UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-JSR
MARTIN TROTT *et al*., plaintiffs *against* PLATINUM MANAGEMENT (NY) LLC, *et al.,* defendants.	No. 1:18-cv-10936-JSR

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF EZRA BEREN'S MOTION FOR SUMMARY JUDGMENT

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Defendant Ezra Beren submits this reply memorandum of law in further support of his motion for summary judgment. Defined terms have the same meaning as used previously.

PRELIMINARY STATEMENT

Mr. Beren has proffered relevant, admissible evidence that he had no management responsibilities, no discretion, no fiduciary duties, knew nothing of the (alleged) tortious acts of others, did not participate in any of the acts comprising the (alleged) "schemes" and received no property by which he could have been unjustly enriched. He has made his *prima facie* case.

Less than three pages of the JOLs' opposition to the Motion ("**Opp. Mem.**") are devoted to Mr. Beren, Opp. Mem. 31 – 33, and these are irrelevant. More significant is their Response and Counter-Statement to Defendant Ezra Beren's Local Rule 56.1 Statement in Support of Motion for Summary Judgment ("**Rule 56.1 Opp.**"), which relies on references to their Amended Statement of Material Facts Pursuant to Local Rule 56.1 ("**JOLs' Rule 56.1 Statement**"), which in turn relies on exhibits to the Amended Declaration of Richard A. Bixter Jr. in Opposition to Defendants' Motions for Summary Judgment ("**Bixter Decl.**").

The JOLs use the same copy-and-paste boilerplate response to fully *two-thirds* of Mr. Beren's Fact Statements. If you dig through the tangle of cross-references in the citations, you find that the citations simply fail to meet the substance of the relevant assertion and seek only to create a muddle of confusion and deception. The easiest way to disentangle the mess created by the JOLs' filings is to take up, first, Mr. Beren's statement of undisputed facts and, second, the JOLs' inadequate response.

ARGUMENT

I.
MR. BEREN'S SUBMISSIONS SHOW HE IS ENTITLED TO SUMMARY JUDGMENT

The elements of the remaining claims against Mr. Beren are discussed in Mr. Beren's initial memorandum of law ("**Initial Mem.**") and it is not necessary to restate them here. Initial Mem. 5 – 8.

Mr. Beren has shown that he had no managerial responsibility at Platinum or at Beechwood. *See* Fact Statement ¶¶ 8, 19 – 23; Beren Aff. ¶¶ 19 – 22; Nordlicht Aff. ¶ 3; San Filippo Aff. ¶ 3. This is attested to by Mr. Beren and by two of his bosses, Mr. San Filippo and Mr. Nordlicht. He had no investment discretion. *See* Beren Aff. ¶¶ 8, 19 – 22; Nordlicht Aff. ¶ 6; San Filippo Aff. ¶ 6. This also is attested to by his superiors. He had no responsibility for the valuation of PPVA—again, a fact confirmed by his superiors. *See* Beren Aff. ¶¶ 36 – 37, 42; Nordlicht Aff. ¶¶ 4 – 5; San Filippo Aff. ¶¶ 4 – 5. Specifically, he was never a member of any Valuation Committee. *See* Beren Aff. ¶¶ 36 – 37, 42; Nordlicht Aff. ¶ 4; San Filippo Aff. ¶ 4. These facts show a *prima facie* entitlement to judgment on the fiduciary duty and fraud claims.

As to the aiding-and-abetting claims, Mr. Beren patiently walked through each of the "schemes" alleged in the SAC and explained that he had neither any involvement nor any knowledge of them. *See* Fact Statement ¶¶ 58 – 100; Beren Aff. ¶¶ 67 – 109. As to many or most of these "schemes," the JOLs admit that he had no knowledge or involvement in them, which defeats any aiding and abetting liability. As to others, principally Agera, the JOLs try to cover up their failure of proof with statements that Mr. Beren "held meetings" and "relayed terms." This in no way shows the kind of knowledge or active participation in someone else's tortious conduct that would be required. Finally, the unjust enrichment claim appears to have been abandoned. *See* Opp. Mem. 31. It (like the other claims) should never have been brought.

II.
THE JOLS' SUBMISSIONS FAIL TO CREATE AN ISSUE OF MATERIAL FACT

A party opposing summary judgment "cannot merely make conclusory assertions to the contrary—it must proffer admissible evidence that set[s] forth specific facts showing a genuinely disputed factual issue that is material under the applicable legal principles." *Olin Corp. v. Lamorak Ins. Co.*, 332 F. Supp. 3d 818, 839 (S.D.N.Y. 2018) (quotations and citations omitted). Where the JOLs claim a fact is disputed, their citations usually are merely irrelevant or opaque. Sometimes, though, they are overtly deceptive. For example:

> 14. PPVA's PEDEVCO investment was held through RJ Credit LLC, in which Mr. Beren held no *ownership* interest. Beren Aff. ¶ 15.
>
> RESPONSE: Disputed. See Beren's Statement of Fact ¶¶ 15-16 below, admitting Beren held a *membership* interest.

