

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION

Case No. 1:18-cv-06658 (JSR)

MELANIE L. CYGANOWSKI, AS RECEIVER,
BY AND FOR PLATINUM PARTNERS CREDIT
OPPORTUNITIES MASTER FUND LP, *et al.*,

Case No. 1:18-cv-12018 (JSR)

Plaintiffs,

v.

BEECHWOOD RE LTD., *et al.*,

Defendants.

SENIOR HEALTH INSURANCE COMPANY OF
PENNSYLVANIA,

Third-Party Plaintiff,

v.

PB INVESTMENT HOLDINGS LTD., *et al.*,

Third-Party Defendants.

**MEMORANDUM OF LAW OF THIRD PARTY DEFENDANTS MICHAEL
NORDLICHT AND KEVIN CASSIDY IN SUPPORT OF THEIR MOTION
TO DISMISS THE THIRD PARTY COMPLAINT FOR FAILURE TO STATE A CLAIM**

**MINTZ LEVIN COHN FERRIS GLOVSKY
AND POPEO PC**

The Chrysler Center
666 Third Avenue
New York, New York 10017

Lawrence R. Gelber
The Vanderbilt Plaza
34 Plaza Street East, Suite 1107
Brooklyn, New York 11238

*Attorneys for Third-Party Defendants
Michael Nordlicht and Kevin Cassidy*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT1

RELEVANT ALLEGATIONS IN THE THIRD PARTY COMPLAINT3

ARGUMENT9

 I. APPLICABLE LEGAL STANDARDS.9

 II. THE TPC FAILS TO STATE A CLAIM FOR AIDING AND
 ABETTING AGAINST MICHAEL NORDLICHT OR KEVIN CASSIDY.....11

 A. The TPC Fails to Plead Actual Knowledge of a Primary Tort11

 B. The TPC Fails to Plead Substantial Assistance12

 C. The TPC Fails to Plead Proximate Causation.....14

 D. The TPC Fails to Satisfy Rule 9(b).....15

 III. THE TPC FAILS TO STATE A CLAIM FOR CIVIL CONSPIRACY
 AGAINST MICHAEL NORDLICHT OR KEVIN CASSIDY.15

 IV. THE TPC FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT
 AGAINST MICHAEL NORDLICHT OR KEVIN CASSIDY.17

CONCLUSION.....19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	9, 13
<i>Atuahene v. City of Hartford</i> , 10 F. App'x 33 (2d Cir. 2001)	15
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	9, 10
<i>Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.</i> , 373 F.3d 296 (2d Cir. 2004).....	17
<i>Burns Jackson Miller Summit & Spitzer v. Lindner</i> , 88 A.D.2d 50 (2d Dep't 1982).....	15
<i>Chevron Corp. v. Donziger</i> , 871 F. Supp. 2d 229 (S.D.N.Y. 2012).....	17
<i>DeBlasio v. Merrill Lynch & Co.</i> , No. 07 Civ. 318 (RJS), 2009 U.S. Dist. LEXIS 64848 (S.D.N.Y. July 27, 2009)	11
<i>Elliott Assocs., L.P. v. Hayes</i> , 141 F. Supp. 2d 344 (S.D.N.Y. 2000)	15
<i>Ferring B.V. v. Allergan, Inc.</i> , 4 F. Supp. 3d 612 (S.D.N.Y. 2014)	13
<i>Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC</i> , 479 F. Supp. 2d 349 (S.D.N.Y. 2007).....	14
<i>IDT Corp. v. Morgan Stanley Dean Witter & Co.</i> , 12 N.Y.3d 132 (2009).....	17
<i>In re Commodity Exch. Inc.</i> , 213 F. Supp. 3d 631 (S.D.N.Y. 2016)	18
<i>In re LIBOR-Based Fin. Instruments Antitrust Litig.</i> , 27 F. Supp. 3d 447 (S.D.N.Y. 2014)	19
<i>In re Optimal U.S. Litig.</i> , 813 F. Supp. 2d 383 (S.D.N.Y. 2011)	17
<i>In re Platinum-Beechwood Litig.</i> , No. 18-cv-06658 (JSR) 2019 U.S. Dist. LEXIS 62745 (S.D.N.Y. Apr. 11, 2019).....	12, 17, 18
<i>Kaufman v. Cohen</i> , 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dep't 2003)	12
<i>Kolbeck v. LIT Am., Inc.</i> , 939 F. Supp. 240 (S.D.N.Y. 1996)	10, 12, 14
<i>Krys v. Butt</i> , 486 F. App'x 153 (2d Cir. 2012)	11
<i>Krys v. Pigott</i> , 749 F.3d 117 (2d Cir. 2014)	10, 11, 12

Laydon v. Mizuho Bank, Ltd., No. 12-cv-3419 (GBD), 2014 U.S. Dist. LEXIS 46368 (S.D.N.Y. Mar. 28, 2014)18

Mazzaro de Abreu v. Bank of Am. Corp., 525 F. Supp. 2d 381 (S.D.N.Y. 2007)10

Pollio v. MF Global, Ltd., 608 F. Supp. 2d 564 (S.D.N.Y. 2009).....9, 10, 13

Pope v. Rice, No. 04 Civ. 4171 (DLC), 2005 U.S. Dist. LEXIS 4011 (S.D.N.Y. Mar. 14, 2015)15, 16, 17

Prout v. Vladeck, 316 F. Supp. 3d 784 (S.D.N.Y. 2018).....10

Rabin v. Dow Jones & Co., No. 14-cr-4498, 2014 U.S. Dist. LEXIS 143428 (S.D.N.Y. Sept. 24, 2014).....13

