PPVA's investors represented that they were "Accredited Investors." (*See, e.g.*, Ex. K, CTRL7528448, at 9.)

31. PPVA's investors represented that they were qualified purchasers." (*See, e.g.*, Ex. K, CTRL7528448, at 12.)

32. PPVA's investors represented that they read and understood the Offering Memoranda and the Limited Partnership Agreement. (*See, e.g.*, Ex. K, CTRL7528448, at 1.

PPVA Investors Understood they Were Taking on a High Degree of Risk

33. The Offering Memorandum provides that "THE SHARES ARE A SPECULATIVE INVESTMENT AND THIS OFFERING INVOLVES SUBSTANTIAL RISK OF LOSS AS DESCRIBED HEREIN." It further provides that "THE SHARES OFFERED HEREIN ARE SUITABLE FOR [eligible investors] WHO DO NOT REQIURE IMMEDIATE LIQUIDITY FOR THEIR INVESTMENTS, FOR WHOM AN INVESTMENT IN THE FUND DOES NOT CONSITUTE A COMPLTE INVESTMENT PROGRAM AND WHO FULLY UNDERSTAND AND ARE WILLING TO ASSUME THE RISKS INVOLVED IN THE FUND'S INVESTMENT PROGRAM." (Ex. H, Offering Memorandum, at 4-5.)

34. The Offering Memorandum provides that "[a]n investment in the Fund is speculative and involves a high degree of risk, including the risk of loss of the entire investment of a Shareholder." (*Id.* at 4.)

35. The Offering Memorandum provides that: "[t]he Master Fund's investment program is speculative and entails substantial risks. Because risks are inherent to varying degrees in all Financial Instruments and investment strategies employed by the Investment Manager, there can be no assurance that the investment objectives of the Master Fund will be achieved. Some investment practices that may or will be employed by the Master Fund can, in certain circumstances, substantially increase the risks to which the Master Fund's investment portfolio is subject and potentially results in a loss of capital." (*Id.* at 23.)

36. The Offering Memorandum provides that "[t]here is a high degree of risk associated with the purchase of Shares of the Fund, and any such purchase should be made only after consultation with independent qualified sources of investment, legal and tax advice. No investor should consider subscribing for more than such investor can comfortably afford to lose." (*Id.* at 32.)

37. The Offering Memorandum disclosed that PPVA would be investing in early-stage companies, private equity investments, and highly-leveraged companies, which involved a high-degree of business and financial risk. (*Id.* at 42-44.)

38. The Offering Memorandum disclosed that PPVA was dependent on the Investment Manager and that "[i]nvestment and trading decisions made by the Investment Manager ultimately are based on the judgment of Mark Nordlicht. No assurance can be given that the Master Fund's investment and trading methods and strategies will be successful under any market conditions." (*Id.* at 46.)

39. The Offering Memorandum disclosed that "[p]rivate equity investments and other illiquid investments will be valued by the Investment Manager in consultation with the Administrator. Securities that the Investment Manager believes are fundamentally undervalued or overvalued may not ultimately be valued in the markets at prices and/or within the time frame that the Investment Manager and the Administrator anticipate." (*Id.*)

40. The Offering Memorandum disclosed that an investment in PPVA came with the risk of limited liquidity and that "[a]n investment in the Fund is suitable only for sophisticated investors who have no need for liquidity in this investment." (*Id.* at 48.)

41. The Offering Memorandum disclosed that "[t[he Investment Manager and its Affiliates are not restricted from entering into other investment advisory relationships or engaging in other business activities, even though such activities may be in competition with the Master Fund and/or may involve substantial amounts of the Investment Manager's time and resources." (*Id.* at 53.)

42. More specifically, the Offering Memorandum disclosed that "The ***principals of* the Investment Manager may** from time to time ***hold direct or indirect ownership interests in one or more other investment management companies***, including those that ***share resources with the Investment Manager*** and/or ***co-invest with the Investment Manager***." (*Id*. (emphasis added).)

43. The Offering Memorandum disclosed that [c]ertain of the Portfolio Managers are not restricted from entering into other investment advisory relationships or engaging in other business activities, even though such activities may be in competition with the Master Fund and/or may involve substantial amounts of such Portfolio Manager's time and resources. (*Id*. at 55.)

44. According to the Offering Memorandum, "[n]either the Investment Management Agreement nor the Memorandum and Articles of Association of the Fund and the Intermediate Fund … restricts the Investment Manager or its members, principals, officers, employees and affiliates … from entering into other investment advisory relationships or engaging in other business activities with other investment funds. (Id. at 24.)

45. The Offering Memorandum disclosed that

> The Investment Manager has substantial discretion in determining the value of certain of the Master Fund's Financial Instruments. While the value of most marketable Financial Instruments is based on prices reported in the public markets, at times, the size of a block of Financial Instruments held by the Master Fund or temporary restrictions on resale may justify imposing a discount on the market-determined value. ***Whether and how***

> ***much to reduce the value of Financial Instruments in any of these circumstances is subject to the Investment Manager's sole discretion in accordance with the Master Fund's valuation process.*** In addition, a significant portion of the Master Fund's assets may be invested in restricted securities. To the extent that the Master Fund makes such investments, ***the value of those investments will be determined in the Investment Manager's sole discretion in accordance with the Master Fund's valuation process.*** The Investment Manager will face a conflict of interest in making any of these valuation decisions. Application of a discount to the value of marketable securities in the Master Fund's portfolio may reduce, or eliminate, any Incentive Allocation to which PPVA LP, an affiliate of the Investment Manager, would otherwise be entitled for the period ending on a Valuation Date (as defined below) or increase the amount of loss carryforward to be recovered before an Incentive Allocation would be allocable. The Investment Manager will face similar conflicts of interest in assigning values to nonmarketable securities.

(*Id.* at 56.)

Specific Disclosures Regarding Beechwood on Platinum Investor Calls

46. In 2014, after Beechwood begin operations, Platinum Management held an investor call to discuss the funds' Q2 2014 performance. Ex. L (Audio Trans. of CTRL_PPCO_0000004).

47. The audio recording was made available to investors through Platinum's website.

48. During the quarterly investor call, Nordlicht disclosed the fact that he was acting as an advisor to a new reinsurance company." Ex. L (Audio Trans. of CTRL_PPCO_0000004 at 34:17-19)

49. Later on the call, Nordlicht disclosed the fact that he had an economic interest in the new company, stating "I have a partial ownership in the overall reinsurance company." Ex. L (Audio Trans. of CTRL_PPCO_0000004 at 35:9-11)

50. Nordlicht also informed investors that the reinsurance company had invested some money in PPVA, stating that "[a] small portion of that money is actually invested in the fund." (Audio Trans. of CTRL_PPCO_0000004 at 34:19-21) And that he "expect[s] them to grow as an investor in the funds." (Audio Trans. of CTRL_PPCO_0000004 at 35:14-15) Ex. L

51. Additionally, Nordlicht told PPVA investors that he expected to do additional transactions with Beechwood going forward, which would be helpful to PPVA from a "liquidity standpoint." Ex. L (Audio Trans. of CTRL_PPCO_0000004 at 34:9-12)

52. Specifically, Nordlicht explained to PPVA investors: "[G]oing forward … if we see from a liquidity standpoint … if the fund has the opportunity and we want to maybe lay off one of our lower yielding funds. Based on their mandate, that's something that … if it fits their

particular mandate … that could be an opportunity for us to take advantage [of]." Ex. L (Audio Trans. of CTRL_PPCO_0000004 at 34:10-36:15).

53. No PPVA investors asked questions about Platinum's relationship with Beechwood on the Q2 2014 investor call or on any subsequent calls. Ex. L

54. One quarter later, Platinum Management held an investor call to discuss the funds' Q3 2014 performance. Ex. M (Audio Trans. of CTRL_PPCO_0000007).

55. The audio recording was made available to investors through Platinum's website.

56. During the quarterly investor call, Nordlicht disclosed the fact that Platinum's principals owned approximately fifty percent of Beechwood. Ex. M (Audio Trans. of CTRL_PPCO_0000007 at 44:7-9)

57. During the quarterly investor call, Nordlicht also disclosed several personnel changes concerning Beechwood and PPVA. Ex. M (Audio Trans. of CTRL_PPCO_0000007 at 44:7-14)

58. Nordlicht informed PPVA investors that David Levy was going to returning to PPVA from BAM, stating, "I want to inform everyone of David Levy is going to be returning to us as co-chief investment officer. David was previously-- had gone to our reinsurance company, in which our principals own fifty percent of the reinsurance company." Ex. M (Audio Trans. of CTRL_PPCO_0000007 at 44:4-9)

59. Nordlicht informed PPVA investors that Danny Saks was going to be leaving PPVA to take on a new position at BAM, stating that Levy was "going to switch places with Danny Saks who is going to become chief investment officer of [B Asset Manager] our reinsurance, the reinsurance vehicle that we have an ownership positon in." Ex. M (Audio Trans. of CTRL_PPCO_0000007 at 44:10-14)

60. Nordlicht explained that Platinum and Beechwood were separate companies, but that Platinum had provided some assistance to Beechwood during the startup phase, noting, for example, that it had helped out Beechwood with financial reporting. Ex. M (Audio Trans. of CTRL_PPCO_0000007 at 44:15-22)

61. Nordlicht explained that, although Platinum and Beechwood were being run separately and had different investment mandates, he expected to do transactions with Beechwood going forward:

> "B [A]sset really has a different kind of mandate where they have to invest a lot more in [liquid] fixed income trading, but we do view this as a very, very beneficial development for Platinum investors, as well in terms of it increases the maneuverability that I have here at Platinum and our two funds because, to the extent I see better risk-adjusted opportunities, maybe higher yielding type of loans for PPCO, for example, I have an outlet where I can go to Danny, who I cannot convince Danny what to do, but I know how he thinks. I know the mandate of B-asset and if I have a lower yielding type of loan, I would have the maneuverability

> and the opportunity to show it to Danny and potentially sell him the aged paper with the lower yielding loan and reallocate to something that's more current and better fit for our overall book."

Ex. M (Audio Trans. of CTRL_PPCO_0000007 at 44:23-45:16)

62. Nordlicht informed investors that he had done some of these types of transactions with David Levy when he was CIO at Beechwood and that he anticipated doing more of these types of transactions with Danny Saks going forward. Ex. M (Audio Trans. of CTRL_PPCO_0000007 at 45:17-20)

63. No PPVA investors asked questions about Platinum's relationship with Beechwood on the Q3 2014 investor call or on any subsequent calls. Ex. M (CTRL_PPCO_0000007)

Disclosures in Platinum's Audited Financial Statements

64. For 2013, the audited financial statements for the Master Fund and the Feeder Funds were prepared by prepared by the professional accounting firm BDO. Ex. N-P (*See* CTRL6437951, CTRL6437952, CTRL6437953.)