Rule 56.1 Opp. ¶ 14 (emphasis added). Mr. Beren's point was that he had no personal economic interest in RJ Credit—which is exactly what the relevant documents reflect. An honest response to this would have been "Admitted." Instead, the JOLs chose a clumsy evasion.

Similarly, the Rule 56.1 Opposition is filled with spurious objections to key assertions. *See* Rule 56.1 Opp. ¶¶ 20 – 22, 36 – 39, 53 – 55, 67, 71, 78 – 79, 81, 83, 85. These statements are not "legal conclusions, unsubstantiated opinions [or] argumentative statements," as the JOLs claim. For example, whether Mr. Beren had any managerial or discretionary authority are facts of Platinum Management's corporate organization that go to the heart of the JOLs' claims. If Mr. Beren had no authority or discretion to make any decisions, he could not have been a fiduciary. Nor could he have performed the allegedly tortious acts. It was up to the JOLs to find evidence showing that Mr. Beren had the kind of managerial responsibilities and involvement that could give rise to fiduciary obligations or make him responsible for the (allegedly) tortious acts of others.

They haven't and they can't—nothing they cite demonstrates Mr. Beren's exercising any discretion or authority—so instead they try to evade their obligation to do so.

Mostly, though, for each "disputed" fact the JOLs copy-and-paste the same response. The response to paragraphs 4, 8 – 10, 19 – 23, 26 – 29, 31 – 46, 48 – 65, 67 – 71, 77 – 79, 81 – 86, 89, 92 – 93, 96 and 100 of Mr. Beren's Rule 56.1 Statement is the same, and consists of, "Disputed, for the reasons set forth in paragraphs ¶¶ 108, 129-59, 459, 678, 683, 703, 714, 779, 791 of PPVA Plaintiffs' Statement of Material Facts." The JOLs use this response for *two-thirds* of the statements they were obliged to rebut with relevant, admissible evidence.

One would assume, then, that these paragraphs must contain a lot of substance if they are applicable to so many different statements of fact, on so many different topics. One would be mistaken. When you unravel the web of the cross-references, they simply do not respond to, or even address, the substance of the statements they purport to rebut. Because the JOLs cannot be bothered to refer to specific, admissible evidence that meets the substance of Mr. Beren's Fact Statement, these counterstatements should be disregarded. *See* Local Civil Rule 56.1(c); *Holtz v. Rockefeller & Co., Inc.*, 258 F3d 62, 73 (2d Cir 2001) ("[W]here the cited materials do not support the factual assertions in the Statements, the Court is free to disregard the assertion").[1]

For example, paragraph 28 of the Fact Statement asserts: "[a]t no time did any part of Mr. Beren's compensation depend on the net asset value of PPVA, and Mr. Beren never received any

[1] The Second Circuit has held that "[w]here baseless allegations are used to prevent summary judgment, sanctions are mandatory if the attorney did not make a reasonable pre-filing inquiry when he or she originally put forward the claim. Rule 11's purposes would be ill-served by any other rule." *Calloway v. Marvel Entm't Grp., a Div. of Cadence Indus. Corp.*, 854 F.2d 1452, 1473 (2d Cir. 1988), *rev'd in part sub nom. Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120 (1989). While the JOLs do not appear to actually have *invented* facts to avoid summary judgment, they surely have evaded their obligation to fairly meet the statements in Mr. Beren's Fact Statement with citations to relevant, admissible evidence.

pay, bonus, incentive compensation or anything else of value as a result of PPVA's NAV." The JOLs dispute this on the basis of the copy-and-paste statement described above. Not a single thing in the JOLs' response tends to refute this assertion. It is a sloppy attempt to shift the work to the Court to sift through the voluminous papers in the hope that the Court will just take them at their word. All they had to do—if they could—was point to a pay statement, email or bank record showing that Mr. Beren received something other than his draw. They did not do so because they cannot; the statement is true and uncontroverted and should have been admitted.

Looking at the references in the boilerplate, paragraph 108 of the JOLs' Rule 56.1 Statement asserts that Mr. Beren is Mr. Huberfeld's son in law and an employee of Platinum and Beechwood. The appropriate response to this is "so what?" It does, however, highlight that Mr. Beren's family relationship is the chief reason that the JOLs included Mr. Beren in their lawsuit.

Paragraphs 129 – 159 are about Mr. Beren's "acting as a conduit for David Bodner and Murray Huberfeld." The significance of this is unclear. A "conduit" theory of fraud usually "functions to impute an employee's misstatements to a corporate defendant." *Silvercreek Mgmt., Inc. v. Citigroup, Inc.*, 248 F. Supp. 3d 428, 441 (S.D.N.Y. 2017). That is the opposite of what the JOLs try to do: ascribe liability to an *employee* for the allegedly false statements of *management*.