Ray Legal Consulting Grp. v. DiJoseph, 37 F. Supp. 3d 704 (S.D.N.Y. 2014)16

Reading Int’l, Inc. v. Oaktree Capital Mgmt., 317 F. Supp. 2d 301 (S.D.N.Y. 2003).....18

Senior Health Ins. Co. of Penn. v. Beechwood Re Ltd., 345 F. Supp. 3d 515 (S.D.N.Y. 2018) (Rakoff, J.).....15

Sharp Int’l Corp. v. State St. Bank & Trust Co., 403 F.3d 43 (2d Cir. 2005).....11, 12, 13

Silvercreek Mgmt. v. Citigroup, Inc., 248 F. Supp. 3d 428 (S.D.N.Y. 2017).....11, 14

Sperry v. Crompton Corp., 8 N.Y.3d 204 (2007)18

SPV OSUS Ltd. v. AIA LLC, No. 15-cv-619 (JSR), 2016 U.S. Dist. LEXIS 69349 (S.D.N.Y. May 26, 2016).....13

Rules

Fed. R. Civ. P. 8.....15

Fed. R. Civ. P. 8(a)(2).....10

Fed. R. Civ. P. 9(b)1, 10, 15

Fed. R. Civ. P. 12(b)(6).....1, 9

PRELIMINARY STATEMENT

Third-Party Defendants Michael Nordlicht and Kevin Cassidy (“Agera Executives”) respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), to dismiss the following claims alleged in the Third-Party Complaint (“TPC”) filed by Defendant Senior Health Insurance Company of Pennsylvania (“SHIP”) (Dkt. No. 195) for failure to state a claim: (1) the First Count for aiding and abetting fraud; (2) the Second Count for aiding and abetting breach of fiduciary duty; (3) the Fifth Count for civil conspiracy, and (4) the Seventh Count for unjust enrichment. The TPC’s failure to meet the obligation to plead facts to support its conclusory allegations is fatal. These claims must be dismissed with prejudice.

The TPC asserts 8 counts against 69 third-party defendants based upon an alleged conspiracy “carried out by the Platinum Entities, the Beechwood Entities, and the Co-Conspirators to gain and retain . . . access to the reserves of SHIP . . . in order to perpetuate the Ponzi-like scheme carried out by Platinum and to otherwise enrich themselves.” TPC ¶ 1. The TPC excludes Michael Nordlicht and Kevin Cassidy from the designation of “Platinum Entities” and “Beechwood Entities.” Instead, the TPC improperly lumps them into the amorphous group labeled “Co-Conspirators.” TPC ¶ 1 nn.1-3. Of the 471 paragraphs, only 12 even mention Kevin Cassidy or Michael Nordlicht. *See* TPC ¶¶ 1, 48-49, 58, 272-73, 288, 296, 304, 308, 449, 465. However, each one of these scattered allegations is devoid of specific facts that in any way connect Michael Nordlicht or Kevin Cassidy to the purported “Platinum-Beechwood Scheme” or SHIP. The TPC is but a hollow package of conclusory allegations against the Agera Executives and is grossly deficient as a matter of law.

The TPC alleges a “Platinum-Beechwood Scheme” by the Beechwood Entities and Platinum Entities. SHIP alleges it was fraudulently induced to enter into investment management agreements with Beechwood Entities whereby the Beechwood Entities gained discretionary

control over \$270 million of SHIP's reserves. TPC ¶¶ 1-4. Beechwood allegedly did not disclose its relationship with Platinum or that Platinum controlled Beechwood's investment decisions. TPC ¶¶ 75-78. SHIP alleges that the Beechwood Entities gave Platinum "unfiltered control over, and access to SHIP's investment account funds" and "misused and misappropriated funds entrusted to its care," resulting in SHIP's economic harm. TPC ¶ 4. SHIP alleges that, had it known that "Beechwood was not independent, exercised no care or discretion with respect to investments and, to the contrary, functioned as an instrumentality of Platinum, [SHIP] would not have engaged or retained Beechwood as their reinsurer or investment advisor." TPC ¶ 77. Yet, SHIP nowhere pleads facts to establish that Michael Nordlicht or Kevin Cassidy actually knew about any such alleged wrongdoing, much less participated in it.

The claims against the Agera Executives are based solely on SHIP's investments in AGH Parent LLC, the entity created by Beechwood to purchase from Principal Growth Strategies, LLC ("PGS") a convertible note issued by Agera Holdings, LLC ("Agera Transaction"). Beechwood induced SHIP to invest \$50 million into AGH Parent in connection with the Note purchase, as well as additional SHIP reserves that were under Beechwood management. TPC ¶¶ 300-03.

At that time, Michael Nordlicht was in-house counsel and Kevin Cassidy was a managing director of Agera Energy Inc., the operating company owned by Agera Holdings. TPC ¶¶ 48-49. It is upon this thin reed - employment by a connected entity - that SHIP purports to build claims against the Agera Executives. But, no specific facts against the Agera Executives are alleged. No facts are pleaded to show that either Michael Nordlicht or Kevin Cassidy (1) actually knew of any fraud perpetuated against SHIP or breach of fiduciary duty owed to SHIP, let alone in connection with the Agera Transaction, (2) intended to participate in such fraud or breach, or (3) acted to further such fraud or breach proximately resulting in damage to SHIP. Similarly, there are no facts

to establish a conspiratorial agreement by the Agera Executives directed at SHIP. In sum, no facts are alleged sufficient to state a secondary liability claim against the Agera Executives.