65. The audited financial statements were completed on February 11, 2015. Ex. P (*See, e.g.*, CTRL6437953, at 3.)

66. The audited financial statements include a disclosure regarding "Off-Balance Sheet Risk," that is, that "some of the Master Fund's financial instruments contain off-balance sheet risk. Generally, these financial instruments represent future commitments to purchase or sell other financial instruments at specific terms at specific future dates. The changes in the fair value of the financial instruments underlying derivatives and the obligation to purchase securities sold short may be in excess of the amounts recognized in the consolidated statement of financial condition." Ex. P (*See, e.g.*, CTRL6437953, at 32.)

67. The audited financial statements include a disclosure regarding "Limited Diversification," which focused specifically on investments in "early stage enterprises" and "concentration related to energy industry assets, primarily, but not limited to oil and gas assets." (*Id.*) Black Elk and Golden Gate were highlighted as two such investments that. (*Id.*)

68. The audited financial statements include a disclosure regarding "liquidity risk." (*Id.* at 33.)

69. The audited financial statements include a detailed description of the Level 3 valuation processes and procedures employed by Platinum Management. (*Id.* at 36-37.)

70. The Master Fund and both Feeder Funds described "Beechwood Asset Management" as a "related party of the General Partner" in their audited financial statements, which were prepared by the professional accounting firm BDO. (*See, e.g.*, Ex. P CTRL6437953, at 41.) BAM is specifically referenced in connection with the Golden Gate, Implant, and Black Elk transactions. (*See, e.g., id.* at 41-42, 59.)

Beechwood

71. The Beechwood Entities are a group of reinsurance companies and asset managers, separate from Platinum, that were formed in 2013 by Mark Feuer and Scott Taylor Ex. Q (Feuer Tr. 40:9-25). Mark Feuer was the Chief Executive Officer at Beechwood. Feuer Tr. 267:25-268:3. Before founding Beechwood, he served as the Chief Operating Officer of Merrill Lynch Americas and the Chief Executive Officer of Marsh USA. Ex. Q, Feuer Tr. 33:20-21.

72. Scott Taylor was the President at Beechwood. Ex. R Taylor Tr. 123:9-10. Before founding Beechwood, he served as a Managing Director with Merrill Lynch & Co. and with Marsh & McLennan. Ex. R Taylor Tr. 11:15-25.

73. In 2012, Feuer and Taylor had known each other for nearly twenty years, having worked together at Merrill Lynch & Co. and with Marsh & McLennan. Ex. R Taylor Tr. 11:15-25.

74. They saw an opportunity to launch a new business in the reinsurance space. Ex. R Taylor Tr. 13:12-14; Ex. Q Feuer Tr. 40:20-25, 42:23-43:5.

75. At or around that time, the market for long-term care ("LTC") insurance in the U.S. was experiencing a high-level of dislocation. The factors contributing to this location included the continued low-interest-rate environment and the regulatory environment in which additional capital and surplus were required to fund long-tail LTC lines. These factors led insurers to reinsure blocks of in-force business and allocate their capital to other, more attractive areas. Ex. S (ST00000443)

76. Feuer and Taylor believed that their contemplated new company could be more profitable than other insurers if it brought a unique focus on claims management. Insurance companies often use third-party administrators to process LTC claims. The insurance companies then wait until the processed claims exceed a certain threshold before beginning to actively manage them. Feuer and Taylor believed that it would be more efficient to invest in actively managing these LTC claims from the outset. This was a contrarian approach. Ex. Q, Feuer Tr. 39:15-40:18

77. Based on advice from industry experts that it would be advisable to raise capital before pursuing any reinsurance deals, Feuer reached out to several individuals to see whether they could contribute capital. One of the individuals he contacted was Murray Huberfeld. Ex. Q Feuer Tr. 26:13-25

78. Huberfeld agreed that he and two business partners, Mark Nordlicht and David Bodner, would help contribute capital for the business. Feuer had no previous relationship with Nordlicht or Bodner. Ex. Q Feuer Tr. 22:23-23:6; 23:8-13; 27:8-16; 41:22-42:19.

79. Beyond just capital, there was another perceived advantage to doing business with Huberfeld and his colleagues. Huberfeld and his colleagues possessed investment expertise, having helped found Platinum, at the time a well-respected and successful hedge fund. In 2013, Platinum had a record of strong performance. However, unbeknownst to Feuer or Taylor,

Platinum was beginning to have liquidity issues. Ex. Q, Feuer Tr. 43:18-23; 44:5-20; 106:25-108:9.

80. Huberfeld and his colleagues introduced Feuer and Taylor to Huberfeld's nephew David Levy. At the time, Levy was the Deputy Chief Investment Officer for one of the Platinum funds. Levy eventually became Beechwood's first Chief Investment Officer. Ex. Q, Feuer Tr. 41:11-21; 45:22-46:4; 65:2.

81. Beechwood never operated out of Platinum's offices. Ex. D, (SanFilippo Tr. 190:6-9.) But Beechwood held meetings with potential clients, like CNO Financial Group, Inc., at Platinum's offices, before the company officially launched. Ex. D, (SanFilippo Tr. 192:14-16.)

82. Huberfeld and his colleagues agreed to provide $100 million worth of capital for the new business. That capital would come in the form of partnership interests from two Platinum funds and private shares of an energy company that were subsequently converted for shares of a publicly-traded company. KPMG LLP performed a valuation on these assets, valuing them at between $100 million and $130 million. Ex. Q, Feuer Tr. 732:10-18 Exhibit 365

83. The capital was placed in Beechwood Re Investments LLC, a Delaware Series LLC, and ultimately structured using demand notes that provided the Beechwood reinsurance entities with the irrevocable right, at their sole discretion, to draw down capital from the demand notes as need. (*See, e.g.*, Ex. T, SPR00021855.)

84. The Beechwood family of companies consisted of three groups of entities: (1) a Cayman Islands-based reinsurance structure, (2) a Bermuda-based reinsurance structure; and (3) a domestic asset manager. [Ex. U, Beechwood Org. Charts]

85. B Asset Manager II LP was formed on September 23, 2014 and did not exist prior to this formation date. Declaration of Christian R. Thomas submitted herewith ("Thomas Decl.") ¶ 3.

86. B Asset Manager II LP served as an investment advisor to (i) Beechwood Bermuda International Ltd. from October 4, 2014 until February 1, 2017, (ii) Beechwood Omnia Ltd. (formerly Old Mutual (Bermuda) Ltd.) from January 1, 2016 until February 1, 2017, and (iii) Beechwood Bermuda Investment Holdings Ltd. from January 1, 2016 until February 1, 2017, where in each case B Asset Manager II, LP provided advice with respect to the purchase from other lenders of existing indebtedness (and not in respect to direct loan originations with borrowers). Thomas Decl. ¶ 4.

87. Since their founding, and at all times relevant to this action, B Asset Manager LP, B Asset Manager II LP, Beechwood Re Holdings, Inc., Beechwood Bermuda International Ltd., and BAM Administrative Services, LLC followed applicable corporate formalities. Thomas Decl. ¶ 5.

88. Since their founding, and at all times relevant to this action, the boards of directors for those Beechwood entities that maintained boards of directors held periodic board meetings and/or entered into board consents in lieu of meetings. Thomas Decl. ¶ 6.

89. Minutes from those meetings and/or board resolutions were routinely prepared and maintained in corporate minute books maintained in Bermuda, in the case of Beechwood Bermuda International Ltd. or in New York, in the case of Beechwood Re Holdings Inc.

90. Beechwood and Platinum operated separately. (Ex. R, *Taylor Tr.* at 303:13-15; at 327:10-15, at 323:8-18; Ex. W, *Beren Tr.* at 126:21-23, at 134:12-135:19, at 146:20-24, at 190:6-10; Ex. X, *Trott Tr.* at 877:2-889:25, at 895:20-25; Ex D, *SanFilippo Tr.* at 198:22-200:24, at 201:7-20; *Saks Tr.* Ex. Y, at 45:9-23, at 55:23-56:16, at 115:6-23, at 196:6-9)

91. Beechwood was not involved in Platinum's investment decision-making. (Ex. Q, *Feuer Tr.* at 502:4-504:25; Ex. R, *Taylor Tr.* at 593:4-5)

92. Taylor and Feuer ran Beechwood. (*Taylor Tr.* at 32:17-19, at 33:25-34:23, at 255:8-15; *Steinberg Tr.* at 72:9-73:7; *N. Bodner Tr.* at 112:12-20; *Feuer Tr.* 60:19-61:6; *Saks Tr.* 97:25-98:7; *SanFilippo Tr.* at 168:21-25; *McGovern Tr.* at 238:23-239:3.)

93. Levy reported to Taylor and Feuer. Ex. CC, Sweetin Tr. 96:10-14

94. Beechwood was appropriately capitalized. (*See, e.g.*, Ex., T, SPR00021855.)

95. Nordlicht, Bodner and Huberfeld were not owners or employees of Beechwood, rather their family members provided capital to Beechwood had ownership interests through trusts.(Ex. Q, *Feuer Tr.* at 20:9-22:22; Ex. R, *Taylor Tr.* at 18:17-19:9, at 532:14-533:17, 535:3-5; Ex. AA, *N. Bodner Tr.* at 53:7-9, at 113:19-21; Ex. Y, *Saks Tr.* at 110:8-13; Ex. DD, *Kim Tr.* at 79:17-25, at 197:4-5, at 232:13-233:11)

96. Nordlicht, Huberfeld, or Bodner never had any authority with respect to Beechwood's investment or management decisions. (Ex. R, *Taylor Tr.* at 32:22-33:2, at 33:25-34:23, at 77:18-22, at 112:12-15; at 122:14-24, at 417:7-11, at 418:10-13, at 532:14-533:17, at 534:2-19, at 535:3-5; Ex. EE, *D. Bodner Tr.* at 148:7-21; Ex. T, *Steinberg Tr.* at 72:9-73:7; Ex. FF, *Thomas Tr.* at 76:23-77:2, 87:12-17, 143:21-144:4, 146:2-5; Ex. W, *Beren Tr.* at 249:11-18; Ex. AA, *N. Bodner Tr.* at 112:21-23; Ex. Q, *Feuer Tr.* at 62:18-21, 63:18-64:12, at 273:2-13, at 761:21-767:24; Ex. DD, *Kim Tr.* at 48:16-17, at 76:17-77:14, at 232:13-233:11; Ex. Y, *Saks Tr.* at 56:17-22, at 102:19-22, at 330:2-3, at 349:4-8; Ex. D, *SanFilippo Tr.*214:23-215:2)

97. Nordlicht and Huberfeld and Bodner occasionally offered advice to Beechwood, but no one at Beechwood had or felt an obligation to accept it. In fact, their advice was rejected on many occasions. (*Feuer Tr.* at 279:16-280:2, at 770:21-771:4, at 773:2-14, at 775:17-22, at 805:3-15; *Thomas Tr.* 189:20-190:6, at 325:3-8; *Saks Tr.* at 120:9-16, at 182:9-24, *Taylor Tr.* at 597:8-14) *Beren Tr.* 69-70 ; 75; 84-86; 159; 161; 164; 166; 194)) *Sweetin Tr.* 196:6-24

Golden Gate Oil, LLC

98. Golden Gate Oil, LLC ("Golden Gate") is a company that was formed for the purpose of acquiring and developing interests in certain oil and gas properties. Ex. GG, CTRL5549920 at 106.