Assuming the JOLs simply intend to show Mr. Beren's involvement in the business, the answer, again, is "so what?" Assuming, *arguendo*, that Mr. Bodner and Mr. Huberfeld are tortfeasors, the fact that Mr. Beren communicated with them, his bosses, about business matters does not suggest either the falsity of any of the communications or his knowledge of any malfeasance. The JOLs' "evidence" only shows Mr. Beren as an employee who discussed business with coworkers. This cannot form the basis for liability. And the JOLs have not and cannot point to any document or deposition testimony that ties him to any specific (alleged) tortious acts.

The JOLs' assertions are also without record support. For example, paragraph 129 contends: "[i]n addition to meetings with Bodner at Agera, over a period of years, Beren met with Bodner regularly." But the citations on which they rely simply do not support this claim. The two references are to the same unauthenticated document, which appears to evidence a single meeting. The JOLs do not offer any evidence that the meeting actually happened or what the supposed meeting was about. There is nothing at all to support the portion of the JOLs' claim with respect to Agera, making this citation also deceptive.

Similarly, paragraphs 130 – 33 suggest other meetings without any indication of their subject matter or even whether they actually occurred.[2] Paragraphs 134 – 38 reference (presumed) meetings and emails in which possible business terms are discussed with others, but the JOLs make no attempt to tie these to any misstatements or "schemes." What the JOLs have shown—again—is that Mr. Beren was an employee who discussed business matters at work.

So, too, paragraph 139. The JOLs contend that their evidence supports the contention that, "[i]n 2013 and 2014, Beren participated in due diligence and strategy with respect to PEDEVCO, Black Elk, Golden Globe, and the broader 'Platinum Oil and Gas assets strategy.'" Rule 56.1 Opp. ¶ 139. Two of the three referenced documents are the same and all three are contentless references to meetings that the JOLs do not show actually occurred or what was discussed, let alone connecting these (presumed) discussions or meetings to any alleged torts.

Paragraph 140 is particularly egregious and worth discussing in detail. The JOLs contend that "Beren participated in multiple PPVA valuation committee meetings." This was the subject of lengthy examination at Mr. Beren's deposition and produced one of the more illuminating bits

[2] One of the more amusing aspects of this assertion is that one of the meetings appears to have been for "learning." Rule 56.1 Opp. ¶ 130. The only record evidence—of which the JOLs are perfectly aware—is that this meeting was for Torah study. *See* Beren Tr. 55:12 – 56:18.

of colloquy. Mr. Beren testified at his deposition, and in his affidavit, that because Mr. Steinberg was unavailable at the time, he participated in a part of a single meeting of the Valuation Committee, by telephone, at which he presented his information, and then dropped off without participating in any discussion. Beren Aff. ¶¶ 44 – 46; Beren Tr. 115:12 – 119:18. The document on which the JOLs rely to controvert this is attached to the Bixter Declaration as Exhibit 596.[3] But the JOLs must rely on admissible evidence and this they do not do.

The JOLs have never attempted to establish the evidentiary predicates for their purported smoking gun. *See* Bixter Decl. ¶ 599. At his deposition, Mr. Beren testified he had not seen it, had not participated in preparing it, knew nothing about it, and had only participated in one Valuation Committee meeting as described above. *See* Beren Tr. 116:22 – 126:4. Mr. Beren's counsel attempted to point out the inadequacy of the JOLs' attempting to authenticate this document through a witness who knew nothing about it, and this was the exchange:

> MR. PROVENZANO: The document looks like it was prepared by Joe SanFilippo, and I know you deposed him. Did you ask him how—
>
> MR. GLUCK: I only had limited time with Mr. SanFilippo—
>
> MR. PROVENZANO: Okay.
>
> MR. GLUCK: —so I hit the important, long-term topics. Meanwhile, we have Mr. Beren here.

Beren Tr. 126:5 – 14. The JOLs simply could not be bothered to ask the person who appeared to have originated this document (Mr. SanFilippo) what it was, whether it was accurate, who provided the information contained in it, what it was intended for or whether it was final or a draft. Perhaps they did not ask because they expected an answer that they did not like. But the document would

[3] The other citations are consistent with Mr. Beren's testimony that it was Mr. Steinberg who was a member of the Valuation Committee.

not be admissible even if it created the fact issue the JOLs seem to think it does[4] and, regardless of their reasons, all the Court is left with is Mr. SanFilippo's confirmation, in his affidavit, that Mr. Beren was not a member of the Valuation Committee. *See* San Filippo Aff. ¶ 4.