The TPC fails to plead the elements of an unjust enrichment claim against Kevin Cassidy and Michael Nordlicht. The TPC pleads that Kevin Cassidy received an interest in AGH Parent worth \$13 million, through non-party Starfish Capital Inc. (“Starfish”), and that Michael Nordlicht held a 95.01% equity interest in Agera Holdings. TPC ¶¶ 272-73, 308. The TPC however fails to plead facts establishing that either of them was enriched by receiving something of value that belonged to SHIP or at SHIP’s expense. This failure dooms the unjust enrichment claim.

In light of the extensive discovery in which SHIP has engaged to date, the claims against the Agera Executives should be dismissed with prejudice.

RELEVANT ALLEGATIONS IN THE THIRD PARTY COMPLAINT

Glaringly absent from the TPC are facts showing that Michael Nordlicht or Kevin Cassidy played knowing or substantial roles in any alleged wrongdoing against SHIP. The Agera Executives are not alleged to be members of the “Platinum Entities” or the “Beechwood Entities.” TPC ¶ 1. The allegations in the TPC relating to the Agera Executives are fatally bereft of facts, wholly conclusory, sparse, and unsubstantiated. They are as follows.

The TPC alleges that Beechwood Re was established by Platinum as a “vehicle to fraudulently induce insurers to entrust funds to Beechwood.” TPC ¶ 63. Under the “Platinum-Beechwood Scheme,” Beechwood allegedly “would then invest those funds at the direction of Platinum, keeping Platinum afloat, generating fees, and enriching the Co-Conspirators.” TPC ¶ 63. The TPC alleges that Beechwood made a series of misrepresentations to induce SHIP to enter into three investment management agreements (“IMAs”). TPC ¶¶ 137-60, 232. Beechwood’s representations allegedly did not reflect its true investment approach. TPC ¶¶ 143, 154-56. The TPC alleges that Beechwood failed to disclose to SHIP the relationship between Platinum and

Beechwood or that the Beechwood Entities were under the control of the Platinum Insiders. TPC ¶¶ 75, 83, 103. SHIP alleges that it entrusted Beechwood with \$270 million of SHIP's reserve funds pursuant to the three IMAs and "based on representations memorialized in the IMAs themselves." TPC ¶¶ 163-67, 183-87, 200-04, 232. SHIP claims that, had SHIP known that Beechwood "functioned as an instrumentality of Platinum, [SHIP] would not have engaged or retained Beechwood as their reinsurer or investment advisor." TPC ¶ 77; *see also* TPC ¶ 132.

SHIP alleges that, in breach of its fiduciary duties owed to SHIP, the Beechwood Entities "placed SHIP's money into investments that were highly speculative, not adequately secured, opaque, and not appropriately disclosed to SHIP." TPC ¶ 233. SHIP alleges that the investments involved "undisclosed related-party transactions," non-arm's length deals, and "intentionally inflated and unsupportable valuations" in "disregard of the interests of SHIP." TPC ¶ 234.

However, no alleged facts remotely connect Michael Nordlicht or Kevin Cassidy to the purported Platinum-Beechwood Scheme. The TPC does not (and cannot) plead facts to establish that Michael Nordlicht or Kevin Cassidy had actual knowledge of or participated in: the creation of Beechwood; the alleged solicitation of SHIP to retain Beechwood; the alleged misrepresentations made to induce SHIP to retain Beechwood and enter into IMAs; SHIP's entrustment of \$270 million to Beechwood pursuant to the IMAs; any investment made with the \$270 million entrusted to Beechwood; any investment decisions or strategies involving SHIP's assets; or any report or representation made to SHIP regarding any such investment. Nor does the TCP allege that Michael Nordlicht or Kevin Cassidy received any fees resulting from SHIP's funds or investments or profited in any way as a result of SHIP.

The TPC limits the alleged connection between the Agera Executives and SHIP solely to SHIP's investments in the June 2016 Agera Transaction. TPC ¶¶ 48-49, 268, 278-80, 283, 285-

88. However, the Agera Transaction does not supply the missing link between the alleged Platinum-Beechwood Scheme and the Agera Executives because there are no facts supporting an inference that Michael Nordlicht or Kevin Cassidy actually knew of, or substantially assisted, any supposed wrongdoing against SHIP.

Agera Energy, LLC was formed in 2014 to “enable” Platinum Partners to acquire the assets of a retail energy company through a bankruptcy proceeding. TPC ¶ 269. The TPC alleges that Michael Nordlicht is the nephew of Mark Nordlicht, who, in 2014, “installed” Michael as in-house counsel of the Agera Energy start-up. TPC ¶ 48. The TPC alleges that Mark Nordlicht “installed” Kevin Cassidy as the managing director of Agera Energy in 2014. TPC ¶ 58.

Agera Holdings, LLC issued a secured convertible promissory note in the amount of \$600,071.23 in favor of PGS, which was convertible into 95.01% of the equity interests in Agera Holdings (“Note”). TPC ¶ 271.¹ Agera Holdings was owned 95.01% by Michael Nordlicht and 4.99% by MF Energy Holdings, respectively. TPC ¶¶ 272-73. PGS held the Note and its member interests were allegedly owned by PPVA and PPCO 55% and 45%, respectively. TPC ¶ 271.