99. During the relevant period, the Master Fund held approximately 48 percent of Golden Gate's outstanding Membership Units, as well as an option to purchase all outstanding Membership Units in the Company. (*Id.* at 106.)

100. On or about April 10, 2012, Golden Gate entered into a contract with Precious Capital, LLC ("Precious Capital"), for a $25.0 million Senior Secured Promissory Note. Ex GG, CTRL5549920 Appendix XIX at 1 Precious Capital was a subsidiary of the Master Fund. (Ex. P, CTRL6437953, at 32.)

101. Under the Senior Secured Promissory Note, Golden Gate Oil received an initial advance of $6.5 million and was entitled to subsequent advances as needed. At origination, the loan carried interest at a rate of 24.996% per annum, payable as 15% on the first business day of each month, and 9.996% per annum payable on the maturity date of April 10, 2015. (Ex. GG, CTRL5549920 Appendix XIX at 1)

102. As of December 31, 2013, Sterling Valuation Group, Inc. valued the Master Fund's 100 percent interest in the Membership Units in the range of $150,617,190 to $173,139,777. (Ex. GG, CTRL5549920 Appendix XIX at 5)

103. On February 26, 2014, Precious Capital sold to BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB all of its right, title and interest in the Senior Secured Promissory Note for 100% of the amount of outstanding principal and accrued interest of $21.8 million and $6.6 million, respectively, for a total purchase price of $28.4 million. BAM Admin served as collateral agent for BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB in connection with the transaction. (Ex. HH, Trott SAC, Exhibit 48.)

104. BAM, BAM II, BRILLC, BRE Holdings and BBIL were not parties to the deal. BAM II had not yet been formed until September 2014 and BBIL had not yet begun operating. (*See* Ex. HH, Trott SAC, Exhibit 48.)

105. To induce BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB to extend this credit to Golden Gate Oil, the Master Fund agreed to provide them with a put option that allowed BAM Admin, in the event of a default on the note, to require the Master Fund to repurchase the right, title, and interest held by BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB in the Senior Secured Promissory Note (the "Put"). (Ex. HH, Trott SAC, Exhibit 48, at § 8(a).)

106. As consideration for the Put, BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB agreed to pay the Master Fund a payment equal to 50% of the deferred interest at maturity. (Ex. HH, Trott SAC, Exhibit 48, at § 8(b).)

107. As of March 31, 2014, Sterling valued the Master Fund's 100 percent interest in the Membership Units in the range of $144,033,690 to $176,000,000. (Ex. II, CTRL5659829 Platinum Exhibit A)

108. The methodology for valuing the Master Fund's 100 percent interest in the Membership Units was the same both before and after Golden Gate transaction at issue — namely, the Master Fund performed an analysis of comparable companies and, based on this analysis, applied a range of Enterprise Value/PV-10 of reserves multiples to an adjusted PV-10 value of Golden Gate's reserves. Ex. II, CTRL5659829 Appendix XVIII at 4

109. This methodology is consistent with the market approach for valuing oil and gas companies that is set forth in the Offering Memoranda, which states that "[i]n addition to the typical valuation multiples (i.e. revenue, EBITDA), consideration will be given to the following acceptable valuation multiples in the Oil and Gas industry: ***Enterprise value to proven reserves***, proven barrels, etc." (Ex. H, Offering Memorandum, at 68.)

110. The price at which the Senior Secured Promissory Notes were purchased by BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB is irrelevant to this methodology. *See* Ex. II, CTRL5659829 Appendix XVIII at 4.

111. The Master Funds and both Feeder Funds disclosed the transaction as a Related Party Transaction in the Notes to its Consolidated Financial Statements for the Year Ended December 31, 2013. Specifically, they provided:

> On February 26, 2014, Beechwood Asset Management ("BAM"), a related party of the General Partner, purchased approximately $28 million of Golden Gate senior secured debt owned by Precious Capital, a majority-owned subsidiary of the Master Fund. The purchased amount included principal and interest. Precious Capital retained approximately $3.2 million of its debt and was appointed as BAM's "Agent" over the total debt facility to GGO. The Master fund sold and assigned the right, title and interest to an aggregate $21,805,500 of the principal amount the Note and $6,584,830 of interest, including deferred interest, due from Golden Gate. Ex. LL, CTRL7705170 Note 4 to Onshore Feeder Fund's Consolidated Financial Statements, Year Ended December 31, 2013, at 52; Note 4 to Offshore Feeder Fund's Consolidated Financial Statements, Year Ended December 31, 2013, at 57) Ex JJ, CTRL7705278

112. The Master Fund also disclosed the transaction as a Related Party Transaction in the Notes to its Consolidated Financial Statements for the Year Ended December 31, 2014. (Note 12 to Consolidated Financial Statements, Year Ended December 31, 2014 at 53., Ex MM.

113. Golden Gate was a performing asset that had value. (Ex. D, SanFilippo Tr. 341:9-23.)

Pedevco Corp.

114. Pedevco Corp. ("Pedevco") is a publicly-traded energy company engaged in the acquisition and development of strategic, high-growth energy projects, including shale oil and gas assets, in the U.S. and Asia. Ex. II, CTRL5659829 at 165

115. On March 7, 2014, Pedevco entered into a transaction with BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB, and RJ Credit LLC. RJ Credit is a subsidiary of the Master Fund. Ex. II, CTRL5659829 at 165

116. The transaction included: (a) a $34,500,000 loan to facilitate the purchase of approximately 28,000 net acres in Colorado; (b) the establishment of a $15,500,000 drilling facility for the development of the new acreage; and (c) the establishment of a joint venture with RJ Resources, a subsidiary of RJ Credit, for a 50% working interest on the project going forward. (Ex. NN, CTRL6053784; *see also* Ex. OO, CTRL5147098.)

117. The $34,500,000 loan was funded by BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB, and RJ Credit LLC through the issuance of Senior Secured Promissory Notes. These lenders contributed funds in the following amounts:

- BRE BCLIC Primary committed $11,800,000;
- BRE BCLIC SUB committed $423,530;
- BRE WNIC 2013 LTC Primary committed $17,522,941;
- BRE WNIC 2013 LTC SUB committed $803,529; and
- RJ Credit committed $3,950,000 CTRL5659829 at 166

118. BAM Admin served as collateral agent for BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB, and RJ Credit in connection with the transaction. (*See* Ex. PP, Trott SAC, Exhibit 49, at § 7.1.)

119. BAM, BAM II, BRILLC, BRE Holdings and BBIL were not parties to the deal. (*See* Ex. PP, Trott SAC, Exhibit 49.) BAM II had not yet been formed until September 2014 and BBIL had not yet begun operating. (Thomas Decl.)

120. As noted above, Pedevco used the loan proceeds to fund the "acquisition of an interest in 40 wells and approximately 28,000 net acres in the DJ Basin, Colorado from an independent U.S. oil and gas company." The acreage acquired in the Niobrara Shale Formation [was] located in Weld County, Colorado, including some acreage in the prolific Wattenberg Area." (Ex. NN, CTRL6053784; *see also* Ex. II, CTRL5659829.)

121. In connection with the transaction, the Master Fund received an "equity kicker," which the other lenders did not receive. As consideration for investing through the note and funding the drilling facility, the Master Fund received a "50% [working interest] in PEDEVCO's assets in the Niobrara, Mississippian, [and] Kazakhstan." (Ex. OO, CTRL5147098)

122. The "equity kicker" is described in Sterling's valuation report:

> As additional consideration for [RJ Credit] providing the loan described above and committing to fund subsequent Notes, RJ Resources ("RJR"),

> an affiliate of the Fund and a wholly owned subsidiary of [RJ Credit], acquired from Red Hawk Petroleum, LLC (i) an equal 50 percent 13,995 net acre position (out of approximately 27,900 total acres) in the assets acquired from Continental in March 2014 comprising oil and gas working interests in the Wattenberg and Wattenberg Extension in the DJ Basin, Colorado (the "Continental Assets"), (ii) 50 percent of the Company's pending interest in the Kazakhstan asset (the "Asia Sixth Assets"), and (iii) 50 percent of the Company's ownership interest in (a) Pacific Energy Development MSL, LLC, which holds the Mississippian Asset, thereby making RJR a 50 percent working interest partner with the Company in the development of the Wattenberg Asset, (b) the Kazakhstan Asset, which the Company is in the process of acquiring, and (c) the Mississippian Asset, allowing the Company to undertake a more aggressive drilling and development program in 2014 and beyond (the "Mississippian Assets" and, together with the Continental Assets and the Asia Sixth Assets, the "Equity Interest").

(Ex. II, CTRL5659829 at 165-166)

123. As Pedevco explained in the press release announcing the deal:

> In order to finance the acquisition and provide the Company with sufficient capital to immediately commence a meaningful development program covering this new acreage, the Company entered into a 3-year term debt facility with RJ Resources, a subsidiary of a NY-based investment management group with more than $1.3 billion in assets under management specializing in resource investments. As part of the transaction, RJ Resources, will be a 50% working interest partner with the Company in the development of its assets going forward, allowing the Company to undertake a more aggressive drilling program, in 2014. As a result, the Company has an interest in 14,000 net acres after closing. The Company has drawn down $34.5 million of a $50 million dollar debt facility, and can draw down the remaining $15.5 million for drilling capital to develop this new acreage.(Ex. NN, CTRL6053784.)

124. BRE BCLIC Primary, BRE BCLIC SUB, BRE WNIC 2013 LTC Primary, BRE WNIC 2013 LTC SUB—which lent the vast majority of the money used to purchase the Colorado, and which did not receive an equity kicker—instead received a first position lien on all assets of the company. *Id*.

125. In 2015 and 2016, the price of oil fell from $140 to $40. (Ex., QQ, Narain Tr. 79:19-80:8.)

126. The price of oil falling from $140 to $40 put pressure on oil and gas companies everywhere and created liquidity issues. (*Id*.)

127. PEDEVCO was one such oil and gas company, and, in January 2016, PEDEVCO requested a standstill from its lenders. (Ex. QQ, Narain Tr. 51:5-12.)

