UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	No. 18 Civ. 6658 (JSR)
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	:	No. 18 Civ. 10936 (JSR)

MEMORANDUM OF LAW OF DEFENDANTS ROCKWELL FULTON CAPITAL L.P. AND DITMAS PARK CAPITAL L.P. IN SUPPORT OF THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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Defendants ROCKWELL FULTON CAPITAL L.P. (“Rockwell”) AND DITMAS PARK CAPITAL L.P. (”Ditmas”) respectfully submit this Memorandum of Law in Support of their motion to dismiss the Second Amended Complaint (Trott D.E. 285) under Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

The only allegation, as they pertains Rockwell and Ditmas, is in Paragraph 186 of the Second Amended Complaint. The allegation states Rockwell and Ditmas “were client’s of Nordlicht.” Even though Rockwell and Ditmas, as part of a larger group entitled the Preferred Investors of the BEOF Funds, were alleged to have received distributions from the BEOF Funds, Rockwell and Ditmas are not alleged to be insiders, to have invested in PPVA or have any dealings with PPVA itself. Rockwell and Fulton were simply “Client’s of Nordlicht” and received distributions as a preferred investor to PPVA’s detriment.

This Court has already dismissed Counts 9 and 10 against Rockwell and Ditmas. Trott D.E. 290. The only remaining Count is Count 15 for unjust enrichment. This claim must be dismissed pursuant to *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991) and the *in pari delicto* doctrine which bars a plaintiff from recovering against a third party for a fraud or other misconduct in which the plaintiff participated. A claim against a third party against a corporation with the cooperation of management accrues to creditors, not the guilty corporation.” *Id* at 120.

Further, under the so-called “Wagoner Rule,” since a bankruptcy trustee stands in the shoes of the corporation and not its creditors, he/she lacks standing to recover from third parties for participating in misconduct perpetrated by the corporation.

As applied in this case, Plaintiff lacks standing to assert claims against non-insider third parties Rockwell and Ditmas to recover for injuries to PPVA allegedly caused by the insider Platinum Defendants.

ARGUMENT

I. Plaintiffs Lack Standing Under the Wagoner Rule to Sue Rockwell and Ditmas

It is long standing law in New York that the Bankruptcy Trustee (or someone standing in the shoes of the wrongdoer) does not have standing to seek recovery from third parties where corporate insiders engaged in the wrongdoing that caused the damages; right of action accrues to the creditors, not the wrongdoing corporation. *Shearson Lehman Hutton v. Wagoner*, 944 F.2d 114, 118 (2d Cir.1991). *See In re ICP Strategic Income fund, Ltd.*, 730 F.App'x 78, 91 (2d Cir 2018) (citing *Kirshner v. KPMG, LLP*, 15 N.Y.3d 446, 465 (2010)). It "mandates that the courts will not intercede to resolve a dispute between two wrongdoers." Kirschner, 15 N.Y.3d at 464. Therefore, "a bankruptcy trustee lacks standing to bring a claim against third parties 'for defrauding a corporation with the cooperation of management.'" *Pergament v. Amton Inc.*, 581 B.R. 16, 30 (Bankr. E.D.N.Y. 2018) (emphasis original, quotation omitted), quoting *Wagoner*, 944 F.2d at 120. See also *In re Verestar, Inc.*, 343 B.R. 444, 478 (Bankr. S.D.N.Y. 2006) (a "plaintiff acting on behalf of a debtor cannot sue [a] third party for damages for which the corporation itself can be held responsible").

The fraudulent actions of the Platinum Defendants who managed and controlled PPVA are imputed to PPVA under traditional agency principles *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465 (2010) ("Agency law presumes imputation even where the agent…commits

fraud"). "[A] corporation is represented by its officers and agents, and their fraud in the course of the corporate dealings is in law the fraud of the corporation." *Id.* (quotation and citation omitted). Thus the acts of the Platinum Defendants are clearly imputed to Plaintiffs PPVA and the Liquidators. A liquidator who, by force of law, has the obligation to pursue the claims of the corporation and so "stands in the shoes of the defunct corporation" and are barred from pursuing claims against third parties. *Wight v. BankAmerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000). This is certainly the case here and therefore the Plaintiff must be barred from pursuing any action against a third parties Rockwell and Ditmas.

Lastly, there are no exceptions to the Wagoner Rule or *in pari delicto* in this case as my do-Defendant Michael Katz has fleshed out in his Memorandum of Law in support of his Motion to Dismiss. To the extent allowed, I join in his arguments as there is no need to repeat them here.

Accordingly, the remaining claim for unjust enrichments against Defendants Rockwell and Ditmas must be dismissed as they are barred by the Wagoner Rule and *in pari delicto* doctrine.

II. Alternatively, the Connection Between PPVA and Rockwell and Ditmas is too Attenuated to Support a Claim for Unjust Enrichment

Alternatively, the Court must dismiss Plaintiffs' sole remaining claim against Rockwell and Ditmas for unjust enrichment because the connection between Rockwell and Ditmas and PPVA is simply too remote. Rockwell and Ditmas are alleged to be "Preferred Investors in the BEOF Funds." ¶186. Plaintiffs concede the BEOF Funds were organized separately from PPVA and "were not PPVA subsidiaries." ¶451. Plaintiffs acknowledge that "the BEOF Funds were a standalone mechanism by which…certain preferred investors were offered

the opportunity to invest in Black Elk 'outside the regular funds,'" i.e., outside of PPVA. ¶452. The only allegations against Rockwell and Ditmas are that they are clients of Nordlicht. Rockwell and Ditmas are not alleged to have personally invested in PPVA and there are no allegations of any dealings between them and PPVA.

The New York Court of Appeals has held that "a claim [for unjust enrichment] will not be supported if the connection between the parties is too attenuated." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011), citing *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 (2007) (a claim for unjust enrichment requires the parties to have a sufficiently close relationship). More particularly, a claim for unjust enrichment cannot proceed "where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement." *Mandarin Trading*, 16 N.Y.3d at 182. A claim for unjust enrichment requires the parties to have had "dealings with each other." *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 517-518 (2012).

The Plaintiff describes the BEOF Preferred Investors as follows: "Defendants 'The Preferred Investors of the BEOF Funds' are various individuals and entities, and their successors in interest and transferees (to be discovered), that were direct or indirect investors in the BEOF Funds and received capital distributions as a result of the Renaissance Sale (defined below). The Preferred Investors of the BEOF Funds were insiders of Platinum Management, were aware of the actions of the Platinum and Beechwood Defendants in furtherance of the Black Elk Scheme, as well as Beechwood's representations that it was unaffiliated with Platinum Management." ¶ 137. As Rockwell and Ditmas were never alleged to be insiders of Platinum Management nor insiders in any respect, rather merely "clients of Nordlicht," there simply is no allegation that there is any relationship between the parties that could have caused reliance or inducement.

Mandarin Trading, 16 N.Y.3d at 182. According to NY law this is a required element of an unjust enrichment claim yet there are no allegations to that extent anywhere in the Complaint.

Accordingly, the Second Amended Complaint must be dismissed as to Rockwell and Ditmas.

CONCLUSION

For the reasons above, the Court should dismiss the Second Amended Complaint against Rockwell and Ditmas in its entirety and grant such other and further relief as the Court deems just and proper.

Dated: April 22, 2019
Brooklyn, NY

/s/ Tovia Jakubowitz_

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