The TPC alleges that Beechwood included certain of SHIP’s assets under management in loans made by the Beechwood Entities to Agera Energy. TPC ¶¶ 274-77. SHIP’s principal on those loans was fully repaid to SHIP. TPC ¶¶ 275, 277. The TPC alleges that Beechwood also included certain of SHIP’s assets under management in two “Repo Agreements” by PGS involving

¹ Agera Energy was a wholly-owned subsidiary of Agera Holdings LLC. See No. 18 Civ. 10936, Dkt. No. 285 at ¶ 620. SHIP alleges that “Agera Energy” issued the Note, which was convertible into 95.01% equity of “Agera Energy.” TPC ¶ 271. However, as evident from the Note itself annexed as Exhibit 84 to the Second Amended Complaint in *Trott*, the Note was issued by Agera **Holdings** LLC and was convertible into equity of Agera **Holdings** at Exhibit 84. See No. 18 Civ. 10936, Dkt. No. 285 at ¶ 620.

the Note. TPC ¶¶ 281-83. SHIP does not allege any facts establishing that Michael Nordlicht or Kevin Cassidy actually knew of, or participated in, any such loans or Repo Agreements.

SHIP alleges that Dhruv Narain and Beechwood, working with Platinum, “orchestrated the sale and resale of the Convertible Note to investors, including SHIP.” TPC ¶ 280. Beechwood allegedly formed AGH Parent to purchase the Note from PGS for \$170 million “in new cash and investment assets.” TPC ¶ 283. The TPC alleges that the “purchase price was negotiated between Narain on Beechwood’s behalf and related party Platinum.” TPC ¶ 284.

“Narain and Feuer approached SHIP in mid-May 2016 to invest funds” in AGH Parent “outside” of the IMAs. TPC ¶ 285. Feuer and Narain met with SHIP’s representatives in SHIP’s offices to solicit SHIP to invest in the purchase of the Note. TPC ¶¶ 285-87. Narain and Feuer met again with SHIP at Beechwood’s offices in New York the following week. TPC ¶ 288. Narain followed up with proposals for SHIP to invest. TPC ¶¶ 289-90. “Based on the information received by and through Narain and Beechwood,” SHIP’s representatives “determined that they would make the proposed investment on behalf of SHIP.” TPC ¶ 291. Narain then negotiated all of the details of SHIP’s investment in AGH Parent. TPC ¶¶ 292-95. SHIP invested \$50 million in exchange for various interests in AGH Parent. TPC ¶¶ 300-01. AGH Parent purchased the Note from PGS in the Agera Transaction that closed on June 9, 2016. TPC ¶ 297.

None of the foregoing allegations involved either of the Agera Executives.

SHIP’s effort to implicate Michael Nordlicht and Kevin Cassidy in a supposed fraud or breach of fiduciary duty against SHIP in connection with the Agera Transaction relies exclusively upon wholly conclusory allegations. For example, the TPC concludes that Michael Nordlicht and Kevin Cassidy “had actual knowledge of all aspects of the Platinum-Beechwood Scheme and took [unidentified] material steps to further its ill goals, to the detriment of SHIP” and further concludes

that Kevin Cassidy “was intimately involved in all aspects of the Agera Transactions.” TPC ¶¶ 48-49. No well-pleaded facts support these hollow conclusions. No facts are pleaded to establish that Michael Nordlicht or Kevin Cassidy had actual knowledge that the Beechwood or Platinum Entities allegedly committed a primary wrong against SHIP. No well-pleaded facts identify any specific act, statement, document, email, transaction, or decision by either Michael Nordlicht or Kevin Cassidy that injured SHIP or helped others to do so.

The TPC vaguely alleges that “Michael Nordlicht participated in meetings with SHIP to discuss the Agera Transactions.” TPC ¶ 48. No specifics are provided anywhere in the TPC. No facts are pleaded showing that any purported meetings with Michael Nordlicht involved false or misleading information.

The TPC alleges that, on May 25, 2016, SHIP representatives met with Narain and Feuer in Beechwood’s offices to solicit SHIP’s investment in AGH Parent. TPC ¶ 288. The TPC alleges that Kevin Cassidy “participated” with unidentified “others from Agera Energy” and “provided [unidentified] information to SHIP regarding corporation operations and assisted Beechwood and Platinum in soliciting SHIP’s investment.” *Id.* No specific facts are pleaded as to what type of operations information was provided by Kevin Cassidy or how he assisted Beechwood in soliciting SHIP’s investment. Moreover, no facts are pleaded to establish that any information that Kevin Cassidy allegedly provided was false, misleading, or otherwise used to perpetuate some wrongdoing. Nor are facts pleaded to establish that anything occurred at the meeting to put Kevin Cassidy on notice of a purported fraud or breach of fiduciary duty being perpetrated against SHIP.

The TPC alleges that lawyers “Steinberg and Ottensoser – working with others, including Michael Nordlicht, Narain, and Kevin Cassidy – were responsible for preparation of the documents” for the Agera Transactions. TPC ¶ 304. This conclusory allegation fails to establish

any culpable knowledge or act by Michael Nordlicht or Kevin Cassidy. Not a single document is identified. No specific facts are alleged to demonstrate that any such document was out of the ordinary course of business, false, misleading, or otherwise used to perpetuate some wrongdoing. The TPC's conclusory allegations fail to transform ordinary actions taken by a lawyer or a senior executive of an operating company into something sinister. In essence, the TPC simply alleges that a lawyer and a senior executive worked on a corporate deal.

The TPC alleges that Narain emailed the lawyers for AGH Parent, Beechwood, Platinum and Agera Energy, including Michael Nordlicht, on June 9, 2016, the morning after Huberfeld's arrest, stating that he "would 'follow up with SHIP'" and "urging" the lawyers "'to close and fund as soon as humanly possible.'" TPC ¶ 296. This email does not support any inference of knowledge of or participation in any wrongdoing against SHIP, especially in light of TPC's allegation that Narain had wanted the transaction to have closed three days earlier. TPC ¶ 293.