128. The PEDEVCO loan was restructured in 2016 and, after the restructuring it was paying interest and performing. (Ex. QQ, Narain Tr. 262:4-13; 443:3-6)

Implant Sciences Corp.

129. Implant Sciences Corp., together with its subsidiaries, develops, manufactures, and sells technology being developed by the company for use in trace explosives detection. [Ex. RR, Sterling]

130. The Master Fund, through its subsidiary DMRJ Group LLC, begin investing in Implant in December 2008. By 2014, the Master Fund had invested in a series of senior secured notes, a convertible note, and a revolving loan. The Master Fund also held certain warrants to purchase the company's common stock. [Ex. RR, Sterling]

131. On March 19, 2014, the Master Fund refinanced. Implant issued a $20 million Senior Secured Promissory Note, bearing interest at 15% per annum, with a stated maturity date of March 31, 2015. [Ex. SS, Notes, Ex. TT, Implant 8-K]

132. Implant used all of the proceeds from the Senior Secured Promissory Note to repay $20 million of its outstanding indebtedness to DMRJ, thereby replenishing Implant's borrowing capacity under its revolving note with DMRJ. [*See* Ex. LL, CTRL7705170 at 55]

133. To induce BAM Admin to enter into the Senior Secured Promissory Note, DMRJ and BAM Admin entered into an Intercreditor Agreement. [*See* Ex. UU, Trott Sac Ex. 50]

134. The Master Fund and both Feeder Funds disclosed the transaction as a Related Party Transaction in the Notes to their Consolidated Financial Statements for the Year Ended December 31, 2013. [*See e.g.* Ex. LL, CTRL7705170 at 55]

135. Specifically, they provided:

> On March 19, 2014. Implant Sciences entered into a note purchase agreement with BAM pursuant to which the company issued senior secured promissory notes in the aggregate principal amount of $20,000,000. The notes bear interest at 15% per annum and mature on March 31, 2015. The company used all of the proceeds from the sale of the notes to repay (i) $17,624,000 of indebtedness to a majority owned subsidiary of the Master Fund under the amended and restated revolving promissory note (ii) $1,809,000 of interest outstanding under that facility, and (iii) $567,000 of interest outstanding under the senior secured convertible promissory note. Ex. LL, CTRL7705170 at 55

136. Between March 19, 2014 and December 31, 2015, Implant paid interest on the BAM notes by using the DMRJ credit line. [*See* Ex. UU, Trott Sac Ex. 50] Implant reported in its public filings that it required additional capital to fund operations, and that there was no

assurance that DMRJ would continue to make advances under its revolving line of credit. (See e.g., Ex. VV, Form 10-Q, 12/31/15]

Black Elk, Northstar GOM Holdings Group LLC, and Montsant

Black Elk was a Houston-based oil and natural gas company engaged in the exploration, development, production and exploration of oil and natural gas properties. [Audited Financials] Ex. LL, CTRL7705170 ; Ex. JJ, CTRL7705278

137. As of December 31, 2013, the Master Fund had investments in Black Elk consisting of both common and preferred unites, notes receivable and participation securities. The Master Fund owned approximately 75% of Black Elk's common equity. Id.

138. Black Elk had outstanding 13.75% Senior Secured Notes. (*Id.*)

139. The interest rates on the Notes was 13.75%. (*Id.*)

140. Black Elk also issued preferred equity. (*Id.*)

141. One class of preferred equity was Black Elk Series E preferred equity. (*Id.*)

142. The Black Elk Series E preferred equity accrued interest at a rate of 20%—higher than the 13.75% rate on the Notes. (*Id.*)

143. The Master held Black Elk bonds, had preferred shares in Black Elk, and held equity interest in Black Elk. (Ex. D, SanFilippo Tr. 352:3-7.)

144. The Master Fund sold more than 52 million shares of Black Elk Series E preferred equity at a price of $1.00 per share during 2013. In connection with those sales, the Master Fund provided purchasers with a put option to repurchase all of the shares for an aggregate repurchase price of $1.00 per share. *Id*.

145. The Master Fund's audited financials identify BAM as a related party of the General Partner and expressly disclose that:

> During 2014, the Master Fund sold short [Black Elk] corporate bonds with an aggregate face value of $24,987,000 to BAM for total proceeds of $24,497,130. The prices of the short sales ranged from $96 to $99. The securities were borrowed from PPBE in order to effectuate the short sale transaction.

Ex. LL, CTRL7705170; Ex. JJ, CTRL7705278 (Note 5 to Offshore Feeder Fund's Consolidated Financial Statements, Year Ended December 31, 2013, at 53; Note 5 to Offshore Feeder Fund's Consolidated Financial Statements, Year Ended December 31, 2013, at 58.)

146. The Master Fund did, in fact, borrow Black Elk notes from PPBE and sell them short to BAM at prices close to par. Id.

147. Nordlicht viewed paying back the Black Elk Series E preferred equity holders as an existential issue for the Master Fund. Ex. HHHH, CTRL6126026 ("This is also the week I need to figure out how to restructure and raise money to pay back 110 million of preferred which if unsuccessful, wd be the end of the fund.")

148. At the time of the Renaissance Sale, Feuer or Taylor were: (1) not aware that BAM clients had purchased Black Elk bonds from the Master Fund; (2) did not know anything about Black Elk's operations, including the Renaissance Sale; (3) did not know about the consent solicitation; (4) did not know how BAM's clients voted or intended to vote on the consent solicitation; (5) did not know how Black Elk planned to use the proceeds of the Renaissance Sale; or (6) did not know how the Master Fund distributed the proceeds of the Renaissance Sale. Ex. R, Taylor Tr. 397:21-22; 398:2-5; 399:3-10; 402:22-24; 403:18-20; 404:6-7; 405:21-24; 407:13-15 and Ex. Q, Feuer Tr. 33:11-12, 565:4-11, 568:23-25; 569:4; 570:8-13; 576; 577:7-18; 578:9, 22-25; 579:2-10; 587:15-25; 588-590; 610.

149. Feuer or Taylor did not play any part in purchasing Black Elk bonds from the Master Fund, voting in the consent solicitation, or distributing the proceeds of the Renaissance Sale. Ex. X, Trott:609-615

150. Northstar GOM Holdings Group LLC ("Northstar Holdings") was an oil and gas exploration and production company headquartered in Houston, Texas. It was a wholly-owned subsidiary of Platinum Partners Value Arbitrage Oil & Gas LLC and, as such, an indirect subsidiary of the Master Fund. [Ex. XX, D&P]

151. Northstar Holdings was formed in June 2014 to complete the acquisition of Northstar Offshore Group, LLC ("Northstar Offshore") from prior private equity owners. [Ex XX, D&P]

152. In June 2014, the price of a barrel of oil was $102 to $106 per barrel. [https://markets.businessinsider.com/commodities/oil-price?type=wti]

153. According to Mark Nordlicht, Northstar Offshore was an attractive acquisition target because it had significant reserves in the Gulf of Mexico and a strong management team. There were substantial synergies with the Master Fund's existing oil and gas holdings. (Ex. L, CTRL PPCO 000004, 07)

154. According to Nordlicht, purchasing Northstar as part of an effort to replace some of the offshore reserves that had been divested during the Renaissance Sale, to consolidate the Master Fund's oil and gas holdings, and to upgrade the team that was managing the Master Fund's oil and gas holdings. (Ex. L, CTRL PPCO 000004, 07)

155. To complete the Northstar Offshore transaction, in September 2014, Northstar Holdings issued $80 million of the second-priority senior secured notes, which paid interest at a rate of 12%. [YY, Ex. 66 to SAC; Docket Entry 285-5)

156. In September 2014, the price of a barrel of oil was $91 to $95 per barrel. [https://markets.businessinsider.com/commodities/oil-price?type=wti]

157. BRE WNIC 2013 LTIC Primary and SHIP participated in this financing by funding 62.5% of the loan through a principal contribution of $50 million. [Ex. XX, D&P]

158. To induce BRE WNIC 2013 LTIC Primary and SHIP to purchase $50 million of second-priority senior secured notes, Principal Growth Strategies, LLC, the Platinum Partners Credit Opportunities Master Fund, L.P. ("PPCO"), and Agera Holdings, LLC entered into a Note and Equity Pledge Agreement through which they pledged certain equity interests in Agera as additional collateral for the investment. [*See* Ex. ZZ, Securities Purchase and Put Agreement, CTRL7035009, at 1.]

159. At the time, Agera was a company that had just been purchased out of bankruptcy.

160. At or around the same time, the Master Fund purchased from Northstar Holdings $30 million in principal of the second-priority senior secured notes, *i.e.*, the balance of the Northstar Offshore issuance. [*See* Ex. ZZ, Securities Purchase and Put Agreement, CTRL7035009, at 1.]

161. The Master Fund then entered into a Securities Purchase and Put Agreement, through which it sold to New Mountain Finance Holdings Ltd. the $30 million second-priority senior secured notes that it had purchased from Northstar Holdings. [*See Id*.]

162. To induce New Mountain to enter into the agreement to purchase $30 million of second-priority senior secured notes, the Master Fund agreed to provide New Mountain with an option to require the Master Fund to repurchase from New Mountain all of the second-priority senior secured notes being purchased (the "Put Option"). [*See* Id.*]*

163. As stated in Securities Purchase and Put Agreement, New Mountain "would not enter into [the] Agreement without the protections afforded by, among other things, the Put Option. [*See* Ex. ZZ, Securities Purchase and Put Agreement, CTRL7035009, at 2.]

164. In August 2016, the price of a barrel of oil was $39 to $48 per barrel. [https://markets.businessinsider.com/commodities/oil-price?type=wti]

165. The loan provided a subsidiary of the Master Fund with $50 million to purchase an oil and gas company with oil reserves in the Gulf of Mexico and a strong management team. (Ex. L, CTRL PPCO 000004, at 30:10-31:15, 45-46.)

166. The lien on Agera was ultimately extinguished as part of the consideration exchanged during the March 2016 restructuring—something that was specially requested by Platinum. See, Ex. AAA, CTRL7622245; Ex. BBB, CTRL8246010.

167. Following the Northstar acquisition, Nordlicht wanted to consolidate the Master Fund's offshore oil and gas assets under Northstar and needed to purchase 13.75% Senior Secured Notes in order to effectuate the transaction. (Ex. CCC, CTRL4961343, Ex. DDD, CTRL4971389, Ex. EEE, CTRL4971425, Ex. FFF, CTRL5011186, Ex. GGG, CTRL5691730, Ex. HHH, CTRL5721850, Ex. III, CTRL5734796, Ex. JJJ, CTRL5765034, Ex. KKK, CTRL7684839, Ex. LLL, CTRL6415594.)