A mysterious failing of the JOLs is their harping on "National Events." *See* JOLs' Rule 56.1 Statement ¶¶ 148 – 58. None of this has anything to do with any of the claims asserted against Mr. Beren in the SAC. Paragraph 159 is similarly (and strangely) irrelevant.

The JOLs offer paragraph 459 perhaps to suggest that Mr. Beren might have brought deals to Beechwood while an employee at Platinum, to refute Mr. Beren's assertion to the contrary. *See* Rule 56.1 Statement ¶ 31; Beren Aff. ¶¶ 29 – 34. What the JOLs should have done was point to a scintilla of evidence, but they replied instead with irrelevant boilerplate. Mr. Beren's statement is true, but the JOLs cannot admit it even though they have no evidence otherwise.

Paragraphs 678, 683, 703, 714 and 791 refer to Agera. Nothing herein ties Mr. Beren to any allegedly tortious act with respect to Agera or refute the Fact Statement. *See* Rule 56.1 Opp. ¶¶ 69, 84 – 89, 99 (same boilerplate response). Mr. Beren's testimony on Agera was clear: he had no involvement in or knowledge of the Agera-Platinum transactions. Not a single document or deponent ties Mr. Beren to them. In fact, Mr. Beren's understanding of Agera was pretty much the *opposite* of what actually occurred—that Agera was looking for funding to execute its own acquisition of another entity. *See* Beren Tr. 258:16 – 262:7. The JOLs offer nothing to refute this.

[4] This document illustrates a pervasive problem with the JOLs' submissions; they routinely provide no basis for admissibility. "The principles governing admissibility of evidence do not change on a motion for summary judgment and only admissible evidence need be considered…." *Olin Corp*, 332 F. Supp. 3d at 836 (citation, quotation omitted). Some, produced from the files of the defendants, *may* be business records, but the Bixler declaration does not establish this and, regardless, that is just a possible hearsay exception. It would not show that the documents are what the JOLs' claim they are. They offer no evidence as to the documents' purpose or accuracy. All of the unauthenticated and inadmissible documents should be similarly disregarded.

Paragraph 779 is a hodge-podge on miscellaneous topics, few of which, relating to PEDEVCO, refer to Mr. Beren. *See* JOLs' Rule 56.1 Statement ¶ 779(c)(i – v, viii, x).[5] All are consistent with Mr. Beren's description of his duties, and none tie him to allegedly tortious acts.

Finally, one of the very few facts the JOLs dispute on the basis of something other than the boilerplate language discussed above is Mr. Beren's statement that he "never had any responsibilities with respect to the Huberfeld Family Foundation. He had no knowledge of its business affairs and never personally received a loan or any other funds from it." Rule 56.1 Opp. ¶ 24. The basis for the JOLs' disputing this is that "Beren's *LinkedIn* page states he works at a 'family office.'" Bixter Decl. ¶ 159. This is deceptive, as the JOLs refer only to a printout of a webpage while ignoring the testimony they elicited about it. Mr. Beren made clear that it is *his* family, not Mr. Huberfeld's family foundation, to which he refers:

> Q. Okay. And I'm just looking at the experience listed on your LinkedIn profile and right below "President, Brightside Academy" is "Manager, private family office, January 2017 to present." So I'm just asking you, what was the family office, and what were your roles?
>
> A. So I put that because I would look for deals and I would essentially, you know, market myself as a private family office, where if a deal would come, I would go to multiple—it could be anyone—right?—that I may or may not have a relationship with, and I would look to source a relationship with and potentially do deals together with them.
>
> Q. And which family office—which family was the family office?
>
> A. Myself, my family, some other friends.
>
> Q. Mr. Huberfeld?

[5] Another statement that ought not have been controversial was that the only investment in Mr. Beren's portfolio was PEDEVCO. The JOLs responded with their boilerplate response. Rule 56 Opp. ¶ 8. Nothing in that response controverts Mr. Beren's assertion. Similarly, Mr. Beren's description of his limited responsibilities with respect to PEDEVCO is "disputed" on the same basis, even though it is 100% consistent with the JOLs' citations. *See* Rule 56 Opp. ¶¶ 36 – 38.

A. No.

Q. Have you ever had any role running the Huberfeld Family Foundation?

A. No.

Q. Have you ever had any interaction with the Huberfeld Family Foundation?

A. No.

Beren Tr. 33:10 – 34:13; 82:12 – 83:8. The JOLs offer nothing to controvert this testimony. This is not advocacy. This is, at best, pettifogging and, at worst, an attempt to mislead the Court.

CONCLUSION

After millions of documents and plenty of depositions, the JOLs have nothing; Mr. Beren simply did not do the things of which he is accused and the JOLs know this (or at the very least they should). In fact, they must have known this since before the SAC was filed. As a result, Mr. Beren is entitled to summary judgment.

Dated: March 17, 2020
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