The TPC alleges that the \$170 million purchase price for the Note was not supported by any third-party valuation. TPC ¶ 284. The TPC conflictingly suggests in one paragraph that the purchase price was inflated (TCP ¶ 284), and in another that it was undervalued (TPC ¶ 305). But, the TPC pleads no facts to establish that Michael Nordlicht or Kevin Cassidy had any knowledge of any third-party valuation of the Note or any valuation assigned by Beechwood or Platinum. Neither Michael Nordlicht nor Kevin Cassidy is alleged to have participated in the negotiation of the purchase price. Thus, no culpable knowledge, intent or conduct by Michael Nordlicht or Kevin Cassidy may be inferred from the purchase price.

SHIP purportedly expressed concern to Narain about Kevin Cassidy being employed by Agera Energy in light of his background and, in response, Narain assured SHIP that "Cassidy would be leaving Agera Energy after the transaction and would have no future role in the

enterprise.” TPC ¶ 308. To the extent SHIP implies that Narain lied, no pleaded facts establish that Kevin Cassidy knew of, or participated in, any such alleged statement to SHIP.

The TPC alleges that “[i]t is unclear what, if anything, [Michael Nordlicht] paid for his interest in Agera [Holdings].” TPC ¶¶ 48, 272. But the TPC does not allege that Michael Nordlicht *received* anything in connection with PGS’ sale of the Note. Thus, no inference of wrongful knowledge, intent or conduct may be drawn from Michael Nordlicht’s equity interest.

The TPC alleges that Kevin Cassidy received “interests in AGH Parent worth in excess of \$13 million through Starfish Capital, an entity dominated and controlled by him for *no apparent consideration*.” TPC ¶ 308 (emphasis added). However, this allegation is belied not only by other facts pleaded in the TPC, but also by Exhibit 86 to the Complaint filed in the related *Trott* action. *See* No. 18 Civ. 10936, Dkt. No. 1-10. The April 2016 email alleged by SHIP in the same sentence of the TPC makes clear that Kevin Cassidy had earned an interest in Agera in consideration for his work in building a successful company. *Id.* (“He got to this great ending and we need to pay him.”) The email made clear that, since PGS was selling its “full” interest in Agera, Kevin Cassidy’s interest in Agera should also be monetized. *Id.*

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

To survive a motion to dismiss under Rule 12(b)(6), the complaint “must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citations and emphasis omitted). A complaint will not satisfy the pleading requirements if it offers only “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action,’” and does not “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). Accordingly, “[w]hile the Court must take

as true all well-pleaded facts, *conclusory allegations must be disregarded.*” *Pollio v. MF Global, Ltd.*, 608 F. Supp. 2d 564, 572 (S.D.N.Y. 2009) (emphasis added; citation omitted).

Moreover, the factual allegations must meet a “plausibility” standard. *Twombly*, 550 U.S. at 564. The complaint must plead sufficient facts to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678, *quoting Twombly*, 550 U.S. at 570; *see also Prout v. Vladeck*, 316 F. Supp. 3d 784, 797 (S.D.N.Y. 2018). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. But, where a complaint “pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (citation omitted). Thus, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 679, *quoting Fed. R. Civ. P. Rule 8(a)(2)*.

Where, as here, the claims sound in fraud, the heightened pleading standard requires the underlying circumstances to be stated with particularity. *See Fed. R. Civ. P. 9(b)*; *see also Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381, 387 (S.D.N.Y. 2007) (“Rule 9(b) provides that the circumstances of fraud must ‘be alleged with particularity,’ requiring ‘reasonable detail as well as allegations of fact from which a strong inference of fraud reasonably may be drawn’”) (citation omitted). This heightened pleading requirement also applies to a claim of aiding and abetting a breach of fiduciary duty that involves an alleged fraud. *See Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014); *see also Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 245 (S.D.N.Y. 1996). Similarly, Rule 9(b)’s heightened pleading requirement applies to claims of unjust enrichment that are “based on the same predicate allegations relating to a fraudulent scheme” that form the

gravamen of a complaint. *See DeBlasio v. Merrill Lynch & Co.*, No. 07 Civ. 318 (RJS), 2009 U.S. Dist. LEXIS 64848, at *35-36, 39 (S.D.N.Y. July 27, 2009).

As shown below, the TPC cannot withstand this legal scrutiny and must be dismissed as against Michael Nordlicht and Kevin Cassidy.

II. THE TPC FAILS TO STATE A CLAIM FOR AIDING AND ABETTING AGAINST MICHAEL NORDLICHT OR KEVIN CASSIDY.

To state a claim for aiding and abetting fraud, a plaintiff must allege (a) a primary fraud, (b) the defendant's actual knowledge of the fraud, and (c) the defendant's "substantial assistance to the fraud," proximately causing damage. *Silvercreek Mgmt. v. Citigroup, Inc.*, 248 F. Supp. 3d 428, 442 (S.D.N.Y. 2017). Similarly, a claim for aiding and abetting a breach of fiduciary duty requires (a) a primary breach of fiduciary obligations owed to plaintiff, (b) that the defendant knowingly induced or participated in the breach, and (c) plaintiff suffered actual damages as a proximate result. *See Sharp Int'l Corp. v. State St. Bank & Trust Co.*, 403 F.3d 43, 49 (2d Cir. 2005). The TPC falls woefully short of pleading facts to establish the existence of each one of these elements against either of the two Agera Executives.