168. Using 13.75% Senior Secured Notes was necessary because the assets that were being sold to Northstar were subject to the Black Elk bond Indenture. (Ex. MMM, CTRL7410595, at 1.)

169. Pursuant to § 4.10(a)(2) of the Indenture at least 75% of consideration received by Black Elk in connection with an asset sale needed to be in the form of "Cash" or "Additional Assets." (Ex. MMM, CTRL7410595, at 1.)

170. The definition of Cash under the indenture included "Liabilities assumed by a transferee pursuant to a customary novation agreement that releases the company from further liability." (Ex. MMM, CTRL7410595, at 1.)

171. Black Elk's position was that transferring the 13.75% Senior Secured Notes and then retiring them would fit within this definition of Cash. (Ex. MMM, CTRL7410595, at 6; see also Ex. NNN, CTRL7684837.)

172. BAM's clients owned a large block of bonds, which allowed them to negotiate a slight premium when the bonds were repurchased. (*See* Ex. OOO, BW-SHIP-00730322.)

173. Platinum did not enter into the Montsant loan for the purpose of buying back the Black Elk bonds. Ex. D, (SanFilippo Tr. 355:2:5.)

174. There is no evidence that Beechwood knew how the Master Fund planned to use the $35.5 million. Ex. R, Taylor Tr. 390:22-392:6.

175. Montsant has not paid back a single cent on the loan. Ex. X, Trott.709

176. Montsant has not distributed any collateral. Ex. X, Trott 304-306

177. SanFilippo testified on behalf of Platinum that "Beechwood provided a benefit to Montsant and Montsant, in turn, gave them additional collateral." (Ex. D, SanFilippo Tr. 338:13-15.)

Nordlicht Side Letter

178. By December 2015, Implant had maxed out its DMRJ credit line and reported that it had cash and cash equivalents of $776,000 – less than half of what was necessary to pay the outstanding interest on the notes. Ex. VV, 10Q

179. The Master Fund was experiencing major liquidity issues. (Ex., IIII, CTRL8009309; Ex. D, SanFilippo Tr. 382:6:10)

180. If BAM Admin allowed Implant to default on the notes, it would give BAM Admin right the right to enforce its remedies under the BAM Notes and Intercreditor Agreement, which included potentially forcing a sale of Implant's assets. Ex., PPP, Trott. SAC Ex. 75

181. To avoid this, BAM required that any proceeds PPVA/DMRJ received from a sale of Implant's assets or equity be remitted to BAM in such amount necessary to satisfy Golden Gate's indebtedness to BAM. (*See* Ex. PPP, Trott Sac Ex. 75; Ex. Q, Feuer Tr. 213:22-214:3)

182. On January 13, 2016, Nordlicht wrote to colleagues, "tomorrow is a crisis…I need the team to be at beechwood first thing in the morning…I am not asking anyone to take responsibility…I just need my money freed up so we can save both businesses." *Id.*

183. Steinberg and Katz testified that Nordlicht was counting on being able to monetize Implant to address part of the Master Fund's liquidity concerns.

184. This cross-collateralization deal was memorialized on January 13, 2016 when Nordlicht signed a one-page pledge agreement, which the Liquidators have referred to in the SAC as the Nordlicht Side Letter. Ex. PPP, Trott. SAC Ex. 75

185. Feuer testified that the Nordlicht Side Letter was a "memorialization of an agreement that [he] reached with Mr. Nordlicht, in [his] office around … January 13, 2016." (Ex. Q, Feuer Tr. 213:17-20.)

186. Feuer testified that "Nordlicht came over to my office, which was very unusual, and suggested that he wasn't going to leave until he could convince me not to default on a company called Implant Sciences" and that the Nordlicht Side Letter was executed in furtherance of Nordlicht's effort to avoid a default. (Ex. Q, Feuer Tr. 213:22-214:3.)

187. Feuer testified that "Nordlicht … said he was not going to leave until he got my assurance that I wasn't going to default on Implant Sciences." (Ex. Q, Feuer Tr. 628:7-13.)

188. Feuer testified that the Nordlicht Side Letter is "a document in which I didn't default on a loan that I was going to, and this is what we got in return for me not defaulting on that loan. (Ex. Q, Feuer Tr. 628:16-20.)

189. Pursuant to the Note Sale Agreement, dated February 26, 2014, in the event of a Golden Gate default, BAM Admin had the right to put Golden Gate back to the Master Fund at an amount equal to the outstanding principal plus any accrued and unpaid interest. (Note, at § 8(a).) Ex. HH, SAC Exhibit 48.

190. Pursuant to the Note Sale Agreement, dated February 26, 2014, in the event of a Golden Gate default, BAM Admin had the right to enforce its rights against Platinum under the contract guarantee (*Id*., at § 9).)

191. The Master Fund has not paid BAM Admin or Beechwood's investor clients any money pursuant to the terms of the Nordlicht side letter.

192. On October 10, 2016, Implant and certain of its affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Delaware Bankruptcy Court, Case No. 1:16-bk- 12338; 12239, 12240, 12241; Dkt. No. 1

193. On June 5, 2017, the Delaware Bankruptcy Court entered an order permitting DMRJ to receive $55 million from the Implant debtors in satisfaction of the claims of DMRJ and Montsant. Delaware Bankruptcy Court, Case No. 1:16-bk- 12338; Docket Entry 752.

March 2016 Restructuring and Master Security Guaranty

194. By 2016, PPVA's investment portfolio had grown increasingly "unbalanced" with a growing concentration of illiquid, private-equity-style investments. As a result, the fund tried to clean up their balance sheet; restructure various loans with Beechwood to reduce interest rates, defer interest payments, extend maturities, release encumbrances on certain assets, and sell certain companies in an effort to increase liquidity, attract new investors, and prolong the life of the fund. Ex. Z, Steinberg Tr. 363:19-365:4

195. The March 2016 restructuring was an effort to address the Master Fund's liquidity issues and keep the fund alive. Ex. Z, Steinberg Tr. 361:9-17; 361:9-17; 368:22-369:13.

196. To ease the pressure on the Master Fund, Platinum Management sought to reduce interest rates, to defer interest payments, to eliminate certain encumbrances, and to clean up the Master Fund's balance sheet. Ex. Z, Steinberg Tr. 358-359

197. Whereas things like interest rate reduction and deferred interest payments provided short term liquidity relief, the elimination of encumbrances on companies like Agera were designed to allow the Master Fund to go out and borrow money, and balance sheet cleanup was designed to attract investors into a new management share class. *Id*.

198. Nordlicht hoped that by bringing in new investors he could rebalance the portfolio, which would make the Master Fund more sustainable. *Id*.

199. The Master Fund received a number of tangible benefits via the March 2016 restructuring.

200. Among other things, the lien on the Master Fund's interest in Agera was released; Northstar debt, which had a high monthly interest rate, was exchanged for PPCO debt, which paid interest in kind; interest rates on the Golden Gate and Montsant loans were lowered substantially; the maturity dates on the Golden Gate and Montsant loans were extended; BAM returned certain Navidea shares to the Master Fund; the Master Fund negotiated the right to remove certain Implant loans from the Montsant collateral account; and BAM agreed to release $2.3 million in collateral it was holding against timely interest payments. Ex. RRR, CTRL8246012

201. Steinberg testified that, through the restructuring, the Master Fund "wanted to reduce the interest payments that it would have to make. So … there was an interest rate reduction in terms of the actual rate that it was going to apply to some of these notes; and, also, there was going to be a deferral period when the interest was just going to accrue for a certain period of time." (Ex. Z, Steinberg Tr. 358:7-14.)

202. Steinberg testified that this interest rate reduction was "part of … this plan that Nordlicht had of somewhat cleaning up the Platinum balance sheet. He was working very hard

towards raising money as part of this management share class, which I don't know if it's been discussed in this litigation before – but he was trying to raise money by selling a piece of the management company." (Ex. Z, Steinberg Tr. 358:15-359:2.)

203. Steinberg testified that it seemed to him that "there were actually a couple of serious suitors for [the management share class]. There was some – one party particularly – I forgot his name – that seemed to be spending a lot of money on his side in terms of having lawyers and accountants to do due diligence on Platinum." (Ex. Z, Steinberg Tr. 359:3-14.)

204. Steinberg testified that, among other things, the restructuring "reduced interest rates," "deferred interest payments," and "freed up Agera from its encumbrances." (Ex. Z, Steinberg Tr. 360:2-8.)

205. Steinberg testified that "having the interest rate[s] reduced and deferring the interest payments and some other benefit that PPVA and PPCO got out of the transaction would help them in furthering this objective," *i.e.*, raising money through a new management share class. (Steinberg Tr. 359:10-14.)

206. Steinberg testified that liquidity from the new management share class would have gone to the Master Fund: "The money would have gone into – what I understood was that the investors' money would have gone in as a limited partner into the fund …. But because he had invested such a large [amount of] money in that period of time, he would have also been granted a piece of the management company." (Ex. Z, Steinberg Tr. 391:10-19.)

207. Steinberg testified that Nordlicht "had two objectives, really, in what he was trying to accomplish with his management share class, as least as far as I understood it …. One was obviously for current liquidity, but [he] also very much wanted to put the fund back into – what he called back into balance, which was having a significant liquid portfolio." (Ex. Z, Steinberg Tr. 361:9-17.)

208. Steinberg testified that when he joined Platinum "a significant amount of the AUM was dedicated towards liquid trading strategies" and that "[Nordlicht] wanted to get back to that balance where part of the funds['] AUM would still be in level three …. He felt he was strong in level three, but also part of it would be level one assets." (Ex. Z, Steinberg Tr. 361:18-362:8)

209. With respect to rebalancing the Master Fund's portfolio, Steinberg testified "[t]hat's – that's what his – that's what he needed. That's where he knew he needed to get to – for the fund to, in his mind, be successful again." (Ex. Z, Steinberg Tr. 362:8-11.)

210. Steinberg testified that his understanding was that rebalancing the Master Fund's portfolio would make the funds more sustainable." (Ex. Z, Steinberg Tr. 364:25-365:4.)

211. Steinberg testified that "Platinum was structured as a traditional hedge fund, which allows redemptions on some kind of notice period. And the liquidity profile of the assets that it held did not match those redemption terms. And that is something that's not sustainable long-term. (Ex. Z, Steinberg Tr. 363:22-364:4)

212. Steinberg testified that Nordlicht did not think that adopting a private equity model "was a viable structure for his investors, and he didn't want to start from scratch again; so he figured: 'My best bet here is to bring in cash that I could start up my liquid book again, and then my liquidity terms to investors would be more aligned with the liquidity profile of [the] assets. (Ex. Z, Steinberg Tr. 364:14-22)

213. Steinberg explained that the restructuring was, therefore, "a classic asset-liability matching exercise." (Ex. Z, Steinberg Tr. 364:23-24.)

