

**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

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

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Defendant Ezra Beren respectfully submits this supplementary reply memorandum of law in response to the JOLs' Supplemental Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment (the "**Suppl. Opp.**") and in further support of his motion for summary judgment. Defined terms have the same meaning as used previously.

PRELIMINARY STATEMENT

Mr. Beren has demonstrated that the relevant, admissible evidence defeats all of the JOLs' claims against him. There is nothing to show that he had any duties that could give rise to liability as a primary tortfeasor. There is nothing to show that he had any knowledge of or participation in the (alleged) "schemes" that could give rise to aiding-and-abetting liability. The JOLs appear to have abandoned their unjust enrichment claim.

Nothing in Mr. Nordlicht's deposition (the "**Deposition**") has remedied the JOLs' fatal lack of evidence. The JOLs present no facts based on the Deposition. The entirety of their argument is that the Court may draw inferences against all of the moving defendants because Mr. Nordlicht invoked the Fifth Amendment. But, as always, the JOLs are careless, or intentionally vague, about how they group the defendants. Mr. Nordlicht answered the questions about Mr. Beren and, as a result, there is no basis to draw any adverse inferences against him.

In fact, as to Mr. Beren, the situation is just the opposite. Mr. Nordlicht *confirmed* the statements he made in his affirmation as well as other facts to which Mr. Beren testified. The JOLs had failed to create a genuine issue of material fact before the Deposition, and they still have not done so.

ARGUMENT

I.

**MR. NORDLICHT’S TESTIMONY CORROBORATES THE
EVIDENCE PROVIDED BY MR. BEREN**

The Deposition confirmed the relevant facts to which Mr. Beren testified and confirmed the absence of any genuine issue of material fact. During the course of the seven-plus hour examination, Mr. Nordlicht was questioned extensively as to his affirmation on behalf of Mr. Beren. He confirmed all of his statements in the affirmation, despite some truly herculean efforts by the JOLs to put words in Mr. Nordlicht’s mouth. There is not enough space here to repeat all of the testimony confirming his affirmation, but since the JOLs offer nothing to the contrary, it is sufficient to note this exchange:

Q. I really only have two questions. The first is, you've been asked a lot of questions today about the—first is, you have been asked a lot of questions today about the affirmation that you submitted on behalf of Mr. Beren in support for his motion for summary judgment. In light of everything you’ve been asked and shown today, do you stand by what you said in that affidavit?

A. I do, yes.

Nordlicht Tr. 292:10 – 20, Provenzano Suppl. Decl. Ex. A.

In addition to reconfirming, under oath, the statements in his affirmation, Mr. Nordlicht provided additional corroboration of Mr. Beren’s account of key facts.

Mr. Nordlicht Confirmed Mr. Beren’s Account of the Sole Valuation Committee Meeting in Which He Participated

Mr. Beren has shown that he was not a member of any valuation committee, Fact Statement ¶ 33; Beren Aff. ¶ 36; Nordlicht Aff. ¶ 4; San Filippo Aff. ¶ 4, and had no role in determining the NAV of PPVA, or of valuing any of PPVA’s assets. Fact Statement ¶¶ 18, 33; Beren Aff. ¶¶ 36 – 37; Nordlicht Aff. ¶ 5; San Filippo Aff. ¶ 5. Mr. Beren once participated in part of one valuation

committee meeting, by telephone, to replace an absent David Steinberg, Fact Statement ¶ 40; Beren Aff. ¶¶ 44 – 46, and did not participate in any discussions with respect to valuing anything. Fact Statement ¶ 34; Beren Aff. ¶ 37.

Nothing at the deposition called these facts into question, and Mr. Nordlicht confirmed Mr. Beren's account:

Q. Okay. So do you know if Mr. Beren sat on this entire meeting or not?

A. Yes.

MR. KOFFMAN: Objection.

THE WITNESS: Mr. Beren did not sit in on the entire meeting.

BY MR. BROWNLEE:

Q. And you remember that specifically, him coming in, giving his report and then leaving, that's your testimony?

A. I remember every valuation committee meeting. Every portfolio manager who presented a position came in just to present their position. And then they left. And only the members of the valuation committee remained in the meeting.

Nordlicht Tr. 142:13 – 143:4, Provenzano Suppl. Decl. Ex. B.