A. The TPC Fails to Plead Actual Knowledge of a Primary Tort

Knowledge may be pleaded generally for claims for aiding and abetting fraud or a breach of fiduciary duty that involves fraud. However, "'generally' is merely a 'relative term' that allows knowledge to be pleaded with less particularity than is required for the pleading of fraud" and "is not the equivalent of conclusorily." *Krys*, 749 F.3d at 129 (citation omitted). The TPC must plead facts showing that defendants had actual knowledge of the alleged primary fraud or breach of duty. *Sharp*, 403 F.3d at 49; *see also Krys*, 749 F.3d at 127-28. Constructive knowledge is insufficient. *Krys*, 749 F.3d at 127-28, *quoting Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2012); *see also*

Kolbeck, 939 F. Supp. at 246. The TPC does not plead facts establishing actual knowledge by the Agera Executives of a primary tort against SHIP.

Rather, the TPC merely concludes, with no factual support, that Kevin Cassidy and Michael Nordlicht had “actual knowledge of all aspects of the ‘Platinum-Beechwood Scheme’... to the detriment of SHIP.” TPC ¶¶ 48-49. The TPC fails to provide a factual basis upon which the Court can draw an inference that Kevin Cassidy or Michael Nordlicht actually knew that Beechwood fraudulently induced SHIP to enter into the IMAs, or breached the fiduciary duties owed to SHIP in connection with those investments. TPC ¶¶ 153-59.

Absent facts supporting the TPC’s conclusions, there can be no inference that the Agera Executives actually knew of any wrongful conduct constituting fraud or breach of fiduciary duty by Beechwood. *See Krys*, 749 F.3d at 129-30 (affirming dismissal of aiding and abetting breach of fiduciary duty claim because of the failure to plead facts establishing actual knowledge of the primary fraud and breach); *see also In re Platinum-Beechwood Litig.*, No. 18-cv-06658 (JSR) 2019 U.S. Dist. LEXIS 62745, at *44-45 (S.D.N.Y. Apr. 11, 2019) (Rakoff J.) (dismissing claims for aiding and abetting breach of fiduciary duties and fraud because plaintiffs’ allegations were insufficient to impute actual knowledge to defendants).

B. The TPC Fails to Plead Substantial Assistance

The inducement or participation element requires fact-based pleading that a defendant provided “substantial assistance” to the primary violator. *Sharp*, 403 F.3d at 50, *citing Kaufman v. Cohen*, 307 A.D.2d 113, 126, 760 N.Y.S.2d 157, 170 (1st Dep’t 2003). As the Second Circuit explained, substantial assistance requires affirmative conduct, mere inaction will not suffice:

Substantial assistance may only be found where the alleged aider and abettor “affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.” “The mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.”

Sharp, 403 F.3d at 50 (citations omitted); *see also SPV OSUS Ltd. v. AIA LLC*, No. 15-cv-619 (JSR), 2016 U.S. Dist. LEXIS 69349, at *19 (S.D.N.Y. May 26, 2016); *Rabin v. Dow Jones & Co.*, No. 14-cr-4498, 2014 U.S. Dist. LEXIS 143428, at *2 (S.D.N.Y. Sept. 24, 2014); *Ferring B.V. v. Allergan, Inc.*, 4 F. Supp. 3d 612, 625 (S.D.N.Y. 2014). Again, the TPC does not meet this pleading requirement.

The TPC fails to plead specific facts that, if true, would establish that Michael Nordlicht or Kevin Cassidy provided affirmative substantial assistance to, or helped conceal, Beechwood's alleged fraud or primary breach of fiduciary duty owed to SHIP.

The vague conclusions that (1) Michael Nordlicht participated in any meeting with SHIP or "participated directly in the closing of those transactions to the detriment of SHIP," or (2) Kevin Cassidy "was intimately involved in all aspects" of the Agera Transaction and participated in meetings with SHIP, provide no information at all. TPC ¶¶ 48-49. SHIP glibly tosses in the phrases "participated," "participated directly," or "intimately involved," but omits any factual substantiation for any such participation or involvement. *Id.* SHIP's empty phrases and conclusions, which are not supported by well-pleaded facts, barely serve to recite the elements of the claim in an attempt to fend off dismissal, and should be disregarded by the Court. *See Iqbal*, 556 U.S. at 678; *Pollio*, 608 F. Supp. 2d at 572.

The absence of facts inculcating the Agera Executives is not surprising because the TPC alleges that others "owned" the relevant entities, solicited and induced SHIP's investments, invested SHIP's assets, and "orchestrated," "maneuvered," "negotiated," "led," and "executed" the Agera Transaction, not Kevin Cassidy or Michael Nordlicht. TPC ¶¶ 276, 280, 284, 315. The vague and conclusory allegation that Kevin Cassidy participated in a meeting with SHIP is insufficient. TPC ¶¶ 48, 288. The TPC does not even attempt to identify any statement or

communication made by Kevin Cassidy. Nor does SHIP explain how he, with fraudulent intent, “assisted” in soliciting SHIP’s investment outside the IMAs. TPC ¶ 288.

SHIP alleges that Platinum and Beechwood’s in-house lawyers Steinberg & Ottensoser – “working with others, including Michael Nordlicht and Kevin Cassidy – were responsible for preparation of the documents.” TPC ¶ 304. This conclusory allegation also is not supported by any facts from which the Court may infer any culpable material participation by Kevin Cassidy or Michael Nordlicht in a wrong against SHIP. The TPC does not identify a single document that Kevin Cassidy or Michael Nordlicht prepared, reviewed or otherwise worked on, let alone a document involving SHIP. There are no facts to establish that, had such document existed, it would have been out of the ordinary course of business, false, misleading, or otherwise used to perpetuate some alleged wrongdoing against SHIP.