214. Steinberg testified that the restructuring "reduced interest" and "took away the encumbrances on Agera at that time, which there was the collateral enhancement in favor of Beechwood or whoever the – whichever trust or underlying insurance company held [it]." (Ex. Z, Steinberg Tr. 360:2-8.)

215. Steinberg also testified that "the Northstar Note had, like, a collateral enhancement against PGS's ownership of Agera. And so there was a bunch of pieces that he needed to be cleaned up so [Nordlicht] could go out and raise money." (Ex. Z, Steinberg Tr. 360:25-361:3.)

216. Steinberg testified that "the biggest negating factor why [the rebalancing] never came to fruition was, in my opinion, because [Nordlicht] wasn't able to raise the management share class." (Ex. Z, Steinberg Tr. 391:3-6.)

Agera Sale

217. David Steinberg negotiated the Agera Sale on behalf of Platinum. (Ex. D, SanFilippo Tr. 270:21-25; 276:24-277:2; 301:6-9.)

218. Platinum valued Agera at approximately $200 million at the time of the Agera Sale. (Ex. D, SanFilippo Tr. 271:2-5.)

219. The purchase price for the Agera Sale was $170 million. Ex. SSS, SHIP0036135 at Section 2.4

220. The purchase price reflected 95% of: enterprise value ($208 million) minus debt of Agera Holdings LLC and each of its direct and indirect subsidiaries plus cash on the consolidated balance sheet of the Agera Group. See Ex. TTT, April 1, 2016 Re-Purchase Agreement, Annex B]

221. On March 2, 2016 Steinberg emailed Nordlicht that he was "at Beechwood now asking for $20mm for prime." Ex. UUU, CTRL8296461.

222. The Master Fund needed to borrow money for a margin call. Ex. QQ, Narain Tr. 91:12-23; 94:19-25

223. On March 2, 2016, Thomas emailed "a draft assignment of note and liens (with repurchase right) in respect of the Agera-PGS convertible note." Ex. VVV, CTRL8298985

224. On March 2, 2016, Steinberg summarized the transaction: "repo agreement. BAM gives us $20mm and we are assigning them the convertible notes we own in Agera Holdings. We have 10 days to buy the convertible notes back from BAM for $20.2mm. If we fail to repurchase within 10 days. They get to keep the convertible notes." Ex. VVV, CTRL8298985

225. On March 3, 2016, Thomas emailed executed copies of the assignment of notes and liens.Ex. WWW, BW-SHIP-00170477

226. B Asset Manager sent Platinum $20 million upon execution of the assignment of notes and liens. Ex. XXX, BW-SHIP-00170485

227. Platinum repurchased the convertible notes within 10 days.

228. On March 13, 2016, Katz emailed Nordlicht to "share some thoughts on Agera and a potential sale to an insider." (Ex. YYY, CTRL8328958.)

229. Katz testified that by "insider" he meant "some[one] from the industry that understands the industry" and by industry he meant "the retail energy industry … which is a very specific industry." Ex. ZZZ, (Katz Tr. 102:14-23.)

230. In his March 13, 2016 email, Katz explained that macro-economic trends in the retail energy market favored selling Agera in the short term. (Ex. YYY, CTRL8328958.)

231. In his March 13, 2016 email, Katz raised certain issues with the Master Fund's alternate exit strategies, including the following: (1) an initial public offering, even one at a higher multiple, would not "generate a full liquidity event," leaving the Master Fund "cash … strapped for some time; cash that could be put into much higher multiple opportunities; (2) the market would require Agera to bring in a new CEO and finding one who could "successfully work with Kevin [Cassidy]" would take time and would be "slow and painful to implement"; and (3) there were likely to be changes in the marketplace over a longer time horizon that would make it harder to sell Agera. (Ex. YYY, CTRL8328958.)

232. In his March 13, 2016 email, Katz explained that, in his view, Nordlicht could replace the potential upside from Agera with new investments in the oil and gas sector:

[E]ven in the best case scenario the amount of money potentially left on the table with a sale of Agera today (let's say 2-3X more than the current valuation) is significantly lower than any potential upside in heavily re-investing the proceeds from the sale of Agera into the Oil&Gas sector (+5-10x). This sector represents the greatest opportunity in a generation, a smart play can return the entire fund(s) several times over. Having insider knowledge and expertise in the oil & gas sector increases the handicap for success.

233. In his March 13, 2016 email, Katz summarized the benefits of selling Agera in the short term to a strategic buyer who was capable of acting quickly. (Ex. YYY, CTRL8328958.) "To summarize," he wrote, "a sale today to the strategic would:

- Bypass market headwinds that are around the corner

- Have a clean and full liquidity event now, bypassing complexities of a future exit with either an IPO, or with an unhealthy sector that will struggle to purchase an asset of that size
- Capitalize on an insider's willingness to purchase now
- Solve together with the sale of Implants our liquidity problem
- Create an amazing marketing story now that can help us push (alongside the reforms we've discussed) in building the AUM asp
- Free up cash to re-invest in the oil & gas sector which is a much higher multiple potential upside opportunity today than the energy retail sector

234. Katz testified that the Master Fund needed "a buyer that could – they could buy this asset in a relatively short time because this is driven by the liquidity crisis. So you know, generate cash. This is just 101 look at what you could sell and try and sell it. So this is an area I more or less understood, so that's why I was advocating for it." (Ex. ZZZ, Katz Tr. 107:18-108:2.)

235. Katz testified that, as of March 2016, he knew that PPVA was in distress and lacked liquidity. (Katz Tr. 223:11-14.) He also testified that "there were investments that came through the door, but they didn't really have money until they had a liquidity event." (Ex. ZZZ, Katz Tr. 227:5-10.)

236. Katz testified that "it made sense for Platinum to divest [itself] of assets so they could generate liquidity and reinvest and pay the redemptions. That's it. It's that simple." (Ex. ZZZ, Katz Tr. 178:19-22)

237. Katz testified that he wanted to see Platinum survive. (Ex. ZZZ, Katz Tr. 250:11-12) ("Absolutely.")

238. Katz testified that he was providing this advice to Nordlicht:

As part of my oversight and the commitment of or what I understood to be the commitment from Platinum to have open book and full transparency on the state of affairs of the various assets, they welcomed my kind of scrutiny and opinions and they were also seeking additional investment from my grandfather as part of that. So I was looking and expressing my opinion. So this was my opinion on Agera. (Ex. ZZZ, Katz Tr. 224:20-225:5.)

239. Steinberg testified that, at or around this time, that Nordlicht "was trying to recapitalize Platinum's balance sheet" and "was focused very much on bringing liquidity and un-encumbering the balance sheet." And that this effort included raising money from investors. (Ex. Z, Steinberg Tr. 163:7-23.)

240. On March 21, 2016, Mark Nordlicht sent an email to various Beechwood employees and investors, including Katz. (Ex. AAAA, CTRL7754044.) In the email, he referenced certain near-term liquidity events and his desire to attract new investors:

It has been a long run but we are nearing the end of the placement of our management share class and are also very close to disposing of Implant. Those two alone will over the next few months get us very close to our long term goals but to be healthy, we really need marketing team to deliver on attracting new investors so we can now take advantage of opportunities which

are plentiful to us after having been playing defense for so long. IT IS TIME TO START PLAYING OFFENSE. I hope each and every person in marketing group can work collaboratively, brainstorm and take initiatives to bring in significant new capital into the firm."

We have some great products to sell. They are unique and despite all the stress of last 9 months, we should remind ourselves we are offering unique, non correlated products that investors really cant find elsewhere. I want to thank entire marketing group for their patience thus far and for all the hand holding that will be required over the next few months as we await implant proceeds.

241. In his March 21, 2016 email, Nordlicht also introduced Katz:

I also want to take this opportunity to introduce Michael Katz who is long term investor in Fund as an LP and now part of the family with an interest in the GP. Michael is very interested in rebranding our image, improving our infrastructure, and helping craft marketing strategies going forward. Please take the time to meet him if you haven't already and share ideas as to how we can make the firm better.

242. In his March 21, 2016 email, Nordlicht also described the recently-restructured Master Fund:

PPVA- Now new and improved, back to the strategy mix that produced 17 percent annualized over a 13 year track record. We obviously left strong positions in vehicle that would travel with the track record and after taking in 100 m of 3 yr locked money, we are now poised to deliver very healthy risk adjusted returns. There are no funds I know [out] there with our track record. Yes, side pocket is challenge but keep in mind, all the investments in side pocket came from gains, are well positioned to bring more gains going forward, and were acquired for little to no value. Going forward, we have great mix of liquid strategies along with equity optionality. One possible initiative we [should] pursue is white label program.

243. On March 21, 2016, Katz responded to Nordlicht's email and told him that he had "[a]lready started meeting with the team," and that he "should have a short term plan (parallel to the long term plan) ready in the coming days." (Ex. BBBB, CTRL7754665)

244. On March 27, 2016, Nordlicht emailed Katz about the aforementioned plan, "which include[d] potentially selling agera besides implant and setting up [debt] facility besides so we have war chest. In this scenario we would really clean everything up. I am very excited." Ex. CCCC, CTRL7772338

245. In his March 13, 2016 email, Nordlicht wrote, "I was reluctant on agera at first but I have idea how to replace that upside in the fund and the liquidity is just too transformative for us to ignore. I also recognize your point on the right time in 'cycle' to exit and it appear we might get [satisfactory] type of bid from a beechwood led consortium."

246. Katz testified that he understood Nordlicht to mean that he was "going to turn things around [at the Master Fund] . . . he's going to sell assets, he's going to bring in capital. That's what he's saying." (Ex. ZZZ, Katz Tr. 119:5-11.)

247. Steinberg testified that, as part of Nordlicht's effort to raise capital, he "wanted to bring in hundreds of millions of dollars of cash that would have been liquidity, whether from investors, selling investments, and then un-encumber[ing] the balance sheet. And that's how he felt the path forward for the fund would be." (Ex. Z, Steinberg Tr. 163:7-23.)

248. Steinberg testified that "getting cash from the Agera sale … would have fulfilled one of the objectives" and that "getting debt reduction would have been the other objective." He explained that "Platinum owed various Beechwood-related parties money. And so the $70 million, $80 million of noncash consideration we, the Platinum side, wanted to go to reduce the balance of that debt." (Ex. Z, Steinberg Tr. 163:25-164:9.)

249. Regarding the noncash consideration for the Agera transaction, Steinberg testified that Platinum "took money from Beechwood" and "owed it back to Beechwood. [P]art of this transaction was to reduce that debt." (Ex. Z, Steinberg Tr. 166:25-167:7.)