Mr. Nordlicht Confirmed that Mr. Beren Had No Investment Discretion.

Mr. Beren explained that he had no investment authority or discretion, Fact Statement ¶¶ 20 – 23; Beren Aff. ¶¶ 8, 19 – 22; Nordlicht Aff. ¶ 6; San Filippo Aff. ¶ 6, and that all of his actions were subject to the approval of his superiors. *See* Nordlicht Tr. 142:13 – 143:4, Provenzano Suppl. Decl. Ex. B; Beren Aff. ¶¶ 19 – 21. Once again, Mr. Nordlicht has confirmed this:

Q. Just to go back to 92, tab 92. We were discussing before the break, were you aware that Mr. Beren was involved in this loan to US Talc and Minerals, Inc.

MR. KOFFMAN: Object to form.

THE WITNESS: Again, I don't recall Talc, but it's not inconsistent for Mr. Beren in his role of sourcing investments to have discussions with our partners that's what we can offer. That's very consistent. That doesn't—that doesn't mean he had any kind of investment authority. That's very consistent with his role.

BY MR. BROWNLEE:

Q. But he certainly had discretion, right, with regard to PPVA's investment decisions? I mean, here he is interacting with potential investor and talking about the loan terms, correct?

MR. KOFFMAN: Objection.

THE WITNESS: He had no discretion. That's not accurate.

Nordlicht Tr. 152:21 – 153:20, Provenzano Suppl. Decl. Ex. C.

Mr. Nordlicht Confirmed that Mr. Beren Had No Involvement in the Agera Transactions.

The “Agera Transactions” play a prominent role in the SAC. The JOLs rely on a couple of meeting invites to suggest that Mr. Beren may have attended meetings that the JOLs do not show actually occurred or, if they occurred, what was discussed. *See* Rule 56.1 Opp. ¶¶ 69, 84 – 86 (all containing same boilerplate response). This was never sufficient to create a genuine issue of material fact, and now Mr. Nordlicht has confirmed that Mr. Beren had no involvement in the Agera transactions:

Q. Could he have been actively involved in some Agera deal?

A. No.

Q. Why is that you just said you don't know why he was there?

A. I don't remember what the meeting was. Ezra Beren was not involved with Agera.

Nordlicht Tr. 128:8 – 14, Provenzano Suppl. Decl. Ex. D.

II.
NO ADVERSE INFERENCE IS APPROPRIATE AS TO MR.
BEREN

The JOLs argue that, as to *all* the moving defendants, Mr. Nordlicht’s “invocation of the Fifth Amendment on all matters of inquiry relevant to the JOLs’ claims is admissible evidence that there are contested issues of material fact in this case.” Suppl. Opp. 6. Buried in a footnote, however, is the admission that “Nordlicht invoked the Fifth Amendment in response to substantially all questions, *with the exception of questions concerning Ezra Beren* and the Affirmation that he submitted on February 14, 2020, in support of Beren’s Motion for Summary Judgment.” (Definitions, docket references omitted, emphasis added.) Suppl. Opp. 2 n.2.

Given his very marginal and junior role, the factors described in the caselaw for imputing adverse inferences to others do not apply to Mr. Beren. Moreover, no adverse inference is appropriate as to him for the much simpler reason that Mr. Nordlicht *answered* questions about Mr. Beren. The JOLs do not point to any fact issue regarding Mr. Beren as to which Mr. Nordlicht invoked his right against self-incrimination, nor do they identify any fact issue with respect to Mr. Beren for which an adverse inference would be appropriate—the JOLs have not said *what* adverse inferences they want the Court to draw. In any event, “the decision to invoke the Fifth Amendment does not itself raise an issue of fact, precluding the Court from granting summary judgment, if the moving party has presented sufficient evidence to support the motion.” *Nissho Iwai Am. Corp. v Siedler*, 94 CIV. 513 (DLC), 1995 WL 555699, at *1 (S.D.N.Y. Sept. 18, 1995) (internal citation omitted).

CONCLUSION

Mr. Beren was entitled to summary judgment before Mr. Nordlicht's deposition. This is even more clear now that Mr. Nordlicht has been deposed and has confirmed every salient point in Mr. Beren's motion.

Dated: April 3, 2020
New York, NY



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