C. The TPC Fails to Plead Proximate Causation

To state a claim for aiding and abetting fraud or breach of fiduciary duty, the TPC must allege that a defendant’s substantial assistance proximately caused the harm on which the primary liability is predicated. *See Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 370-71 (S.D.N.Y. 2007); *Silvercreek Mgmt.*, 248 F. Supp. 3d at 446 (finding that plaintiff alleged with particularity how defendants knowingly engaged in fraudulent transactions, which directly caused plaintiff’s losses). The TPC must allege more than “but-for causation,” it must allege that the “injury was ‘a direct or reasonably foreseeable result of the conduct.’” *Id.*; *see also Kolbeck*, 939 F. Supp. at 249. Here, the TPC fails to plead any facts to establish the required causal link between the Agera Executives’ alleged conduct and the harm suffered by SHIP.

The TPC concludes that Michael Nordlicht participated in meetings with SHIP to discuss the Agera Transaction and participated in the closing of the transactions, that Kevin Cassidy participated in a meeting with SHIP, and that they both worked on unspecified documents relating

to the transactions. These allegations do not establish that injury to SHIP was a direct or reasonably foreseeable result of any of these actions. These bald allegations are insufficient to establish the required proximate causal connection. Indeed, the TCP alleges otherwise that SHIP relied upon Narain and Beechwood in determining to invest and remain with Beechwood and to invest in AGH Parent, which proximately causing the claimed losses.

D. The TPC Fails to Satisfy Rule 9(b)

SHIP employs impermissible group pleading here by “lumping all the defendants together” under “Co-Conspirators” or “Co-Conspirator Defendants” and “providing no factual basis to distinguish their conduct. *See, e.g.*, TPC ¶¶ 415, 417-18, 423-24, 426-28, 446-48. This tactic fails to meet even the “minimum standard” of Federal Rule of Civil Procedure 8, let alone the heightened standard of Rule 9(b). *Atuahene v. City of Hartford*, 10 F. App’x 33, 34 (2d Cir. 2001). Group pleading may be appropriate only “where the defendants are a narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a [published company document]” *Elliott Assocs., L.P. v. Hayes*, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000) (citation omitted). No such facts are alleged as against The Agera Executives.

III. THE TPC FAILS TO STATE A CLAIM FOR CIVIL CONSPIRACY AGAINST MICHAEL NORDLICHT OR KEVIN CASSIDY.

“Under New York law, civil conspiracy is not an independent tort.” *Senior Health Ins. Co. of Penn. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 531 (S.D.N.Y. 2018) (Rakoff, J.) (dismissing SHIP’s conspiracy claim with prejudice as SHIP failed to plausibly allege underlying torts). “All that an allegation of conspiracy can accomplish is to connect nonactors, who might otherwise escape liability, with the acts of their co-conspirators.” *Burns Jackson Miller Summit & Spitzer v. Lindner*, 88 A.D.2d 50, 72, 452 N.Y.S.2d 80, 93-94 (2d Dep’t 1982), *aff’d*, 59 N.Y.2d 314 (1983). “Where there is an underlying tort, the elements of civil conspiracy are: (1) the corrupt agreement

between two or more persons, (2) an overt act, (3) their intentional participation in the furtherance of a plan or purpose, and (4) the resulting damage.” *Pope v. Rice*, No. 04 Civ. 4171 (DLC), 2005 U.S. Dist. LEXIS 4011, at *42 (S.D.N.Y. Mar. 14, 2015) (citation omitted). The TCP does not plead facts to satisfy these elements.

The plaintiff “must establish facts which support an inference that defendants knowingly agreed to cooperate in a fraudulent scheme, or shared a perfidious purpose.” *Ray Legal Consulting Grp. v. DiJoseph*, 37 F. Supp. 3d 704, 722 (S.D.N.Y. 2014) (internal citation omitted). The TPC does not plead any facts to establish that either Kevin Cassidy or Michael Nordlicht entered into a corrupt agreement with the Beechwood Entities or Platinum Entities to defraud SHIP or breach fiduciary duties owed to SHIP.

Nor does the TPC plead facts to demonstrate that Michael Nordlicht or Kevin Cassidy intentionally participated in the furtherance of the alleged fraud or breach of fiduciary duty owed to SHIP. The Agera Executives are not alleged to have played any role in the misrepresentations allegedly made to SHIP regarding Beechwood’s relationship with Platinum or the investment strategy or use of SHIP’s funds. The vague and conclusory allegations of Michael Nordlicht and Kevin Cassidy’s purported involvement in SHIP’s investment in AGH Parent do not establish that either of the Agera Executives intentionally participated in any fraudulent scheme or shared a perfidious purpose with Beechwood or Platinum against SHIP.

Moreover, “[i]n order to sustain an allegation of civil conspiracy that involves a conspiracy to breach a fiduciary duty, all members of the alleged conspiracy must independently owe a fiduciary duty to the plaintiff.” *Pope*, 2005 U.S. Dist. LEXIS 4011, at *42. The TPC does not, and cannot, plead facts to establish that either Kevin Cassidy or Michael Nordlicht independently owed a fiduciary duty to SHIP. Thus, the conspiracy claim collapses from its own vacuity.