250. Steinberg testified regarding the value of the noncash consideration. Regarding the China Horizon notes Steinberg testified that he "may have understood at the time that China Horizon was still a business, a viable business -- although China Post wasn't willing to continue its relationship into new stores, but the existing stores, and there were like 200 or 300 of them, would still be in existence …." (Ex. Z, Steinberg Tr. 248:15-249:12.)

251. Regarding the Golden Gates notes Steinberg testified that, in his opinion, "[i]t's very possible that the notes could have been repaid. I mean, you're talking about something that, as far as I recall, had reserve reports of, like, $800 million or something like that. So I would think that $30 million is plausible. . . ." (Ex. Z, Steinberg Tr. 259:12-25.)

252. Steinberg testified that liquidity situation at the Master Fund in May 2016 created a sense of urgency surrounding the Agera transaction: "[T]he urgency towards closing Agera, for sure what I knew and based on what I actually knew to be occurring at PPVA at the time, was liquidity-based. (Ex. Z, Steinberg Tr. 170:20-171:7.)

253. Steinberg testified that "Platinum was getting margin calls on a daily basis for significant amounts of money" and that Nordlicht had called him and said, 'You need to get Agera to close as fast as possible. We can't wait until August to get this money. We need to close as quickly as possible.'" (Steinberg Tr. 171:3-7.)

254. Steinberg testified that Agera was sold "out of necessity," explaining that Platinum "needed to sell Agera to generate the cash. And so when you're selling something in a distressed state, you know, you're not going to get 100 percent of what you thought you were going to get when -- before you started the sales process." (Ex. Z, Steinberg Tr. 200:5-201:5.)

255. Feuer described the negotiation and "very tough." Ex. Q, Feuer Tr. 648:4-13

256. On April 1, 2016, during the next turn of the Assignment of Notes and Liens, Steinberg struck the language "as selected by such Purchasers in their sole discretion[]." Ex. DDDD, BW-SHIP-00763011, Ex. EEEE, BW-SHIP-00763012, at 6.

257. Later that same day, Thomas sent an email to Steinberg, which included Steinberg's deletion. Ex. FFFF, BW-SHIP-01219005, at 6

258. The Assignment of Note and Liens, dated April 1, 2016, Ex. JJJJ, identified the purchase price for the Agera transaction:

A purchase price equal to the product of (i) (a) the enterprise value of Agera Holdings LLC of US$208,400,000 less (b) all indebtedness of Agera Holdings LLC and each of its direct and indirect subsidiaries (collectively, the "Agera Group") plus (c) all cash on the consolidated balance sheet of the Agera Group multiplied by (ii) 0.95 (the "Purchase Price")

259. Thomas testified he would look to the Assignment of Notes and Liens regarding the method for calculating value. Ex. FF, Thomas Tr. 258-262

260. The Assignment of Note and Liens, dated April 1, 2016, stated that noncash consideration would be calculated using the "aggregate face value" of $90 million. Ex. JJJJ.

261. Steinberg testified that "[Platinum] needed to transact. The transaction needed to occur …. Platinum needed to transact. That's how Mark felt … he needed to transact at that price." (Ex. Z, Steinberg Tr. 268:17-269:3.)

262. Steinberg testified, "I don't think [Nordlicht] would have sold Agera had it not been for the liquidity problem." (Ex. Z, Steinberg Tr. 200:5-201:5.)

263. Steinberg testified that liquidity situation at the Master Fund in June 2016 created a sense of urgency surrounding the Agera transaction: I recall that … from Platinum's side, there was an urgency to make sure the transaction stays on track …. Because Platinum needed the liquidity … we were expecting whatever was left of the liquidity. It was only 20, 30 million dollars that was left from the $55 million we were going to get. Platinum needed it, and they were depending on that cash coming from this transaction …." (Ex. Z, Steinberg Tr. 215:21-216:10.)

264. The Agera transaction was done for liquidity. (Ex. Z, SanFilippo Tr. 323:21-24.)

265. SanFilippo testified on behalf of Platinum Management that "we were in desperate need of cash at the time, I think. That had to factor into the decision" to close the Agera transaction." (Ex. Z, SanFilippo Tr. 283:24-284:3.)

266. SanFilippo testified on behalf of Platinum Management that "it was important [to close the Agera deal] because Platinum was in need of liquidity at the time. (Ex. Z, SanFilippo Tr. 309:10-11.)

267. According to its unaudited financial statements, the Master Fund had access to only $68,530 of cash assets on May 30, 2016. Ex. E, Winding Up Petition

268. Platinum used the Agera proceeds for liquidity purposes. (Ex. Z, SanFilippo Tr. 309:12-15.)

269. Steinberg testified about the effect of the liquidity from the Agera transaction:

Q In connection with this transaction that closed in June of 2016, PPVA benefited by getting cash as a result of this closing, correct?

A PPVA definitely got cash as part of this closing.

Q And it benefited from that cash, correct?

A . . . there are pros and cons to the transaction. But PPVA needed that cash and benefited from the cash that it got.

Q Well, it got a liquidity boost from having that cash come in in early June of 2016, correct?

A I believe it was probably at least a month, maybe even more, where the proceeds from the Agera sale were the only cash that Platinum had . . . available to it.

Q And that allowed PPVA to continue on for that month or maybe more, correct?

A Correct . . . PPVA, the -- Platinum operated with that cash . . . probably until the liquidators came on board.

Q Which was the end of August –

A Correct. . . . I recall no other inflows came in …. for the entire month of June and maybe parts of July, the only source of liquidity that Platinum had was from the Agera transaction.

Q Okay. So that was over two months, from June 9 until the end of August of 2016, correct?

A If I recall correctly.

(Ex. Z, Steinberg Tr. 336:2-337:23.)

270. Steinberg testified that "I think that what [Nordlicht] was hoping for was a smooth Agera closing, a smooth Implant closing. He wasn't counting on this guy filing his petition in the Cayman Islands for liquidation, hoping to close the management share class, Murray not getting arrested, and raising money; and then there would have been, you know, a big Kumbaya by, you know, a lot of money coming into the fund. I think that was his plan. [But] a lot of things went wrong within a period of probably three or four weeks." (Ex. Z, Steinberg Tr. 368:22-369:9.)

271. Steinberg testified that "[Nordlicht] certainly was hoping the funds would survive." (Ex. Z, Steinberg Tr. 369:10-13.)

272. Agera was a complex, hard-to-value asset.

273. Beechwood was uniquely well-positioned to purchase the asset because it was familiar with the company and was, therefore, able to move quickly.

274. The noncash component of the transaction was akin to debt reduction for the Master Fund (Ex. Z, Steinberg Tr. 163:25-164:9; 166:25-167:7).

275. The noncash component was also akin to debt reduction for PPCO, which owned roughly half of the Agera convertible note. (Ex. D, SanFilippo Tr. 290:18-291:2; SanFilippo Tr. 291:10-292:2)

276. SanFilippo testified "the fact of the matter is [PPCO] got a benefit here." (Ex. D, SanFilippo Tr. 292:14-15.)

277. SanFilippo testified "the forgiveness of debt in this transaction is a benefit to PPCO." (Ex. D, SanFilippo Tr. 292:14-15.)

278. The purchase option agreement provided that the noncash component of the transaction would be valued using the face value of the securities.

279. Steinberg, who negotiated on behalf of the Master Fund, believed that there was sufficient collateral coverage for companies like China Horizon and PEDEVCO to cover the loans. Ex. D, Steinberg Tr. 248:15-249:12; 259:12-25

280. SanFilippo testified regarding the China Horizon Note that "PPVA [and] Platinum Management believed that it was at fair value," agreeing it was a "full value asset on June 9, 2016.)

281. SanFilippo testified regarding PEDEVCO that it was not a bad deal for Platinum. (Ex. D, SanFilippo Tr. 305:21-306:3.)

282. Agera declared bankruptcy in October 2019. United States Bankruptcy Court for the Southern District of New York, Case No. 19-23802

PPVA Eventually Failed

283. On June 30, 2016, the Master Fund suspended withdrawals in accordance with its limited partnership agreement. SAC; §§281-290

284. On June 30, 2016 the Feeder Funds provided notice that they had resolved that determination of the net asset value of shares would be suspended, along with their ability to redeem shares. SAC; §§281-290

285. On July 18, 2016, the General Partner retained Guidepost Solutions LLC as an Independent Oversight Management to assist with the development and implementation of a plan for the orderly realization of the Master Fund's assets. SAC; §§281-290

286. On July 28, 2016, an investor petitioned the Grand Court of the Cayman Islands to wind up the Offshore Feeder Fund on the basis of an unpaid redemption. SAC; §§281-290

287. On August 23, 2016, the Master Fund filed a "Winding Up Petition" in the Grand Court of the Cayman Islands. SAC; §§281-290

288. The "Winding Up Petition" explained that the Master Fund's financial position had deteriorated due to a combination of factors, including (a) the growing concentration of illiquid private equity-style investments in the Master Fund, which caused an imbalance between the fund's liquid and illiquid assets; (b) a decline in the price of oil, damaging the fund's oil and gas investments; (c) a delay in the availability of audited financial statements; (d) delayed monetization events in relation to the Master Fund's assets, which postponed the planned rebalancing of the Master Fund's liquidity position; (e) investor redemptions remaining unpaid; and (f) necessary borrowing to fund certain investments. SAC; §§281-290

289. The "Winding Up Petition" explained that the Master Fund's financial position had also been negatively impacted by various regulatory issues and investigations. Because these issues had been reported in the press, the Master Fund found it nearly impossible to monetize its existing positions to benefit the Master Fund and its ultimate investors. SAC; §§281-290

290. The Liquidators were thereafter appointed.

291. The Liquidators filed their Complaint on November 21, 2019 (Docket Entry, 1).

292. After the Court granted the Beechwood Parties Partial Motion to Dismiss, the Liquidators filed their First Amended Complaint.

293. The Liquidators Filed their Second Amended Complaint on March 29, 2019. Docket Entry 285.

294. Paragraphs 793-845 contain the allegedly false statements by the Platinum Defendants.

China Horizon

295. In or around March 2016, representatives of Platinum Partners Value Arbitrage Fund L.P. ("PPVA"), including Chief Legal Officer Suzanne Horowitz, General Counsel David Ottensoser and lead project manager David Steinberg, negotiated a Collateral Assignment, dated March 21, 2016, between PPVA and BAM Administrative Services LLC ("BAM") with respect to (1) a certain Demand Promissory Note, dated July 1, 2015, issued by China Horizon Investments Group ("China Horizon") to PPVA in the original principal amount of $2,499,788 (the "China Horizon Demand Note"), and (2) a certain Promissory Note, dated July 1, 2015, issued by China Horizon to PPVA in the original principal amount of $2,265,084 (the "China Horizon Promissory Note" and together with the China Horizon Demand Note, the "China Horizon Notes"), as well as certain other assets. Thomas Decl. ¶ 8.