IV. THE TPC FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT AGAINST MICHAEL NORDLICHT OR KEVIN CASSIDY.

“The theory of unjust enrichment lies as a quasi-contract claim.’ It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned.” *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009) (citation omitted). To state a claim for unjust enrichment, a complaint must allege “that (1) defendant was enriched, (2) at plaintiff’s expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.” *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004); *see also In re Optimal U.S. Litig.*, 813 F. Supp. 2d 383, 402 (S.D.N.Y. 2011). The Seventh Count fails to meet the elements necessary to sustain an unjust enrichment claim against Kevin Cassidy or Michael Nordlicht.

First, a “complaint does not state a cause of action in unjust enrichment if it fails to allege that defendant received something of value which belongs to the plaintiff.” *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 260 (S.D.N.Y. 2012). The TPC does not allege that Kevin Cassidy or Michael Nordlicht was enriched or received any benefit *at the expense of, or belonged to, SHIP*.

The TPC pleads that *Starfish* allegedly received “interests in AGH Parent worth in excess of \$13 million . . . for no apparent consideration.” TPC ¶ 308. There are no well-pleaded facts showing that Kevin Cassidy received anything of value in connection with the Agera Transaction. Critically, even as to *Starfish*, the TPC fails to establish that any interest or payments received by *Starfish* in the Agera Transaction was *at SHIP’s expense* or *otherwise belonged to SHIP*.

The underlying premise alleged in the TPC differs from that in the *Trott* action, where plaintiffs alleged that Kevin Cassidy was unjustly enriched because *Starfish* was granted 8% of the membership interests in PGS before the Agera Transaction and, upon PGS’ sale of the Note, *Starfish* received \$7 million in cash and \$6.5 million in interest in AGH Parent. *Platinum-*

Beechwood Litig., 2019 U.S. Dist. LEXIS 62745, at *76. This Court held that those allegations in the *Trott* action made it plausible, at the pleading stage, that Cassidy was unjustly enriched at the expense of PPVA through PGS. *Id.* By contrast, here, the TPC does not, and cannot, make any connection between any cash or member interest received by Starfish and SHIP and thus cannot establish that Cassidy was unjustly enriched *at the expense of SHIP*.

The TPC makes the conclusory allegation that Michael Nordlicht “was unjustly enriched as a result of the 95.01% equity interest he was granted in Agera Energy, whose apparent appreciation in value inured to his benefit and to SHIP’s detriment” when the Agera Transaction was “consummated.” TCP ¶ 465. However, the TCP fails to plead that the interest in “Agera Energy,” or any alleged appreciation in value in Agera Energy, *belonged to SHIP*.

Second, an unjust enrichment claim “requires some type of direct dealing or actual, substantive relationship” between the plaintiff and defendant. *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD), 2014 U.S. Dist. LEXIS 46368, at *42 (S.D.N.Y. Mar. 28, 2014), *quoting Reading Int’l, Inc. v. Oaktree Capital Mgmt.*, 317 F. Supp. 2d 301, 334 (S.D.N.Y. 2003). If the relationship is “too attenuated,” the unjust enrichment claim must be dismissed. *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16 (2007); *see also In re Commodity Exch. Inc.*, 213 F. Supp. 3d 631, 677-8 (S.D.N.Y. 2016) (“Because Plaintiffs have failed to allege that they had any relevant relationship with the Defendants or that Defendants were enriched at Plaintiffs’ expense, the SAC fails to state a claim for unjust enrichment”). Here, the TPC alleges a single purported act of contact between Kevin Cassidy and SHIP on May 25, 2016, allegedly in connection with a meeting in Beechwood’s offices. TPC ¶ 288. This meeting does not provide the missing link.

The TPC also fails to allege a single act of direct dealing between Michael Nordlicht and SHIP, let alone any substantive relationship between them. It is not plausible to conclude that

Michael Nordlicht was unjustly enriched at SHIP's expense where the TPC does not plead a single direct dealing or communication with SHIP whatsoever.

In sum, the TPC fails to state a claim for unjust enrichment against Michael Nordlicht or Kevin Cassidy. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 27 F. Supp. 3d 447, 479 (S.D.N.Y. 2014) (dismissing unjust enrichment claim where the relationship between the parties was too attenuated and explaining that "it makes little sense to conclude that a particular defendant bank somehow improperly obtained profits intended for a certain plaintiff when those two parties never transacted or otherwise maintained a business relationship at all").

CONCLUSION

It is respectfully requested that the Court enter an order (a) dismissing the First, Second, Fifth, and Seventh Counts of the TPC as against both Michael Nordlicht and Kevin Cassidy with prejudice and without leave to replead, and (b) granting Michael Nordlicht and Kevin Cassidy such further relief as the Court deems just.

Dated: New York, New York
June 14, 2019

**MINTZ, LEVIN, COHN, FERRIS, GLOVSKY
AND POPEO, P.C.**

By: /s/ Therese M. Doherty

Therese M. Doherty
LisaMarie F. Collins
Iris Hsiao

The Chrysler Center
666 Third Avenue
New York, New York 10017
Telephone: (212) 935-3000
Facsimile: (212) 983-3115
[Email: tdoherty@mintz.com](mailto:tdoherty@mintz.com)
lfcollins@mintz.com
ihsiao@mintz.com

Lawrence R. Gelber

The Vanderbilt Plaza
34 Plaza Street East, Suite 1107
Brooklyn, New York 11238
Telephone: (718) 638-2383
Facsimile: (718) 857-9339
Email: GelberLaw@aol.com

*Attorneys for Third-Party Defendants
Michael Nordlicht and Kevin Cassidy*