296. Under the terms of the Collateral Assignment, PPVA agreed to assign all of its rights, title and interest in the China Horizon Notes to BAM, for the ratable benefit of the noteholders identified in that certain Amended and Restated Agency Agreement, dated as of March 21, 2016 (the "Noteholders"), who are each intended beneficiaries of that certain Master

Guaranty Agreement, dated as of March 21, 2016 by each of Montsant Partners LLC ("Montsant"), Golden Gate Oil LLC ("GGO"), PPVA, and Mark A. Nordlicht, as guarantors, as collateral security for all debts, liabilities and obligations of PPVA, Montsant, and GGO owing to BAM and the Noteholders. Thomas Decl. ¶ 9.

297. Specifically, on or about March 2, 2016, during negotiations between PPVA and BAM about a restructuring of Montsant and GGO debt, PPVA General Counsel David Ottensoser sent to me and BAM's outside counsel copies of the China Horizon Notes as a means to provide details regarding proposed new collateral. On or about March 11, 2016, PPVA through Ariel Berkowitz again provided BAM with copies of these same China Horizon Notes so that they could be accurately identified in the Collateral Assignment. Thomas Decl. ¶ 10.

298. Under the Collateral Assignment, PPVA expressly granted to BAM a security interest in the following Collateral:

(a) all of [PPVA's] right, title and interest to (but not its obligations under) that certain Demand Promissory Note in the original principal amount of $2,499,788.00, dated July 1, 2015 (as amended, restated, or otherwise modified from time to time, the "China Horizon Demand Note") issued by China Horizon Investments Group ("China Horizon") to [PPVA], together with all of [PPVA's] right, title and interest in and to all documents, instruments and agreements entered into in connection with the transactions contemplated thereby and all attendant liens, rights, claims, title, assignments and interests (including security interests) pertaining to or arising therefrom,

(b) all of [PPVA's] right, title and interest to (but not its obligations under) that certain Promissory Note in the original principal amount of $2,265,084.00, dated July 1, 2015 (as amended, restated, or modified from time to time, the "China Horizon Promissory Note" and together with the China Horizon Demand Note, each a "Note" and collectively the "Notes") issued by China Horizon to [PPVA], together with all of [PPVA's] right, title and interest in and to all documents, instruments and agreements entered into in connection with the transactions contemplated thereby and all attendant liens, rights, claims, title, assignments and interests (including security interests) pertaining to or arising therefrom; and

(c) all indemnity rights and all moneys and claims for moneys due and/or to become due to [PPVA] under or in respect of each item of Collateral.

Thomas Decl. ¶ 11.

299. The Collateral Assignment further grants BAM express rights to demand and receive amounts which may become due to PPVA from China Horizon, as follows:

[PPVA] hereby (i) irrevocably authorizes and directs China Horizon, and its respective successors and assigns, to make all payments and distributions due to [PPVA] under or arising under any item of Collateral directly to [BAM Admin] and (ii) irrevocably authorizes and empowers [BAM Admin] (a) to ask, demand, receive, receipt and give acquittance for any and all amounts which may be or become due or payable, or remain unpaid at any time and times to [PPVA] by China Horizon under and pursuant to any item of Collateral, (b) to endorse any checks, drafts or other orders for the payment of money payable to [PPVA] in payment thereof,

and (c) in [BAM Admin's] discretion to file any claims or take any action or institute any proceeding, either in its own name or in the name of [PPVA] or otherwise, which [BAM Admin] may deem necessary or advisable to effectuate the foregoing. It is expressly understood and agreed, however, that [BAM Admin] shall not be required or obligated in any manner to make any demand or to make any inquiry as to the nature or sufficiency of any payment received by it, or to present or file any claim or take any other action to collect or enforce the payment of any amounts which may have been assigned to [BAM Admin] or to which [BAM Admin] may be entitled hereunder at any time or times.

Thomas Decl. ¶ 12.

300. In January 2018, I learned through review of the PPCO Receiver's Second Status Report to the Court that was made publicly available, that China Horizon had recovered approximately $15 million in connection with a lawsuit it had filed against China Post. Thereafter, BAM took steps through counsel to enforce its rights under the Collateral Assignment to have certain of those proceeds applied as repayment of the China Horizon Notes. To date, BAM has been unsuccessful in its efforts to recover any amounts with respect to the China Horizon Notes. Thomas Decl. ¶ 13.

301. On March 16, 2018 I was informed via email by Alan Clingman, the CEO of China Horizon, that the China Horizon Notes that PPVA had pledged to BAM under the Collateral Assignment did not exist at March 21, 2016 when PPVA purported to pledge them, and that China Horizon was unaware of the existence of the Collateral Assignment. According to Alan Clingman, the China Horizon Notes that PPVA represented in March 2016 to BAM as valid had actually been previously cancelled with new notes issued to PPVA on or about January 1, 2016. Thomas Decl. ¶ 14.

VistaGen Therapeutics

302. BAM is collateral agent for the senior secured creditors to Montsant, which is a wholly-owned subsidiary of PPVA. A portion of BAM's collateral supporting Montsant debt consists of certificated equity securities of VistaGen Therapeutics, Inc. ("VistaGen"), which certificates and underlying securities are maintained in a brokerage account over which BAM has perfected control. Thomas Decl. ¶ 15.

303. Original stock certificate No. 35 issued by VistaGen is one of these securities held in the controlled account, and it states that Montsant is the rightful owner of 1,087,339 of Series B Preferred Shares of VistaGen ("Cert. 35"). Thomas Decl. ¶ 16.

304. Original stock certificate No. 4 issued by VistaGen is another one of these securities held in the controlled account, and it states that Montsant is the rightful owner of 490,000 of Series B Preferred Shares of VistaGen ("Cert. 4"). Thomas Decl. ¶ 17.

305. Original stock certificate No. 9 issued by VistaGen is another one of these securities held in the controlled account, and it states that Montsant is the rightful owner of 500,000 of Series A Convertible Preferred Shares of VistaGen ("Cert. 9"). Thomas Decl. ¶ 18.

306. On December 16, 2016, I received an email from Jerry Dotson, the Chief Financial Officer of VistaGen, which attached a list of the VistaGen collateral as annotated by Mr. Dotson to indicate the then current status of those listed VistaGen securities. Thomas Decl. ¶ 19.

307. Mr. Dotson in his annotated notes indicated that in May 2016 and June 2016, VistaGen initiated an automatic conversion of certain of its shares of its outstanding Series B Preferred Stock (which public filings of Vistagen support having happened) as well as honored a voluntary conversion initiated by Montsant of certain of its other outstanding Series B Preferred Stock. Thomas Decl. ¶ 20.

308. Mr. Dotson further indicated in his annotated notes that as relates to Cert. 35 and Cert. 4, 60,000 shares of Series B Preferred Shares under Cert. 4 had automatically converted into an unspecified number of unregistered common shares, as well as 676,746 of Series B Preferred Shares under Cert. 35 had also automatically converted into an unspecified number of unregistered common shares. Thomas Decl. ¶ 21.

309. Furthermore, Mr. Dotson confirmed in his annotated notes that Montsant had also initiated a voluntary conversion of 87,500 Series B Preferred Shares under Cert. 35 on August 18, 2016, one week before PPVA was put into provisional liquidation in the Cayman Islands. Thomas Decl. ¶ 22.

310. On June 28, 2016, PPVA, through its representative Ariel Berkowitz (with a copy to David Steinberg), misrepresented to me that all 1,087,339 of Series B Preferred Shares under Cert. 35 had been converted into common shares. Thomas Decl. ¶ 23.

311. Based on Mr. Dotson's annotated notes, 87,500 of these allegedly converted shares under Cert. 35 were only voluntarily converted six weeks later in mid-August 2016 and even following this voluntary conversion, 323,093 Series B Preferred Shares under Cert. 35 remained unconverted. Thomas Decl. ¶ 24.

312. Furthermore, Mr. Berkowitz represented as part of an inducement for BAM to release additional collateral that even without including the alleged "converted" 1,087,339 Series B Preferred Shares under Cert. 35, there still remained in the collateral account an aggregate amount of 1,955,915 Series B Preferred Shares ("Represented Shares"). Thomas Decl. ¶ 25.

313. The schedule of collateral as annotated by Mr. Dotson, only however evidences 1,131,669 Series B Preferred Shares ("Scheduled Shares"), and when I apply the per share factor of $3.67 (the then current trading price of VistaGen common stock) to the difference between the Represented Shares and the Scheduled Shares, it implies a imputed collateral value overstatement by Mr. Berkowitz of $3,024,982.82, which collateral value overstatement was intended to be used as part of the collateral testing. Thomas Decl. ¶ 26.

314. Through my further review of Mr. Dotson's annotated notes to the collateral schedule as compared against Mr. Berkowitz's June 29, 2016 email, I also discovered that PPVA, through Mr. Berkowitz, also overstated the collateral value of pledged Series A Preferred Shares by an amount equal to $1,192,750 (using the same per share factor referenced above and multiplying this factor by the difference in the number of Series A Preferred Shares listed on the

collateral schedule vs. the number of Series A Preferred Shares represented by Mr. Berkowitz to exist as part of the collateral pool). Thomas Decl. ¶ 27.

315. On September 23, 2016, in an effort to track down collateral missing from the Montsant collateral account, I contacted the then liquidators of PPVA, Barry Lynch and Matthew Wright, via email to raise the issue referenced above that certain VistGen securities that formed part of the Montsant collateral pledged to BAM had been automatically converted into an unknown number of common shares without a redeposit of those common shares into the Montsant collateral account. Thomas Decl. ¶ 28.

316. On Monday September 26, 2016, both Barry Lynch and Matthew Wright attended a live meeting at the offices of Beechwood Re Holdings Inc. in New York with myself and Dhruv Narain to discuss my email, during which meeting it was disclosed to Mr. Narain and I that the VistaGen common shares that had been issued as part of the automatic conversion referenced above had been sold thereafter in a market trade with the proceeds of that trade distributed to PPVA and presumably expended to fund PPVA operating expenses. Thomas Decl. ¶ 29.

317. To date no proceeds of the conversions of the pledged VistaGen securities referenced above, whether in the form of common stock proceeds or cash proceeds from the sale of such common stock proceeds, have been redeposited into the Montsant collateral account, nor has PPVA undertaken to otherwise segregate and/or replace any such proceeds pending the resolution of claims by the Beechwood Entities and PPVA against each other. Thomas Decl. ¶ 30.

Dated: Kew Gardens, New York
February 14, 2020

LIPSIUS-BENHAIM LAW, LLP
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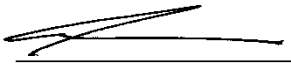
By: 

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